



## Framework Convention on Climate Change

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

#### Technical paper

#### *Summary*

This document was prepared in order to support the consideration by the Subsidiary Body for Implementation (SBI) of procedures, mechanisms and institutional arrangements under the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) to allow for appeals of decisions of the Executive Board of the clean development mechanism (CDM), in response to a request by the CMP contained in paragraphs 18 to 20 of decision 3/CMP.6. This document takes into account the proposals on the matter contained in the 2010 annual report of the Executive Board of the CDM (FCCC/KP/CMP/2010/10), statutes and rules of procedure of a number of international tribunals and relevant technical literature. While the document does not attempt to provide an overview or synthesis of views expressed by Parties and intergovernmental organizations contained in document FCCC/SBI/2011/MISC.2 and the views of admitted observer organizations posted on the UNFCCC website, the issues identified therein have been also taken into account in its preparation.

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## I. Introduction

### A. Background

1. The clean development mechanism (CDM), defined in Article 12 of the Kyoto Protocol (the Protocol), allows for the registration of project activities in Parties not included in Annex I to the Convention (non-Annex I Parties) for the abatement of emissions of greenhouse gases. Such project activities can result in the issuance of credits known as certified emission reductions (CERs), each credit representing one tonne of carbon dioxide equivalent, which can be acquired by Parties included in Annex I to the Convention (Annex I Parties) with emission reduction or limitation commitments under the Protocol and used to meet their mitigation commitments under the Protocol.

2. Decision 3/CMP.1 of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) sets out the CDM modalities and procedures. They mandate the Executive Board of the CDM (hereinafter referred to as the Executive Board) to supervise the CDM. In this regard, the Executive Board is responsible for the registration of CDM project activities and the issuance of CERs.<sup>1</sup> The Executive Board may approve requests for registration and issuance, or approve such requests with alterations, or reject them, thereby affecting the interests of project participants (i.e. Parties involved or private or public entities authorized by the Parties to participate in the project activities).<sup>2</sup>

3. At its fifth session, the CMP requested the Executive Board to establish, following consultation with stakeholders, procedures for considering appeals that are brought by stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of CDM project activities or proposed project activities, in relation to:

(a) Situations where a designated operational entity (DOE) may not have performed its duties in accordance with the rules or requirements of the CMP and/or the Executive Board;

(b) Rulings taken by or under the authority of the Executive Board in the context of review in accordance with the procedures for review regarding the rejection or alteration of requests for registration or issuance.<sup>3</sup>

4. The CMP also requested the Executive Board to design the procedures referred to in paragraph 3 above focusing on, but not limited to, ensuring due process, and to report on implementation to the CMP at its sixth session.<sup>4</sup>

5. Having considered the matter, the Executive Board, in its 2010 annual report to the CMP,<sup>5</sup> noted that, taking into account its mandate to register projects and issue CERs, it was not in a position to implement procedures for appeals against such decisions.<sup>6</sup> However, it made a number of recommendations to the CMP with regard to possible procedures and arrangements for appeals.<sup>7</sup>

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<sup>1</sup> See decision 3/CMP.1, annex, chapter C.

<sup>2</sup> See decision 3/CMP.1, annex, chapter F.

<sup>3</sup> Decision 2/CMP.5, paragraph 42. N.B. The procedures for review of requests for registration and for review of requests for issuance referred to in paragraphs 41 and 65 of the annex to decision 3/CMP.1 are contained in annexes 40 and 41 to the report on the fifty-fifth meeting of the Executive Board (EB 55 report) (see also decision 2/CMP.5, paragraph 38).

<sup>4</sup> Decision 2/CMP.5, paragraph 43.

<sup>5</sup> FCCC/KP/CMP/2010/10.

<sup>6</sup> FCCC/KP/CMP/2010/10, paragraph 51.

<sup>7</sup> FCCC/KP/CMP/2010/10, annex II.

6. At its sixth session, the CMP requested the Subsidiary Body for Implementation (SBI) to make recommendations to it, with a view to adopting a decision at its seventh session on procedures, mechanisms and institutional arrangements under the CMP to allow for appeals against decisions of the Executive Board based on decision 2/CMP.5, paragraph 42, taking into account the recommendations of the Executive Board contained in annex II to its 2010 annual report.<sup>8</sup> The CMP invited Parties, intergovernmental organizations and admitted observer organizations to submit to the secretariat, by 28 March 2011, their views on the matter and requested the secretariat to compile the submissions into a miscellaneous document.<sup>9</sup>

## **B. Mandate**

7. The CMP, in its decision 3/CMP.6, requested the secretariat to prepare a technical paper, for consideration by the SBI, on procedures, mechanisms and institutional arrangements under the CMP to allow for appeals of decisions of the Executive Board.<sup>10</sup>

## **C. Scope of the paper**

### **1. Decisions of the Executive Board addressed**

8. This document has been prepared in response to the mandate described in paragraph 7 above. It provides information on and an analysis of common elements found in international appeal mechanisms and procedures. It consists of an introduction and 10 substantive chapters.

9. With respect to the scope of the mandate set out in paragraph 18 of decision 3/CMP.6, it is recalled that, in 2010, the Executive Board developed a procedure for complaints against DOEs as part of the new accreditation procedure.<sup>11</sup> Under the complaints procedure, project participants or entities who submitted comments during the global stakeholder consultation process and whose comments have not been taken into account by the DOE can complain to the CDM Accreditation Panel about their dissatisfaction with the performance of the DOE. Without prejudice to further consideration by Parties of those procedures and their relation to situations in which a DOE may not have performed its duties in accordance with the relevant requirements, as referred to in paragraph 42(a) of decision 2/CMP.5, this paper will focus on paragraph 42(b) of that decision, namely rulings taken by or under the authority of the Executive Board regarding the rejection or alteration of requests for registration or issuance.

10. Furthermore, the mandate contained in paragraph 42(b) of decision 2/CMP.5 refers to the rulings of the Executive Board with regard to the rejection or alteration of requests for registration or issuance. Therefore, this paper does not address other decisions made by the Executive Board. It is worth noting, however, that the Executive Board also makes decisions with regard to the renewal of crediting periods.<sup>12</sup> In accordance with the procedures for renewal of the crediting period of a registered CDM project activity,<sup>13</sup> the procedure for review of requests for registration<sup>14</sup> is applied also to the review of requests for such renewal. There appears to be a certain similarity between the nature of the rights

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<sup>8</sup> Decision 3/CMP.6, paragraph 18.

<sup>9</sup> Decision 3/CMP.6, paragraphs 19 and 20.

<sup>10</sup> Decision 3/CMP.6, paragraph 20.

<sup>11</sup> EB 56 report, annex 2, appendix 3.

<sup>12</sup> Decision 3/CMP.1, annex, paragraph 49.

<sup>13</sup> EB 46 report, annex 11.

<sup>14</sup> EB 55 report, annex 40.

and interests affected by the rejection or alteration of requests for renewal and of requests for registration.

## 2. Examples of international bodies considered

11. Appeal mechanisms are rare in international legal systems, and even rarer are mechanisms that give private parties rights to bring cases against administrative bodies of international organizations. In view of this, this paper examines examples of tribunals which review administrative decisions taken by international bodies (primarily administrative tribunals of international organizations which review applications filed by staff members challenging individual employment decisions of such organizations). In addition, to illustrate the organizational aspects of a roster-based ad hoc panel model, the paper looks at several arbitration tribunals based on such model. It should be noted, however, that the nature of the disputes considered by such arbitration tribunals (mainly two-party disputes, and often State-to-State disputes) differs significantly from the consideration of administrative decisions of an international body such as the Executive Board. The examples considered in this paper include:<sup>15</sup>

(a) The United Nations Dispute Tribunal (deals with, inter alia, complaints filed by individual United Nations staff members appealing administrative decisions relating to their employment);<sup>16</sup>

(b) The United Nations Appeals Tribunal (deals with, inter alia, appeals of judgements of the United Nations Dispute Tribunal);<sup>17</sup>

(c) The World Bank Administrative Tribunal (considers applications submitted by staff members of the World Bank Group alleging non-observance of their contracts of employment or terms of appointment);<sup>18</sup>

(d) The Court of Arbitration for Sport (CAS) (in addition to arbitration and/or mediation of disputes arising within the field of sport, the Court hears appeals concerning decisions of federations, associations or other sports-related bodies);<sup>19</sup>

(e) Chapter 19 of the North American Free Trade Agreement (NAFTA) (allows private parties involved in a national anti-dumping or countervailing duty proceeding to

<sup>15</sup> The international tribunals listed in paragraph 11(a–d) deal with administrative decisions of international organizations, while those listed in paragraph 11(e–g) consider trade and investment disputes involving one or more States or their appeals. The list is by no means exhaustive; some of the other international tribunals include: the International Court of Justice, which settles legal disputes submitted by States and provides advisory opinions on legal questions referred to it by authorized United Nations organizations and specialized agencies; the Permanent Court of Arbitration, which administers arbitration, conciliation and fact-finding in disputes involving various combinations of States, private parties, State entities and intergovernmental organizations; the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, whose shared Appeals Chamber hears appeals relating to the judgements and/or sentences passed by the Trial Chambers of the Courts; a number of administrative tribunals of organizations of the United Nations system; as well as regional tribunals, such as the European Court of Justice and its Court of First Instance, which adjudicates, inter alia, cases brought by private parties.

<sup>16</sup> United Nations General Assembly resolutions 63/253 and 64/119, documents A/RES/63/253 and A/RES/64/119.

<sup>17</sup> As footnote 16 above.

<sup>18</sup> Statute of the administrative tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation. Available at <[web90.worldbank.org/crm/wbt/wbtwebsite.nsf](http://web90.worldbank.org/crm/wbt/wbtwebsite.nsf)>.

<sup>19</sup> CAS. 2010. Statutes of the Bodies Working for the Settlement of Sports-Related Disputes. Available at <[www.tas-cas.org/rules](http://www.tas-cas.org/rules)>.

request a binational panel established under NAFTA to conduct a judicial review of the national government agency's decision);<sup>20</sup>

(f) The World Trade Organization (WTO) ad hoc panels (adjudicate disputes between members of WTO) and the WTO Appellate Body (hears appeals of reports issued by the ad hoc panels);<sup>21</sup>

(g) The International Centre for Settlement of Investment Disputes (ICSID) (an international arbitration system providing facilities for the conciliation and arbitration of international investment disputes usually brought by private investors against States).<sup>22</sup>

#### **D. Possible action by the Subsidiary Body for Implementation**

12. The SBI may wish to review the information contained in this technical paper in its consideration and development of recommendations on procedures, mechanisms and institutional arrangements under the CMP to allow for appeals of decisions of the Executive Board.

## **II. Relevant decisions of the Executive Board of the clean development mechanism**

13. In accordance with the CDM modalities and procedures, DOEs, on behalf of project participants, submit to the Executive Board requests for registration of validated projects as CDM project activities. They also submit requests for issuance of CERs. Decisions of the Executive Board on whether or not to register activities or to issue CERs affect the obligations of Parties as well as the interests of DOEs and project participants.

14. According to decision 3/CMP.1, annex, paragraph 41, the registration by the Executive Board of a proposed CDM project activity shall be deemed final eight weeks after the date of receipt by the Executive Board of the request for registration, unless a Party involved in the project activity or at least three members of the Executive Board request a review of the proposed CDM project activity. A review is required, inter alia, to be "related to issues associated with the validation requirements".<sup>23</sup>

15. According to decision 3/CMP.1, annex, paragraph 65, the issuance of CERs shall be considered final 15 days after the date of receipt of the request for issuance, unless a Party involved in the project activity or at least three members of the Executive Board request a review of the proposed issuance of CERs. Such a review is limited to the circumstances set out in that paragraph, namely the issues of fraud, malfeasance or incompetence of the

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<sup>20</sup> NAFTA, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289.

<sup>21</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to the Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.

<sup>22</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159. Although there is no appellate mechanism per se, under the ICSID Convention, after a tribunal has issued its final award on the merits, a party may, if all of the extraordinary requirements are met, request that an annulment committee be established.

<sup>23</sup> Decision 3/CMP.1, annex, paragraph 41(a). Additionally, the procedure for review of requests for registration adopted by the Executive Board, as requested by the CMP in its decision 2/CMP.5, paragraph 39, is set forth in annex 40 to the EB 55 report. Also relevant are the guidelines for requesting a review and making decisions and objections regarding review assessments, contained in annex 14 to the EB 59 report.

DOEs. Upon receiving a request for such a review, the Executive Board, at its next meeting, is to decide on a course of action, including whether or not to perform a review.<sup>24</sup>

16. With respect to decisions of the Executive Board rejecting requests for registration or issuance, both the procedure for review of requests for registration<sup>25</sup> and the procedure for review of requests for issuance of CERs<sup>26</sup> contain the identical requirements in paragraph 16 thereof:

“If an assessment’s proposed decision is to reject the request for registration [issuance], then the assessment shall included (sic) a proposed ruling. The proposed ruling shall contain an explanation of the reasons and rationale for the proposed decision including, but not limited to:

- (a) The facts and any interpretation of the facts that formed the basis of the proposed ruling;
- (b) The CDM rules and requirements applied to the facts;
- (c) The interpretation of the CDM rules and requirements as applied to the facts.”

### III. General considerations regarding appeal mechanisms

#### A. The distinction between appeal and judicial review

17. Questions have been raised as to whether the mechanism under consideration is actually an appeal mechanism or more akin to judicial review. Although the concepts are different in law, as explained in the following paragraphs, this paper proceeds on the basis that the mandate is to develop what has been called an appeals procedure, without prejudice to the functions it may be given.

18. At the national level, there is usually substantial difference between an appeal and judicial review conducted by courts. In many jurisdictions, in considering an appeal of a decision by a lower tribunal, an appeal instance tribunal hears the case and the evidence de novo or afresh, and may substitute its own judgement on the merits of the case for that of the lower instance. It considers the merits of the decision to determine whether the decision is correct. However, when a court is conducting a judicial review of specialized, expert agencies, in deciding whether to uphold or to quash it, it often applies a deferential standard of review, considering the manner in which the decision was made, without necessarily considering the whole case anew. On appeal the question is ‘right or wrong’? On review the question is ‘lawful or unlawful’?<sup>27</sup>

19. With respect to international tribunals, this distinction in the use of terminology does not appear to be so clear-cut. For example, the United Nations Appeals Tribunal, which hears appeals against decisions of the United Nations Dispute Tribunal, applies a standard of review that is deferential and similar to a typical judicial review standard applied by

<sup>24</sup> The procedure for review of requests for issuance of CERs, as requested by the CMP in its decision 2/CMP.5, paragraphs 37–39, is set forth in annex 41 to the EB 55 report. Also relevant are the guidelines for requesting a review and making decisions and objections regarding review assessments, contained in annex 14 to the EB 59 report.

<sup>25</sup> EB 55 report, annex 40.

<sup>26</sup> EB 55 report, annex 41.

<sup>27</sup> Wade and Forsyth. 2004. *Administrative Law*, 9<sup>th</sup> edition. Oxford: Oxford University Press. pp.33–34.

national courts (see chapter VI.A below). However, the Tribunal is called the “Appeals” Tribunal and its statute indicates that its mandate is to conduct “appeals”.<sup>28</sup>

20. Therefore, at the international level, it does not necessarily follow that the name of a body determines whether it carries out an ‘appeal’ function as opposed to a ‘review’ function. What is important is that the functions, in particular those relating to the standard of review, are clearly determined and set out in the body’s mandate. In view of this, this paper will refer to an appeal mechanism throughout, without prejudice to the envisaged functions of the body and the standard of review which the Parties may wish to decide on.

## **B. Principles of justice**

21. The CMP has recognized the principles of natural justice of transparency and due process, as well as the fundamental importance of impartiality and consistency in the decision-making of the Executive Board.<sup>29</sup>

22. A number of key concepts, such as independence and impartiality, fair procedures and due process, transparency, consistency, timeliness, efficiency and cost-effectiveness, are found in international appeal mechanisms, in order to satisfy the requirements of natural justice. This chapter provides an overview of these key concepts, in order to frame the issues raised in the subsequent chapters.

### **1. Independence and impartiality**

23. Independence and impartiality on the part of a decision maker are fundamental to any legal system.<sup>30</sup> Independence comes from one of the two key principles of natural justice, which requires administrative decision makers to be free from bias, whether real or perceived, and to maintain an open mind.<sup>31</sup>

24. Independence and impartiality can be influenced by the type of appeal mechanism selected, the process of appointment, the qualifications of the persons appointed, the terms of their appointments, and the renewability of their terms.

25. To ensure its independence and impartiality, the appeal mechanism would have to be independent from the Executive Board, the secretariat, other bodies established by the CMP and by the Executive Board, as well as from DOEs, project participants, potential project participants and stakeholders. How independence and impartiality can be built into an appeal mechanism is explored in chapter V below.

### **2. Fair procedures and due process**

26. The other fundamental principle of natural justice is that of due process. It relates to guarantees of, inter alia, fair procedures by administrative or judicial bodies,<sup>32</sup> and its specific scope is usually determined by the types of procedure, specific circumstances or relevant law.<sup>33</sup>

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<sup>28</sup> United Nations General Assembly resolution 63/253, Administration of Justice at the United Nations, document A/RES/63/253, 17 March 2009, annex II, Statute of the United Nations Appeals Tribunal, Article 2.

<sup>29</sup> See, for example, decision 2/CMP.5, paragraph 7, and decision 3/CMP.6, paragraph 13.

<sup>30</sup> Régimbald G. 2008. *Canadian Administrative Law*. LexisNexis Canada Inc. p.329; see also Coffey G. 2009. *Administrative Law*. Round Hall Essential Law Text. Dublin: Thomson Reuters. p.134.

<sup>31</sup> As footnote 31 above.

<sup>32</sup> Uwakah OT. 1997. *Due Process in Nigeria’s Administrative Law System*. University Press of America. p.21.

<sup>33</sup> Segel L. 2010. *Introduction to Criminal Justice*. Wadsworth, Cengage Learning. p.160.



27. This principle applies equally to international tribunals as it does to national ones.<sup>34</sup> For example, the WTO Appellate Body has affirmed the importance of the principle of due process, declaring that the term is implicit in the rules and procedures governing the settlement of WTO disputes.<sup>35</sup>

28. Elements of due process in a procedural context would include participants' rights to be heard (be it in writing or orally). Participants would also have a right to receive a decision explaining the legal and factual reasons for the decision. The rationale behind this fairness principle is that it ensures that decisions are fully thought through by the decision maker and that the evidence and participants' submissions have been fully taken into account, and it guards against arbitrariness.<sup>36</sup> These issues are explored further in chapters VI–VII and IX–XI below.

### 3. Transparency

29. Transparency has been defined as “sharing information or acting in an open manner” or “a measure of the degree to which information about official activity is made available to an interested party”.<sup>37</sup> In an appeal, this might require that an application for appeal, the submissions of the participants, the decisions and rulings of the appeal mechanism and other important documents in the appeals proceeding be made available on the UNFCCC website as soon as practicable.

30. While transparency is a fundamental principle that should be respected, care should also be taken to develop special procedures to protect business confidential information so that trade, financial or other information of which the disclosure may be harmful to a private party's business interests would not be disclosed to competitors. For example, Chapter 19 of NAFTA has formal rules of procedure for protecting business confidential information, as do many national legal systems. Some international systems, such as ICSID and WTO, have developed ad hoc procedures for protecting business confidential information (see also chapters VI.D and XI.B below).

### 4. Consistency

31. Consistency in decision-making, or rather lack of arbitrariness, is another important feature of natural justice. For the appeals body, factors such as composition, membership, expertise, and provisions made for decision-making following discussion among all judges (collegiality) are critical in ensuring consistency of decision-making.

32. It is worth noting that the CMP has emphasized the importance of enhancing consistency in the decision-making of the Executive Board.<sup>38</sup> A mechanism for appealing decisions of the Executive Board may enhance the consistency of its decision-making in relation to the CDM, which is critical to the effective functioning of, and in turn confidence in, the CDM.

<sup>34</sup> Mani VS. 1980. *International Adjudication: Procedural Aspects*. The Hague: Martinus Nijhoff. p.12.

<sup>35</sup> See, for example, the WTO Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, document WT/DS50/AB/R, adopted on 16 January 1998, DSR 1998:I, 9, paragraphs 94 and 95; and the WTO Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, document WT/DS18/AB/R, adopted on 6 November 1998, DSR 1998:VIII, 3327, paragraph 272.

<sup>36</sup> See Coffey G. 2009. *Administrative Law*. Round Hall Essential Law Text. Dublin: Thomson Reuters. p.292.

<sup>37</sup> See Mock W. 1999. On the Centrality of Information Law and Transparency. *John Marshall Journal of Computer and Information Law*. Vol. XVII.

<sup>38</sup> See, for example, decision 2/CMP.5, paragraph 7, and decision 3/CMP.6, paragraph 13.

## **5. Competence and expertise**

33. The competence and expertise of members of the appeal mechanism are essential to the quality, consistency and coherence of its overall decision-making.

34. The expertise required of members of rosters of ad hoc panel or arbitration systems depends on the nature of the disputes being considered under each system. However, most appeal mechanisms require members to have legal expertise, given the quasi-judicial nature of their function and the importance of complying with the principles of natural justice. Examples of the type of expertise sought by specific appeals bodies are found in chapter V.E below.

35. In order to ensure that the appeal mechanism has high standing and commands the respect of all the parties involved, members would have to be highly regarded and knowledgeable experts. To this end, the nomination process would benefit from a rigorous selection process, including clear selection criteria, interviews with the candidates, etc.

## **6. Timeliness, efficiency and cost-effectiveness**

36. To effectively discharge its functions in accordance with natural justice, an appeal mechanism should be efficient, operate in a timely manner, so as not to cause delays which can be costly to potential project participants, and not be unduly expensive such that it would deter applicants from bringing claims. It should also be efficient and cost-effective from an administrative perspective.

37. In order to ensure efficiency, timeliness and effectiveness, there should be relatively short, precise time limits for the entire duration of the appeal proceeding as well for each stage in the process. Procedures without explicit time frames can lead to delays, which can be expensive for participants, both in terms of legal fees and any economic loss incurred (see also chapter IX below).

# **IV. Institutional and other issues**

## **A. Institutional issues**

### **1. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol**

38. Article 13, paragraph 4(h), of the Protocol provides that the CMP may establish such subsidiary bodies as are deemed necessary for the implementation of the Protocol. In decision 3/CMP.6, paragraph 18, it is envisaged that the CMP will adopt a decision, at its seventh session, on procedures, mechanisms and institutional arrangements **under the CMP** to allow for appeals of decisions of the Executive Board. Such a decision may include the establishment of an appeals body as well as rules on the appointment of members to that body. As in the case of other subsidiary bodies under the Protocol, it is anticipated that the CMP would appoint the members of the appeal mechanism. A subsidiary body is usually accountable to the supreme body that established it (see also chapter VIII below).

### **2. The Executive Board**

39. As noted in paragraph 25 above, to ensure independence and impartiality, the appeal mechanism would have to be independent from the Executive Board.

40. Consideration should also be given to the Executive Board's involvement in an appeal mechanism. In administrative law, when the decision of an administrative agency is

being reviewed by an appeals body or a court, the review is conducted on the basis of the agency's decision (including its reasons for the decision) as well as the administrative record underlying its decision. At the international level, the agency does not usually participate in the proceeding itself.<sup>39</sup>

41. The reason for this relates to the principle of fair procedures. The decision of the decision-making body is expected to include the legal and factual reasons for its decision.<sup>40</sup> The decision should speak for itself. The involvement of the body whose decision is being appealed in an appeal mechanism would provide it with the possibility of seeking to interpret its own decision, or to change the basis of its original decision and/or to provide additional information about its deliberations. This could have an impact on procedural fairness and due process, since the appeal was based on the original decision and not on a revised justification. The appellant should not be put in the position of appealing against a 'moving target'. Therefore, an appeals body usually only reviews the decision and the reasons given for the decision; it does not look behind or seek to second-guess what is in the administrative record.

### **3. The secretariat**

42. In order to ensure the independence and impartiality of the appeal mechanism, as well as the effectiveness and quality of its decision-making, it will be necessary to provide a secretariat staff that is separate and independent from the secretariat staff that supports the Executive Board. Secretariat staff would conduct legal research and draft legal memoranda to assist the members of the appeals body in making and drafting their decisions. In addition, there will be cost considerations regarding the secretariat staff, to ensure that it is adequately resourced to effectively support the appeal mechanism. The level of resources should be determined on the basis of an estimate of the volume of anticipated appeals.

## **B. Other issues**

### **1. The decision establishing the appeal mechanism, rules of procedure and code of conduct**

43. Statutes, decisions or international agreements establishing appeal mechanisms are usually limited to fundamental issues such as the types of case the body may hear, its composition (qualifications, terms, rotation and selection process), impartiality, conflict of interest, standard of review, authority to make its own rules of procedure, decisions and orders it may make, and in some cases, a maximum length of time for the conduct of proceedings. All other details relating to their rules of procedure and internal operations are usually left to the bodies themselves to establish, allowing them some measure of discretion and flexibility in this, while important matters relating to the jurisdiction, powers and composition are determined by the body that creates the appeal mechanism. For example, the United Nations Dispute Tribunal and the United Nations Appeals Tribunal have broad authority to establish their own rules of procedure, subject to the approval of the United Nations General Assembly,<sup>41</sup> as does the WTO Appellate Body.<sup>42</sup> A similar approach has

<sup>39</sup> For example, the United Nations Dispute Tribunal does not appear as a respondent in proceedings before the United Nations Appeals Tribunal; a WTO ad hoc panel does not participate in a WTO Appellate Body proceeding; and the United States International Trade Commission does not participate in a NAFTA Chapter 19 binational panel review of its decision.

<sup>40</sup> See Coffey G. 2009. *Administrative Law*. Round Hall Essential Law Text. Dublin: Thomson Reuters. p.288.

<sup>41</sup> United Nations General Assembly resolution 63/253, Administration of Justice at the United Nations, document A/RES/63/253, 17 March 2009, annex I, Statute of the United Nations Dispute Tribunal, Article 7, and annex II, Statute of the United Nations Appeals Tribunal, Article 6.

been taken by some of the compliance mechanisms under multilateral environmental agreements.<sup>43</sup>

44. In the context of a CDM appeal mechanism, this model would mean that the CMP would determine the jurisdiction, powers and composition of the appeal mechanism, while delegating to the appeals body the preparation of its rules of procedure and/or operational modalities, and code of conduct with respect to impartiality, conflict of interest and confidentiality, subject to approval by the CMP. This approach might not be entirely suitable for an ad hoc system, however, which might require detailed rules to be developed by the CMP (see para. 90 below).

## **2. Commencement of consideration**

45. Parties may wish to consider whether a threshold date should be established, such that only decisions taken by the Executive Board after this date would be eligible for appeal. Setting out a clear date could prevent any ambiguity and provide clear guidance to the appeals body and to any potential petitioners. In this regard, Parties may wish to note that retroactive application of procedures is not usual in either the national or the international context. Parties may also wish to consider allowing the newly established appeal mechanism a period of time before it begins consideration of appeals to enable it to take care of administrative issues such as the scheduling of the first meeting and to develop any necessary operational modalities.

## **3. Caseload**

46. The expected caseload of appeals is an important factor to take into consideration in designing an appropriate appeal mechanism. The cases for which appeals would most likely be submitted are requests for registration or issuance that are rejected by the Executive Board. In 2010, the Executive Board rejected 28 requests for registration and 19 requests for issuance. It is likely that the number of appeals in such a year would be below such levels. Other cases potentially subject to appeal, such as alterations in the quantities of CERs issued, are more limited.

47. Examples from other appeal mechanisms tend to indicate that there is usually an initial high number of appeals, which levels out as the appeal mechanism matures.<sup>44</sup> A high take-up in the early years may be particularly evident if the appeals process is expeditious and efficient. Of course, this will depend upon the potential petitioners' views about the potential benefits and costs of bringing appeals, and in particular if the process is relatively timely and final, then chances are that directly involved stakeholders will probably take the opportunity to appeal.

## **4. Privileges and immunities**

48. Parties may wish to consider whether the members of the appeal mechanism should be accorded privileges and immunities. In this regard, it is noted that the CMP has been

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<sup>42</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17.9.

<sup>43</sup> See, for example, Guidance on the Aarhus Convention Compliance Committee. Available at <[www.unece.org/env/pp/compliance.htm](http://www.unece.org/env/pp/compliance.htm)>.

<sup>44</sup> For example, when the WTO Appellate Body was established in 1995, the negotiators had originally contemplated that appeals would be brought only in the rarest of cases, when panels had clearly made wrong decisions. However, in the first few years, 100 per cent of the panels' decisions were appealed to the Appellate Body, because the time frames were short (60–90 days), the costs were not significant, and members had difficulty explaining to their constituencies why they had not pursued all the options open to them. Since then, the rate of appeal has decreased somewhat, but it is still high, at around 76–80 per cent.

considering the issue of privileges and immunities for individuals serving on constituted bodies under the Protocol. A draft text is currently under consideration by the SBI.<sup>45</sup>

## 5. Languages

49. Taking into account the importance of transparency as well as possible budgetary implications, Parties may also wish to consider and set out in their decision the number of working languages for the appeals body and whether its decisions should be translated.

## V. Type and composition of the appeal mechanism

50. This paper examines three general options for the type and composition of the mechanism: an ad hoc panel system with a roster of experts; a standing tribunal with part-time members; and a standing tribunal with full-time members.

51. These three options incorporate several of the more specific suggestions made in the 2010 annual report of the Executive Board, which included the designation of an existing standing body (i.e. the enforcement branch of the Compliance Committee) and the creation of ad hoc or standing bodies.<sup>46</sup> The suggestion to create ad hoc or standing bodies under the Executive Board is not examined in this paper, as it would be inconsistent with the principles of independence and impartiality for the Executive Board to establish panels to hear appeals from its decisions. The suggestion to designate bodies external to the CMP is also not discussed here, as the mandate set out in paragraph 18 of decision 3/CMP.6 refers to institutional arrangements under the CMP.<sup>47</sup>

52. With regard to an **ad hoc panel system with a roster** of experts, there are numerous arbitration systems, mainly first-instance arbitration panels, at the international level, but very few appeal or review mechanisms that rely on this model. Examples include CAS, Chapters 19 and 20 of NAFTA, ICSID and the WTO ad hoc panel system.

53. A **standing tribunal with part-time members** is another model. One of the main examples at the international level is the WTO Appellate Body, which hears appeals of panel decisions on issues of law or legal interpretation. In addition, individual members of the Appellate Body are called upon to act as arbitrators in disputes about the reasonable period of time for implementation of WTO decisions.

54. The Kyoto Protocol Compliance Committee is another example of a part-time standing body. Referring appeals under the CDM to the enforcement branch of the Compliance Committee would involve considerations similar to those for any part-time standing body, with some additional specific considerations outlined in section H below.

55. The third possible option is a **standing tribunal with full-time members**. Examples include most of the administrative tribunals of international organizations, such as the United Nations Dispute Tribunal, the United Nations Appeals Tribunal and the World Bank Administrative Tribunal.

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<sup>45</sup> FCCC/SBI/2010/27, paragraph 157.

<sup>46</sup> FCCC/KP/CMP/2010/10, paragraph 51.

<sup>47</sup> Nevertheless, Parties may wish to note some considerations in this regard, including the fact that appeals against decisions of the Executive Board would constitute appeals against an administrative decision of an international body. Most of the international dispute resolution mechanisms, such as the International Court of Justice or the Permanent Court of Arbitration, primarily deal with disputes between two parties (with one often being a State), who select members of the arbitral tribunal. When considering the course proposed in paragraph 51(e), Parties may wish to take into account the specific nature of the CDM as well as the extent to which they would wish to see the appeals body accountable to the CMP.

56. Some of the considerations relevant to each of the three options referred to in paragraphs 52, 53 and 55 above are discussed in this chapter, including: the ability to fulfil the criteria of independence, impartiality, fair procedures, transparency, consistency and effectiveness essential for this mechanism; as well as considerations relating to relative costs, timeliness and efficiency. For standing bodies, many of the considerations are similar, regardless of whether the bodies are constituted on a full- or part-time basis.

## **A. Size**

### **1. Ad hoc panel system with a roster**

57. Among the rosters that exist at the international level, the roster size varies greatly. Interestingly, such rosters are almost never used exclusively for the selection of panellists, arbitrators or conciliators. In all of the examples cited below, the parties may, and regularly do, choose to select panellists and arbitrators who are not on the rosters.

58. For example, CAS has a roster of at least 150 arbitrators, but the parties are not required to use it when selecting a panel. Under the NAFTA Chapter 20 State-to-State dispute mechanism, panels may be selected either from or not from a roster of 30 persons nominated by the parties. Under the NAFTA Chapter 19 binational panel review procedure, in which private persons can seek judicial review of a national agency's decision, the parties may decide whether or not to use the roster, which is comprised of at least 75 persons nominated by the NAFTA Parties.

59. ICSID has two panels of experts (one for each of its two sets of arbitration procedures), to which each of its 146 members may designate four experts and the Chairman of the Administrative Council may designate 10. Parties may choose whether or not to use these panels in selecting conciliators or arbitrators.

60. There is an indicative list to which members of WTO may nominate their citizens, but it is not often used for the purpose of selecting panellists.

61. Generally speaking, a shorter roster (e.g. 10 or 12 experts) could be seen as more conducive to ensuring continuity, collegiality and consistency within the appeal mechanism. It should be noted, however, that too small a roster could make it difficult to meet the goals of the CDM of efficiency, timeliness and effectiveness by ensuring the availability of enough persons to compose panels on short notice to hear appeals.

### **2. Standing tribunal with part-time members**

62. Standing part-time bodies usually have a compact membership. The number is small (e.g. the WTO Appellate Body has seven members) to encourage collegiality, consistency and coherence in decision-making as well as administrative efficiency and cost-effectiveness.

### **3. Standing tribunal with full-time members**

63. Similar to the standing part-time body option, the small composition (e.g. five or seven members) would encourage collegiality, consistency and coherence in decision-making as well as administrative efficiency and cost-effectiveness.

64. The United Nations Appeals Tribunal has seven judges, the United Nations Dispute Tribunal counts three full-time and two part-time judges, and the World Bank Administrative Tribunal has seven.

## B. Formation of panels

### 1. Ad hoc panel system with a roster

65. With regard to the size of ad hoc panels, three persons appears to be the norm, as it is preferable to one person decision-making for reasons of impartiality and to five-person panels for reasons of efficiency, cost-effectiveness and timeliness.

66. For ICSID arbitrations, tribunals of three persons are usually selected by the parties to the dispute or, when they cannot agree, appointed by the Chairman of the Administrative Council. Under NAFTA Chapter 19 and 20 procedures, panels selected by parties to a dispute are composed of five experts either from or not from the roster. CAS hears cases in panels of three. Under the WTO ad hoc panel system, the disputing parties select a panel of three persons (usually from a list of names proposed by the secretariat which conforms to the parties' specifications about expertise and experience). If the disputing parties cannot agree, the WTO Director-General can be called upon to compose the panel. In the past few years, the WTO Director-General has been asked to nominate approximately 75 per cent of the panellists.

67. The process of selecting a panel from a roster is an important issue. The roster system is often used in arbitration proceedings because it provides the two parties to a dispute with the possibility of selecting arbitrators. The CDM appeal mechanism, however, would not have two formal parties to a dispute because appeals would be made against administrative decisions made by an international body. Therefore, some of the possible options for the selection of the panel include:

(a) Selection by the Executive Board: given the importance allocated by Parties and stakeholders to the independence and impartiality of the appeal mechanism,<sup>48</sup> this option might not be appropriate;

(b) Selection by the Executive Secretary:<sup>49</sup> examples of such models exist in WTO and ICSID, where the Director-General and the Chairman of the Administrative Council select the panellists and the tribunal members in the majority of cases. Nevertheless, the appropriateness of this should be considered;

(c) Selection by a chair and co-chairs: under this option, the full membership of the roster could hold periodic meetings and elect chairs or co-chairs with a mandate, *inter alia*, to select panels.

### 2. Standing tribunals

68. The formation of panels can be relevant not only to the ad hoc system based on rosters but also to standing bodies. Decision-making in panels or divisions of three could provide for more efficient and timely decision-making than decision-making by the full membership of seven or 10, while still ensuring impartiality. The United Nations Dispute Tribunal hears cases with only one judge, whereas the United Nations Appeals Tribunal and the World Bank Administrative Tribunal usually hear cases in panels of three.

69. Also, consistency and coherence can be promoted by encouraging collegiality within the body as a whole through regular meetings of all members, at which decisions, rules of procedure and other matters affecting its work could be discussed. For example, the WTO

<sup>48</sup> See submissions made in accordance with paragraph 19 of decision 3.CMP.6 (see FCCC/SBI/2011/MISC.2).

<sup>49</sup> The option given in paragraph 51(c) of document FCCC/KP/CMP/2010/10 provided for 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.

Appellate Body hears appeals in divisions of three. However, during every appeal, all seven members meet to exchange views as part of the Appellate Body's practice of collegiality to ensure consistency and coherence in their decisions.

70. Should Parties decide on this approach, the composition of each division could be determined internally by the standing body itself or by its chair on the basis of rotation, taking into account the principles of random selection, unpredictability (so that parties would not try to time appeals in order to 'judge shop'), equitable distribution of cases, and opportunity for all members to serve regardless of their national origin. These principles could be elaborated in the operational modalities established by the standing part-time body, subject to approval by the CMP.

## **C. Nominations<sup>50</sup>**

### **1. Ad hoc panel system with a roster**

71. Whether the roster is large or not, it is important that a proper regional balance be maintained among the experts on the roster. In this regard, it is possible to use the model of nominations to some of the bodies under the CMP (for example, one expert nominated by each regional group, two each by Annex I and non-Annex I Parties and one by small island developing States).

### **2. Standing tribunals**

72. As with other models, Parties should consider whether the nomination process should follow the existing election procedures for other Protocol bodies (e.g. nominations by regional groups, etc).

73. The need for the members of the appeals body to be highly qualified would support a selection process which ensures that the selected candidate first and foremost has the ability to fulfil his or her role. In this regard, it can be argued that adherence to a strict, formalized regional distribution of members might increase the likelihood of politicization of the appointment process. A possible way out could be to mandate bodies already chosen in accordance with the principle of regional distribution to nominate candidates for election by the CMP (e.g. the Compliance Committee).

74. Under an alternative scenario, each regional group could nominate three to five candidates to be interviewed by a group of legal experts established by the CMP, with a view to that group making recommendations on the best-qualified candidates for the standing body. As an example of a similar model, the members of the WTO Appellate Body are appointed by the Dispute Settlement Body (comprised of all the members of WTO) from nominations made by WTO members, upon the recommendations of an expert group comprised of the WTO Director-General and the five Chairs of the WTO Councils after consultation with all WTO members. The expert group interviews all candidates.

### **3. Standing full-time tribunal**

75. The United Nations General Assembly decides who is to be appointed as judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, upon the recommendation of the Internal Justice Council. No more than one candidate for each Tribunal shall be considered for each Member State of the United Nations, and due consideration is to be given to geographical distribution and gender balance.

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<sup>50</sup> As is the case with other bodies under the Protocol, the nominations would normally be made for election by the CMP.



## **D. Term of office**

### **1. Ad hoc panel system with a roster**

76. A longer, non-renewable term (of, for example, five years) could afford greater incentives for independence, impartiality and consistency in decision-making as well as greater collegiality among the members and more of a sense of shared institutional culture. The non-renewability of his/her term insulates a member from fears of influence or concerns about how his/her decisions may be viewed by Parties who may be considering the renewal of his/her term.

77. To ensure continuity, a staggered rotation during the first term would be important, with a part of the roster nominated for a shorter term of office. In providing any such staggered rotation for the first term, and depending on the number of experts and the composition, Parties may wish to consider how to ensure that regional balance and, if relevant, variety of expertise are maintained.

### **2. Standing tribunals**

78. As with a roster-based system, a longer term of office usually assures greater impartiality and independence of the body. A staggered first term of office would also be important to ensure consistency and continuity. As an example, the members of the WTO Appellate Body serve for a term of four years, renewable once. The judges of the United Nations Appeals Tribunal and the United Nations Dispute Tribunal are appointed for one non-renewable term of seven years, while the judges of the World Bank Administrative Tribunal have a five-year term, renewable once.

## **E. Expertise**

### **1. Ad hoc panel system with a roster**

79. The expertise required of members of rosters depends on the nature of the disputes being considered under each system. For CAS, legal training and competence in sports law and/or international arbitration is emphasized; for NAFTA, expertise in law, international trade or resolution of disputes arising under international trade agreements is critical; and for WTO, experience in the settlement of WTO disputes or in other WTO activities, teaching international trade law or serving as a senior trade policy official is important.

80. Depending on the size of the roster and the standard of review, legal and technical expertise, such as knowledge of the operation and rules of the CDM could be considered, as could judicial or arbitral experience.

### **2. Standing tribunals**

81. While considerations with regard to qualifications of members are similar for all models examined in this paper (see also paras. 33 to 35 above), the compact size of a standing body would require that most, if not all, members have legal expertise. Technical expertise in fields relevant to CDM project activities could also be important. Parties may wish to consider, however, that while considerable legal expertise would be required, it is not likely that the membership of a compact appeals body would cover all possible fields of technical expertise relevant to possible CDM project activities. In this regard, whether or not some of the members have technical skills, the appeals body might need to be able to call on outside experts where necessary.

82. Parties may also wish to consider the importance of availability on short notice and the flexibility of the members of the appeals body. This is particularly important since the

caseload is difficult to foresee at this time and it could be important that members are not only available to attend regular meetings but are also available on short notice to hear cases. To this end, if a potential member is in full-time employment, this may be considered as somewhat of a hindrance. Candidates from academia and retired officials, experts or judges could provide a possible pool of candidates with flexible schedules.

83. For example, the members of the WTO Appellate Body are required to be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, and to be unaffiliated with any government. The membership of the WTO Appellate Body must be broadly representative of the membership of WTO. Members are required to be available at all times and at short notice, to stay abreast of dispute settlement and other WTO activities, and to not participate in any activities that would create a direct or indirect conflict of interest.

84. Qualifications specified in the statutes of the United Nations permanent Tribunals are that the persons must be “of high moral character” and, for the United Nations Dispute Tribunal, “possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions” and, for the United Nations Appeals Tribunal, “possess at least 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions”.

## **F. Remuneration and costs involved**

### **1. Ad hoc panel system with a roster**

85. The availability of persons on the roster to serve on panels when required could be a potential problem in an ad hoc panel system, unless there are financial or other incentives to encourage members to be available at all times and on short notice to hear appeals. In practice, compensation for ad hoc panellists can range from no compensation for government officials to 783 Swiss francs (CHF) a day plus expenses for non-governmental persons in WTO, to USD 3,000 a day plus expenses in ICSID.

86. The costs involved in the panel system depend on the size of the roster, whether and what remuneration is paid to members, the caseload and secretarial support expenses, as well as time and administrative expenses related to the panel selection process and costs related to any collegial meetings for the full membership of the roster. Translation and interpretation costs are also involved in some systems.

87. Since this model is most often used in international arbitration, a significant percentage of the costs is usually borne by the parties to the disputes. The costs of the secretariat of ICSID are financed by the World Bank and the costs of proceedings are borne by the disputing parties (USD 25,000 claimant fee, USD 20,000 annual fee for proceedings shared by the disputing parties, and additional related expenses (arbitrator fees, transcripts, etc.)). The 2010 annual budget for ICSID arbitration and conciliation proceedings was approximately USD 22 million (including trust funds held on behalf of parties in ongoing proceedings). A total of 27 new cases were initiated in 2010 and approximately 120 cases were ongoing during the fiscal year. One of the recent annual budgets for the ad hoc panels of WTO (not including the costs of the secretariat) was approximately CHF 1 million, with an average of three to 20 panels established annually since 1995.

### **2. Standing part-time tribunal**

88. Because of the significant amount of time that members of the appeal mechanism would be required to dedicate to its work, Parties may wish to consider whether the payment of retainer fees and daily fees or expenses would be appropriate. For comparison,

the members of the WTO Appellate Body are paid a monthly retainer of CHF 9,085 to ensure their availability for appeals; they are also paid a daily fee of CHF 783 plus travel expenses for each appeal, arbitration or other assignment. The WTO Appellate Body has had a caseload that ranges between three and 13 appeals and several arbitrations filed per year. The 2010 budget for the members of the WTO Appellate Body was approximately CHF 800,000.

### **3. Standing full-time tribunal**

89. Members of the United Nations permanent tribunals are appointed as judges in the United Nations system, with commensurate salaries and benefits, which implies that the cost of the system is significant.

## **G. Rules of procedure and operational modalities**

### **1. Ad hoc panel system with a roster**

90. Unlike in the case of a standing body, any detailed operational modalities for an appeal mechanism based on ad hoc panels would have to be developed and approved by the CMP because the experts on the roster would have no official standing as a body other than to be available to hear appeals when called upon. Therefore, it would be important that a code of conduct with respect to impartiality, conflict of interest and confidentiality be developed and approved by the CMP before the panels begin hearing their first cases.

91. In WTO, extensive rules of procedure for panels are set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes, and additional rules are developed by the panels in consultation with the parties in individual cases (mostly relating to time frames for filing submissions and dates and modalities for oral hearings). In ICSID, the detailed procedures are set out in the ICSID Convention itself (the tribunal and the parties can agree on additional procedures, but the main procedures are set out in the Convention).

### **2. Standing tribunals**

92. A standing body would likely be in a position to develop in detail its own operational modalities within the parameters established by the CMP in the rules and procedures. Where such modalities would be elaborated by the body itself, it could be important for the CMP to review them on the basis of the appellate body's annual reports and to provide further guidance as necessary (see para. 38 above and chapter VIII below).

## **H. Practical and other considerations**

93. Each of the possible options has its advantages and drawbacks which might have to be considered, taking into account the fundamental principles on which the mechanism should be based as well as on the practical needs and specifics of the CDM process. Some of these considerations are outlined in the following paragraphs.

94. If a large caseload is anticipated, a permanent standing body might be an option worth considering. However, it might be rather difficult to estimate the potential caseload at this time. Therefore, greater flexibility of the mechanism to adjust to the caseload as required might be called for, especially in the early years. A part-time approach (whereby panels would only be established or, in the case of a standing body, convened, when there are appeals to be heard) would provide for such flexibility.

95. The permanent availability of members of an appeals body would greatly facilitate the timeliness and efficiency of the mechanism. However, even in the case of a part-time standing body, members should be available to convene regularly as well as on an ad hoc basis, thereby also providing for a timely approach. At the same time, some of the existing examples of the roster system (e.g. WTO or NAFTA) seem to indicate that the selection of ad hoc panels can cause significant delays, expenditure of money and political capital. This is, however, specific to dispute arbitration, where it can be difficult to satisfy the disputing parties with regard to the qualifications, impartiality and experience of the proposed panellists. The availability of panellists could also pose more of a challenge in any ad hoc system as compared with standing bodies, and could lead to delays, inefficiencies and greater costs.

96. Broad geographical distribution as well as diversity of expertise could be best provided by a roster system, particularly where rosters of 30 or more persons are selected. A roster system could also offer the flexibility of choosing panellists who are not nationals of the countries of interested parties.

97. The need to improve consistency in decision-making under the CDM has been identified by the CMP on a number of occasions (see para. 21 above). The small number of members of standing bodies, the length of their terms as well as their qualifications ensured through a rigorous selection process would provide for greater consistency and coherence. In an ad hoc system, panels that meet to hear separate cases are likely to be less consistent than standing bodies of individuals that regularly hear cases together. Smaller rosters and a more collegial approach to the work (e.g. through periodic meetings of the full membership to update them on the CDM rules and to discuss matters of procedure and practice, or through sharing the detailed reasoning for individual decisions among the full membership) could go some way towards minimizing the shortcomings of the panel approach. However, the consistency, continuity, timeliness and efficiency of the panel approach are likely to be inferior to those of a standing body.

98. A standing body would be in a position to prepare and adopt regular reports on its activities to the CMP, thereby increasing its accountability. Such reporting might pose a challenge for a mechanism based on a roster of experts who only meet in small ad hoc panels.

99. A full-time standing body would be the most expensive investment, especially if a large caseload is not anticipated. It would require facilities and staff, adding to the administrative burden and cost. Full-time judges are usually appointed as high-ranking United Nations officials, with significant salaries and benefits. The costs and administrative demands on the secretariat would be lower with an ad hoc panel system. However, depending on the volume of cases in a particular year, an ad hoc system might be as expensive as a standing part-time body, because of the number of members on the roster, as well as the administrative cost and complexity of selecting and operating the ad hoc panel system.

100. With regard to the option of relying on the Compliance Committee, some of its advantages include an existing election mechanism and rules of procedure, and an established body with proven expertise in the field of the Protocol. Having such elements in place could lower the financial and timing implications of establishing an appeal mechanism, including with regard to any negotiations or costs affiliated with its membership, particularly if the current procedures and schedule of meetings are used.

101. This option does, however, have a number of possible drawbacks. The rules of procedure tailored to the compliance process would not be fully applicable to the review of the decisions of the Executive Board on individual CDM project activities. The large membership of the enforcement branch (10 members and 10 alternates), while being an

asset for the review of compliance by Parties, might not be conducive to effective and expedient decision-making on appeals. The infrequency of meetings, the rigidity of the schedule, and the existing workload might also affect the timeliness and effectiveness of appeals.

102. Another possibility would be to enlarge the enforcement branch with a view to having a special division to deal with appeals (or indeed creating a new branch of the Compliance Committee). However, it is worth noting that the practical implications of such additional membership, for which separate rules of procedure and a modified election mechanism as well as additional operational costs would have to be considered, could be similar to those of establishing a new body.

103. Furthermore, in assessing the appropriateness of relying on the compliance mechanism to hear appeals against decisions made by an intergovernmental body such as the Executive Board, Parties may wish to consider the different nature and purpose of the two processes. Compliance mechanisms are the systems adopted under multilateral agreements to address issues of compliance by Parties with their obligations under the relevant treaties. Expanding the mandate of the Compliance Committee to address administrative decision-making by an intergovernmental body might lead to tensions in balancing the two distinct functions of the body as well as to the expansion of the traditional scope of compliance regimes in multilateral agreements.

## VI. Standard of review and nature of decisions

### A. Standard of review

104. At both the national and the international level, regulations setting out appeals processes determine the degree of deference given by the appeals body in reviewing a decision. In a less deferential review, the appeals body can review all aspects of the decision from the beginning (*de novo*) and can overturn the decision by making a new one. Whereas, in a more deferential review, the appeals body would accord more deference to the judgement of the decision maker, by only disturbing the original decision if it considers that in reaching such a decision obvious error was made (see also chapter III.A above).

105. In many national legal systems, the intensity of review of administrative tribunals, commissions or agencies by the courts is deferential, because it is recognized that these bodies are regulated by parliaments or legislatures, not by the courts.<sup>51</sup> Appellate courts in many jurisdictions (e.g. the Federal Court of Canada) would review decisions of agencies and lower courts on the grounds of, *inter alia*, jurisdiction, principles of natural justice, error of law, erroneous finding of fact made in an irrational, perverse or capricious manner or without regard to material before it, fraud or perjured evidence.<sup>52</sup>

106. International appeals tribunals apply a deferential standard of review, particularly to errors of procedure and of findings of fact, while a less deferential standard is used for errors on a question of law. For example, the Statute of the United Nations Appeals Tribunal sets out grounds for review of appeals against decisions of the United Nations

<sup>51</sup> Régimbald G. 2008. *Canadian Administrative Law*. LexisNexis Canada Inc. p.12.

<sup>52</sup> High courts sometimes vary the degree of deference depending on the subject matter of the decision in question. For example, the French Council of State allows administrative bodies a lot of discretion in matters of public policy but significantly less in cases involving fundamental rights (see Irvine D. 2003. *Human Rights, Constitutional Law and the Development of the English Legal System*. Heart Publishing. p.287).

Dispute Tribunal. The Appeals Tribunal hears appeals which assert that in making its decision the Dispute Tribunal:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case;
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.<sup>53</sup>

107. In designing an appeal mechanism and determining the standard of review, an important consideration is the classification of the types of decision made by the body being reviewed. The Executive Board is engaged in administrative decision-making that involves factual findings, interpretation of CDM rules, and application of those rules to the facts of the case at hand.<sup>54</sup> Registering emission abatement projects and issuing offset credits are technical activities, requiring the Executive Board to apply specialized expertise in making its rulings, in which it is supported by a range of expert bodies.

108. Parties therefore may wish to consider whether, on matters of fact or procedure, a specialized international administrative body such as the Executive Board could be given a deferential standard of review. At the same time, it is important that the rules be interpreted and applied correctly and in accordance with the law. It would therefore seem that the appeals body could have a greater degree of authority to review aspects of the decision related to questions of interpretation of CDM rules and requirements.

109. Building on the example of the standard of review of the United Nations Appeals Tribunal, Parties may wish to consider the standard of review for the CDM appeal mechanism providing for consideration of appeals which allege that in making its decision the Executive Board has:

- (a) Exceeded its jurisdiction or competence;
- (b) Erred on a question of law;
- (c) Committed an error in procedure, such as to materially affect the decision in the case;
- (d) Erred on a question of fact, resulting in a manifestly unreasonable decision.

## **B. Decisions**

### **1. Final decisions**

110. An appeals body can usually affirm, reverse, modify or remand a decision under review.

111. In its recommendations, the Executive Board proposed that the appeal mechanism should have only two options for its final decisions: (a) to affirm the ruling of the Executive Board; or (b) to remand the request of registration or issuance to the Executive Board for

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<sup>53</sup> United Nations General Assembly resolution 63/253, Administration of Justice at the United Nations, document A/RES/63/253, 17 March 2009, annex II, Statute of the United Nations Appeals Tribunal, Article 2.1.

<sup>54</sup> Procedures for review established in EB report 55, annexes 40 and 41.

further consideration.<sup>55</sup> It also proposed procedures for its reconsideration of requests upon remand.<sup>56</sup>

112. Experience has shown that there can be several instances of back and forth ('ping pongs') in a review whose extent is limited to remanding a case back to the agency concerned.<sup>57</sup> The Executive Board proposed to reconsider and decide on requests for registration or issuance on remand expeditiously and to make its reconsidered decisions consistent with the judgement of the appeal mechanism. However, if it rules to reject the request again, an appeal of that ruling could potentially be brought,<sup>58</sup> and time and effort could be expended in subsequent appeal proceedings.

113. Where an appeal mechanism has the authority to modify the decision, there will be no potential problem with misinterpretation or misapplication of its rulings and, thus, consistency and coherence will be enhanced. Also, timeliness and efficiency will be greater, because the decision of the appeal mechanism will be final, and there will be no need to remand the decision back to the Executive Board for reconsideration, and no opportunity in the event of a rejection ruling by the Executive Board for further appeals and further remands.

114. If a deferential standard of review is applied, the decisions of the Executive Board will only be reversed if a factual error resulted in a manifestly unreasonable decision, a procedural error materially affected the whole case, or a legal error affected the interpretation of the CDM rules. In a well-functioning system, there should not be many occasions on which the decisions of the Executive Board would have to be overturned.

115. Parties may wish to consider whether the appeal mechanism should have the authority to affirm, reverse or modify a decision of the Executive Board on questions of interpretation of the CDM rules, of procedure and of fact.

116. Parties may also wish to consider whether there may be some cases involving questions of fact in which the appeal mechanism may wish to exercise its discretion to remand the decision back to the Executive Board for reconsideration or further examination because the record does not contain sufficient facts for the appeals body to make a proper assessment.

## **2. Binding nature of decisions**

117. The decisions of international tribunals, such as the United Nations Appeals Tribunal, are binding upon the parties to the particular case, are final and are without appeal.<sup>59</sup>

118. Parties may wish to consider whether decisions of the appeal mechanism should be binding on the participants and the Executive Board (for the case at issue and/or as a precedent for future cases involving similar issues) and final in the sense that there would be no further appeal.

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<sup>55</sup> FCCC/KP/CMP/2010/10, annex II, paragraph 47.

<sup>56</sup> FCCC/KP/CMP/2010/10, annex II, paragraphs 51–60.

<sup>57</sup> See, for example, the NAFTA Chapter 19 United States Softwood Lumber Anti-dumping and Countervailing Duty binational panels between the United States of America and Canada.

<sup>58</sup> See FCCC/KP/CMP/2010/10, annex II, paragraph 74, where the Executive Board contemplates that a reconsidered ruling that rejects or requires an alteration to a request for registration or issuance may be appealed.

<sup>59</sup> United Nations General Assembly resolution 63/253, Administration of Justice at the United Nations, document A/RES/63/253, 17 March 2009, annex II, Statute of the United Nations Appeals Tribunal, Article 10.5, annex I, Statute of the United Nations Dispute Tribunal, Article 11.3; and annex II, Statute of the United Nations Appeals Tribunal, Article 10.6.

### 3. Orders on procedural matters

119. The Executive Board proposed that the appeal mechanism should not have the authority to consider any motions (i.e. requests made to the tribunal to decide on a particular matter, usually related to the proceedings in question).<sup>60</sup>

120. At the same time, preliminary procedural issues may arise in some cases that are impossible to anticipate and that are not specifically dealt with in the rules of procedure. For this reason, most rules of procedure have a ‘gap rule’, which allows an ad hoc panel or a tribunal to establish a procedure in a particular proceeding, where necessary, in order to effectively manage that proceeding.<sup>61</sup>

121. Parties may therefore wish to consider whether to afford the appeals body with the authority to make orders dealing with procedural matters that are necessary to allow it to effectively and efficiently manage an appeal proceeding (e.g. hearing a preliminary matter, such as representation by counsel, the disclosure of evidence or the protection of business confidential information, that a party wishes to raise and that the appeal mechanism deems important to the functioning of its proceeding). If it finds that the matter is trivial and unimportant, it will likely dismiss the application.

### C. Compensation and damages

122. For greater clarity, Parties may wish to consider whether the remedies of reparation and compensation should be specifically excluded from application in appeals of decisions of the Executive Board, as recommended by the Executive Board.<sup>62</sup>

### D. Transparency and confidentiality

123. It is the established practice of most international and national tribunals, and public bodies to issue their decisions in writing with the reasons, facts and rules on which they are based.<sup>63</sup> For example, judgements of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal are required to be communicated to each party, published (while protecting personal data), and made generally available by the Registry.<sup>64</sup>

124. Parties may wish to consider whether to include a specific provision in their decision to ensure that copies of each decision or order made in an appeal are communicated to each petitioner, participant and the Executive Board by the appeal mechanism, and published on the Executive Board’s website.

125. While transparency is important, due regard should be given to the protection of confidential information (see also para. 30 above and chapter XI.B below).

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<sup>60</sup> FCCC/KP/CMP/2010/10, paragraph 80.

<sup>61</sup> United Nations General Assembly resolution 64/119, Administration of Justice at the United Nations, document A/RES/64/119, 15 January 2010, annex I, Rules of Procedure of the United Nations Appeals Tribunal, Article 31, and annex I, Rules of Procedure of the United Nations Dispute Tribunal, Article 36; WTO Appellate Body, Working Procedures for Appellate Review, document WT/AB/WP/6, 16 August 2010, Article 16.1; and WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Panel Procedures, Article 12.1.

<sup>62</sup> FCCC/KP/CMP/2010/10, annex II, paragraph 63.

<sup>63</sup> See paragraph 28 of this document; see also Coffey G. 2009. *Administrative Law*. Round Hall Essential Law Text. Dublin: Thomson Reuters. p.288.

<sup>64</sup> United Nations General Assembly resolution 63/253, Administration of Justice at the United Nations, document A/RES/63/253, 17 March 2009, annex I, Statute of the United Nations Dispute Tribunal, Articles 11.5 and 11.6, and annex II, Statute of the United Nations Appeals Tribunal, Articles 10.8 and 10.9.



## VII. Right to appeal

126. Parties may wish to consider who should have standing to appeal decisions of the Executive Board relating to the registration of CDM project activities or the issuance of CERs.

127. The CMP, in its decision 2/CMP.5, paragraph 42, provided the direction that appeals should be “brought by stakeholders directly involved, defined in a conservative manner”.

128. For the purposes of reviews by the Executive Board under paragraphs 41 or 65 of the annex to decision 3/CMP.1, only “a Party involved in the project activity” or “three members of the Executive Board” have standing to request a review. A “Party” is defined as a Party to the Protocol.<sup>65</sup>

129. The Executive Board, in its recommendation on the procedure for appeals,<sup>66</sup> proposed that only the “project participants (as identified on the modalities of communication form)” and “the designated national authorities of the host country and of Parties included in Annex I [...] or subsequently included as Parties involved” be permitted to commence appeals.

130. In the light of the language referring to “stakeholders directly involved, defined in a conservative manner”, Parties could consider whether a petitioner should include any Party, project participant or DOE directly involved in the project activity or proposed project activity concerned. Parties may also wish to consider whether some or all of the above should be able to join as multiple petitioners in commencing an appeal. Parties may further wish to consider whether any Party, project participant or DOE directly involved in the project activity or proposed project activity concerned which does not wish to participate as a petitioner in filing an appeal should have the right to intervene in the appeal.

131. Parties may wish to consider the implications of these options for issues such as environmental integrity, legitimacy and confidence as well as for caseload, the efficiency of the appeal mechanism and the possibility of vexatious or frivolous claims.

132. With respect to third-party intervention, Parties may also wish to consider whether interested stakeholders, such as those who participated in the consultations at the earlier stages of the CDM process, should be given an opportunity to intervene, for example at the discretion of the appeal mechanism. This issue could be addressed also in the rules of procedure of the appeal mechanism.

## VIII. Review and reporting

133. A subsidiary body is usually accountable to the supreme body that established it. Therefore, an appeal mechanism established by the CMP would be accountable to the CMP and report to it. Such accountability could be facilitated through the requirement for the appeals body to submit annual reports to the CMP on its activities.

134. The CMP might decide to provide guidance to the appeals body following the review of its annual reports. Parties may wish to consider whether to conduct a comprehensive review of the functioning of the appeal mechanism after the first two or three years of its operation.

<sup>65</sup> Annex to decision 3/CMP.1.

<sup>66</sup> FCCC/KP/CMP/2010/10, annex II.

## **IX. Time limits**

135. In order to ensure fair procedures and transparency as well as efficiency, timeliness and effectiveness, Parties may wish to consider whether the overall time limit for the issuance of a written decision by the appeal mechanism should be set by the appeals body, subject to the overall principles of timeliness, efficiency and fairness.<sup>67</sup> Factors such as oral hearings, work in several languages and reliance on external expertise would influence the length of the proceedings. A working schedule for each stage in the process could also be set out in the rules of procedure.

136. Parties may also wish to consider whether a time limit for filing an appeal should be set (e.g. 45 or 60 days after receipt of the rejection of the Executive Board). This might enhance timeliness, efficiency and cost-effectiveness as well as the predictability and fairness of procedures in the appeals proceedings. For example, appeals against judgements of the United Nations Dispute Tribunal have to be filed with the United Nations Appeals Tribunal within 45 calendar days after the receipt of the judgement.<sup>68</sup>

## **X. Fees**

137. In order to cover the costs of the appeal process and deter frivolous appeals, the Executive Board has proposed a filing fee in relation to requests for registration of USD 7,500 for small-scale project activities and USD 50,000 for large-scale project activities. With respect to appeals in relation to requests for issuance, it has proposed a fee based on a formula relating to the quantity of emission reductions or removals certified by the DOE in the request for issuance under appeal.<sup>69</sup>

138. Administrative tribunals of international organizations usually do not impose fees on appellants. WTO does not charge fees for bringing dispute settlement cases; however, members pay annual dues to WTO, which cover the cost of the dispute settlement system from the annual budget of WTO. Dispute settlement by ICSID operates on the basis of fees of USD 25,000 required from the claimant for bringing a case and an annual fee of USD 20,000 for the cost of the proceedings thereafter shared by the parties.

139. For fairness reasons, Parties may wish to consider whether any fees should be required for lodging an appeal and, if so, whether the appeals body would determine a schedule of fees that is commensurate with the costs of proceedings and not overly excessive so as to act as a deterrent to parties bringing appeals.

## **XI. Rules of procedure and conduct**

### **A. Elements to be addressed in the rules of procedure**

140. As noted in chapter IV.B.1 above, a standing appeals body could have the delegated authority to establish its own rules of procedure and/or operational modalities, subject to the approval of the CMP and on the basis of the general principles and guidance set out in

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<sup>67</sup> For example, it is 90 working days from the filing of the notice of appeal to the issuance of a fully translated final decision by the WTO Appellate Body.

<sup>68</sup> United Nations General Assembly resolution 64/119, Administration of Justice at the United Nations, document A/RES/64/119, 15 January 2010, annex I, Rules of Procedure of the United Nations Appeals Tribunal, Article 7.1(a).

<sup>69</sup> FCCC/KP/CMP/2010/10, annex II, paragraphs 61 and 62.

the establishing decisions. Rules of procedure for a roster-based mechanism might need to be developed by the CMP (see chapter V.G.1 above).

141. The rules of procedure may address the elements outlined below.

# **1. Working schedule**

142. A working schedule could be developed for each stage of the appeal, including the transmittal of the record, the filing of the petitioner's submission, the filing of any participants' submissions, an oral hearing (if one is to be held) and the issuance of the decision by the appeal mechanism.

# **2. Ex parte communications**

143. In accordance with the principles of fair procedures and impartiality, members of panels and tribunals are usually prohibited from communicating independently with individual parties during a proceeding. In the context of appeals under the CDM, this would include communication with members of the Executive Board, petitioners, other participants in the appeal, or secretariat officials who assisted the Executive Board in its review in question. Similarly, one member of a panel or a tribunal should not meet with all of the parties involved in the appeals proceeding in the absence of his/her colleagues.

# **3. Commencement of an appeal**

144. An appeal should commence with a notice of appeal filed by a petitioner. Parties may wish to consider whether the written submission by the petitioner should be filed at the same time as the notice or later.

145. For the purposes of transparency and due process, the notice of appeal could be filed with the appeal mechanism and provided to all interested parties and made available on the UNFCCC website. For reasons of due process and to establish the jurisdiction of the appeal mechanism, the notice should identify the claims of appeal, informing all interested parties as to the legal and factual bases for the claims. However, the legal and factual arguments do not need to be stated in precise detail in the notice of appeal, as these are usually provided in the subsequent written submissions.

# **4. The record**

146. Normally, the record in an appeals proceeding means any document or oral evidence that was entered into the formal record of the body being reviewed in the particular case. It is usually submitted expeditiously after the receipt of a notice of appeal. For example, for the United Nations Appeals Tribunal the written record means anything that has been entered in the formal record of the Dispute Tribunal, including submissions, evidence, testimony, motions, evidence, objections, rulings and the judgement.<sup>70</sup>

147. In order to ensure a fair, impartial and correct decision, and to allow the appeal mechanism to properly assess the case, the complete record of the Executive Board in a registration or issuance review should be submitted to the appeal mechanism. The record, however, is simply those documents and other evidence relating to the registration or issuance review under appeal in the case before the appeal mechanism. It does not include decisions, documents and other evidence relating to previous reviews and appeals.

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<sup>70</sup> United Nations General Assembly resolution 63/253, Administration of Justice at the United Nations, document A/RES/63/253, 17 March 2009, annex II, Article 7.

## **5. Written submissions and oral hearings**

148. An appellate proceeding can take place solely on the basis of an exchange of written submissions by the interested participants, or an oral hearing can be held. The petitioners usually file the notice of appeal and their written submission containing arguments. If there are any other participants or interested parties, they should follow, after having seen the petitioner's written submission, in filing their written submissions.

149. The appeal mechanism may then decide whether to hold an oral hearing, in which all the parties will be invited to participate, or to deliberate on the basis of the written submissions it has received. In addition, it may provide, at its discretion, for an opportunity for submissions from non-parties. The details as to the timing of the filing of written submissions and their contents, and whether or not there is to be an oral hearing (either in person or by videoconference, and whether mandatory or at the discretion of the appeal mechanism), could be provided for in the rules of procedure.

## **6. Deliberations and decisions**

150. Deliberations are the process of internal decision-making by the appeal mechanism once it has heard from the participants in the appeal and the members are deciding and drafting their decision. Deliberations of the appeal mechanism are usually confidential. The reports of the WTO Appellate Body are drafted without the presence of the parties to the dispute.<sup>71</sup> The deliberations of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal are required by their statutes to be confidential.<sup>72</sup>

151. Decisions are usually taken by a majority vote (as in the case of the United Nations Appeals Tribunal, CAS and the WTO Appellate Body).

## **B. Rules of conduct**

152. Similar to establishing rules of procedure, the appeal mechanism could also establish, subject to their approval by the CMP, its own rules of conduct relating to impartiality, conflict of interest and confidentiality. Such rules could provide for the disclosure by members and staff of the appeal mechanism of any potential direct or indirect conflict of interest that might affect the impartiality or independence of their decisions, and protect the confidentiality of their deliberations.<sup>73</sup>

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<sup>71</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17.10.

<sup>72</sup> United Nations General Assembly resolution 63/253, Administration of Justice at the United Nations, document A/RES/63/253, 17 March 2009, annex I, Statute of the United Nations Dispute Tribunal, Article 11.2, and annex II, Statute of the United Nations Appeals Tribunal, Article 10.4.

<sup>73</sup> For a detailed example, see the WTO Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, document WT/DSB/RC/1, adopted on 11 December 1996.