



Views on the CDM Appeals Procedure

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At COP15, the CMP requested the Clean Development Mechanism (“CDM”) Executive Board (“EB”) to establish, in 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 clean development mechanism project activities or proposed clean development mechanism project activities.¹

In April 2010, Climate Action Network International (“CAN”) submitted comments, in response to a call for public input by the EB on a proposed appeals procedure for the CDM project approval process.² Similar views were expressed in the CAN submission to the Subsidiary Body for Implementation (“SBI”) on ways to enhance the engagement of observer organizations in August 2010.³

Following the public consultation, the EB proposed recommendations for an appeals procedure in its 2010 Annual Report to the CMP.⁴ The recommendations identify project participants and Designated National Authorities as the only stakeholders that would have standing to appeal. The CMP reconsidered the issue in Cancun, and requested the SBI to make recommendations to the CMP with a view to adopting a decision on procedures, mechanism and institutional arrangements to allow for appeals against EB decisions at CMP7 (Durban).⁵

The inclusion of an appeals procedure in the CDM project approval process presents a critical opportunity for the EB to promote public trust in and acceptance of the CDM as an effective means for reaching its twin goals of emissions reductions and sustainable development under the Kyoto Protocol. It also provides an opportunity to introduce coherence and quality control into the EB decision-making process. As such, the purpose of these comments is to highlight key safeguards that must be included in the appeals procedure to promote transparency, accountability, and consistency in the CDM project approval process. These safeguards will also allow for meaningful public input into the EB decision-making process, considering that public participation is woefully lacking under the current procedures.

- **CAN strongly recommends that the right of stakeholders to appeal be implemented as broadly as possible to address the rights of peoples and communities affected by CDM projects, and the wider impacts that flawed CDM projects have on global climate change and sustainable development;**
- **At the minimum, the definition of *stakeholders directly involved defined in a conservative manner* must include local communities directly affected by a project activity (e.g. communities that would have to be consulted at the local stakeholder consultation).**

¹ U.N. Doc. FCCC/KP/CMP/2009/21/Add.1 (Mar. 30, 2010), para. 42, available at <http://unfccc.int/resource/docs/2009/cmp5/eng/21a01.pdf#page=4>.

² CAN Submission to the CDM Executive Board on CDM Appeals Procedure (Apr. 2010), available at http://cdm.unfccc.int/public_inputs/2010/cmp5_para42_43/cfi/KTDEUYD4LL4X9ZVNV62GFQMFLNEM2S.

³ CAN Submission to the SBI concerning views on ways to enhance the engagement of observer organizations (Aug. 2010), available at <http://unfccc.int/resource/docs/2010/smsn/ngo/196.pdf>.

⁴ U.N. Doc. FCCC/KP/CMP/2010/10 (2010).

⁵ U.N. Doc. FCCC/KP/CMP/2010/12/Add.2 (2011).

Moreover, CAN recommends the following:

- Allow appeals on EB decisions to approve or reject a project following review, and include both procedural and substantive violations;
- Compile and make publicly available an accurate and complete record upon which the appeal is based;
- Make all submissions and decisions in the appeals process public;
- Ensure that any hearings be open to the public;
- Ensure that interested organizations and communities are free to make submissions as part of the appeals process;
- Develop rules, procedures, and codes of conduct and ethics to ensure that the appeals body is independent, competent, impartial, and accountable; and
- Improve and strengthen participatory rights for all stakeholders, including the right to request a review of registration or issuance requests to avoid unnecessary appeals.

The rights of access to information, full and effective participation, and access to justice are basic human rights. Transparency, accountability, and integrity are integral components of an effective governance system, particularly where public resources and decision-making processes impact human rights and sustainable development. The fundamental principles of access to justice are enshrined in numerous human rights and environmental law declarations, including the Universal Declaration of Human Rights⁶, 1992 Rio Declaration on Environment and Development⁷, 2002 World Summit on Sustainable Development in Johannesburg⁸, Aarhus Convention⁹, among others.

Several international dispute settlement tribunals have also explicitly acknowledged the value of public participation in the settlement of disputes and some investment arbitration panels have adopted procedures for ensuring that non-party submissions in arbitration disputes are relevant and do not burden the parties or disrupt the proceedings.¹⁰

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⁶ Article 10 firmly states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...”

⁷ Principle 10 states “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, ... , and the opportunity to participate in decision-making processes ... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

⁸ World Summit on Sustainable Development (2002), Plan of Implementation, *available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm. Paragraph 128 reaffirmed the “central role of broad-based stakeholder participation including access to judicial and administrative proceedings, in environmental matters, as well as public participation in decision-making...”

⁹ UN/ECE Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters, Arts. 3 and 9. The European Commission has adopted various directives and decisions implementing the access to justice requirement of the Aarhus Convention.

¹⁰ For example, in the World Trade Organization, the Appellate Body has determined that both it and the dispute settlement panels have the authority to receive and consider submissions from non-governmental entities and individuals. As a result, it is now recognized that individuals and non-governmental entities can submit their views to WTO dispute resolution panels. In some cases, arbitration tribunals have allowed third parties to make amicus submissions in the dispute and made some dispute proceedings open to the public. *See, e.g., Methanex v. United States of America*, Decisions of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae,” 15 Jan. 2001 (allowing *amicus* submissions).