



CAN Comments CDM Appeals Procedure April 2010

Climate Action Network – International is a coalition of roughly 500 environmental and development non-governmental organizations worldwide committed to limiting human-induced climate change to ecologically sustainable levels.

The undersigned members of the Climate Action Network International (“CAN”) respectfully submit these comments in response to a call for public input by the Clean Development Mechanism (“CDM”) Executive Board (“EB”) on a proposed appeals procedure for the CDM project approval process.¹ The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (“CMP”) has requested that the EB develop such procedures pursuant to Decision 2/CMP 5, *Further Guidance on the Clean Development Mechanism*.²

The inclusion of an appeals procedure in the CDM project approval process presents a crucial opportunity for the EB to promote public trust in and acceptance of the CDM as a valid tool for reaching its goals under the Kyoto Protocol – namely, mitigating global climate change while promoting sustainable development. It is likewise 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 appeal procedure in order to promote transparency, accountability, and consistency in the CDM project approval process, improve the efficacy of the CDM as a tool for reducing greenhouse gas emissions, and allow for more meaningful public input into the EB’s decision-making – something that is woefully lacking under the current procedures.³

Not discussed here are CAN’s views on the numerous flaws in the CDM or suggestions as to how it might be fundamentally restructured in the post-2012 regime. CAN’s position on the Kyoto Protocol flexibility mechanisms are set forth in other policy papers.⁴ Suffice it to say, however, substantial evidence

¹ See http://cdm.unfccc.int/public_inputs/2010/cmp5_para42_43/index.html.

² FCCC/KP/CMP/2009/21/Add.1, p. 4, available at <http://unfccc.int/resource/docs/2009/cmp5/eng/21a01.pdf#page=4>.

³ These shortcomings were clearly recognized by the CMP in Decision 2/CMP 5 when it requested that the EB, “as its highest priority, continue to significantly improve transparency, consistency and impartiality in its work by, *inter alia*:

(a) Continuing its efforts to improve consistency in its decision-making;
(b) Publishing detailed explanations of and the rationale for decisions taken, . . . ;
(c) Taking into account input from relevant international organizations . . . in its decision-making process[.];
Decision 2/CMP 5, ¶ 7.

⁴ See, e.g., “COP 14 December 2008 - CAN position on the future of the CDM,” December 2008, available at <http://www.climatenetwork.org/climate-change-basics/by-meeting-and-date/cop-14-poznan-december-2008/December%202008%20-%20CAN%20position%20on%20the%20future%20of%20the%20CDM%20COP14.doc/view>; “CAN International Views regarding review of the CDM under the Article 9 Review of the Kyoto Protocol,” December 2008, available at <http://climatenetwork.org/climate-change-basics/by-meeting-and-date/cop-14-poznan-december-2008/December%202008%20-%20CAN%20position%20on%20CDM%20Art%209%20and%20EB%20report%20issues%20COP14.doc>; “CAN position on HFC issues,” December 2008, available at <http://climatenetwork.org/climate-change-basics/by-meeting-and-date/cop-14-poznan-december-2008/December%202008%20-%20CAN%20position%20on%20HFC%20issues%20COP14.doc/view>; “CAN position on nuclear in the CDM,” December 2008, available at <http://climatenetwork.org/climate-change-basics/by-meeting-and-date/cop-14-poznan-december-2008/December%202008%20-%20CAN%20position%20on%20nuclear%20in%20the%20CDM%20COP14.doc>; “CAN Positions on CDM Options,” March 2009, available at <http://www.climatenetwork.org/climate-change-basics/by-meeting-and-date/cop-14-poznan-december-2008/March%202009%20-%20CAN%20position%20on%20CDM%20options.doc/view>; “Intervention prepared by Climate Action Network International for the AWG-KP Contact Group on emissions trading and the project based mechanisms,” April 7, 2009, available at http://climatenetwork.org/climate-change-basics/by-meeting-and-date/bonn-i-mar-apr-2009/Intervention_CDM_%20AWG-KP_flexmex_Final.pdf; “CAN Position Statement The Role of International Offsets in Light of Current Annex I Emissions Reduction Targets and Climate Financing Commitments,” November 2009, available at

that a significant number of CDM projects do not meet the requirements or actually mitigate global climate change should prompt the EB to look upon the creation of a public appeals process as a welcome opportunity to address accountability and integrity issues. These comments are focused on general principles and features that characterize fair and effective appeals processes; specific procedures for appeal must ensure compliance with these principles. Once the EB develops draft procedures for appeal, CAN welcomes the opportunity to submit additional comments on their design and on specific provisions.

As further discussed below, CAN strongly recommends that the EB adopt procedures that meet the following basic criteria:

- The right of stakeholders to appeal must be implemented as broadly as possible to address the wider impacts that flawed CDM projects have on global climate change and sustainable development.
- Stakeholders must be afforded the right to request a review of registration or issuance requests in order to avoid unnecessary appeals.
- Appeals must be allowed on EB decisions to approve a project following review, not just rejections, and include both procedural and substantive violations.
- An accurate and complete record upon which the appeal is based must be compiled and made publicly available.
- Rules, procedures, and codes of conduct and ethics must be put in place to ensure that the appeals body is independent, competent, impartial, and accountable.

A. The Right of Stakeholders to Appeal Must Be Broadly Implemented.

According to Decision 2/CMP 5, the EB is required to adopt appeal procedures for “stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation” of a CDM project activity. *Id.*, ¶ 42. Despite the suggestion that stakeholders entitled to appeal should be interpreted in a “conservative manner,” CAN strongly urges the EB to implement the right of stakeholders to appeal as broadly as possible. This stems from the fact that CDM project activities affect the rights not only of communities living in the physical vicinity of the project, but also citizens across the globe who are affected, or will be affected, by global climate change.

Too narrow an interpretation of the right of stakeholders to appeal questionable CDM projects is likely to undermine meaningful public input into the process. Current practice indicates that the local stakeholder consultation process undertaken by most project developers ranges from cursory at best to fraudulent at worst. Moreover, limiting the definition of stakeholders entitled to appeal to those that submit comments on the validation report is also likely to be insufficient. Practice shows that a limited number of comments are submitted during the validation stage, most likely due to language or capacity issues, or insufficient notice. As such, limiting the right to appeal to local stakeholders living in the vicinity of the project or to stakeholders that submitted comments during the validation stage of a project activity is likely to prove entirely ineffective.

In addition, too narrow a definition of stakeholders is likely to result in a less robust public check on the CDM project approval process, and risks undermining altogether the very purpose of an appeals

http://climatenetwork.org/climate-change-basics/by-meeting-and-date/copenhagen-december-2009/CAN_position_offsets_Nov09.pdf

procedure as a way to promote transparency, accountability and integrity in the decision-making process. Public review can act as an important tool for verifying that a proposed project activity will result in real, additional, permanent reductions in greenhouse gases without imposing adverse environmental or social impacts. However, as demonstrated by many stakeholder comments on past projects, stakeholders living or working near a proposed project (or otherwise “directly involved, as defined in a conservative manner”) are often more interested in the promise of immediate economic benefits, such as jobs and the like, and have little incentive, or even the ability or capacity, to address more complicated questions relating to the project’s impacts on global climate change – e.g., additionality, baselines calculations, and other issues that are the basis of a project’s eligibility for CDM credits. Limiting the right to participate in CDM project approval to too narrow a category of stakeholders will unfairly tilt the appeals process toward approval of questionable or flawed CDM projects and away from ensuring the climate integrity of the CDM. Moreover, the very existence of a public review process is likely to promote compliance by project participants who in the absence of such a mechanism would be less inclined to comply with all standards and procedures.

A more sound approach would be to include in the definition of “stakeholders” non-governmental organizations and civil society groups that have the capacity to monitor and review proposed CDM project activities,⁵ and who can both provide a voice for citizens living in the vicinity of a project site to ensure that environmental and social impacts are addressed, and serve as “public attorneys general” to ensure the integrity and efficacy of the CDM as a means of mitigating global climate change and promoting sustainable development.⁶

B. Stakeholders Should Be Afforded the Right to Request a Review of a Registration Request in Order to Avoid Unnecessary Appeals.

The *Draft Procedures for Review of a Proposed CDM Project Activity* (“Draft Procedures for Review”) limit the right to request a review of a project seeking registration to a “Party involved in the proposed CDM activity” and members of the EB. *Id.*, ¶¶ 6, 10. As noted in comments on the *Draft Procedures for Review*, the right to request a review of a registration request should be extended to the public, including stakeholders and UNFCCC accredited NGOs.⁷ Providing the public the right to request a review will help ensure that CDM projects seeking registration meet all of the applicable requirements, and that all errors, inconsistencies, or omissions in the Project Design Document (“PDD”) and supporting documentation are clarified and explained *before* the project is formally registered, thereby avoiding a future appeal. At present, the public (limited to “stakeholders and UNFCCC accredited non-governmental organizations”) only has the right to submit comments during the validation stage.⁸ Often the comments relate to inaccuracies in the PDD (prepared by the project developer), or the lack of supporting documentation to demonstrate that the project meets the registration requirements (e.g., additionality, stakeholder consultation, evaluation of environmental impacts). While the DOE is supposed to address the public comments in the validation report that it submits to the EB along with a request for project registration, where the

⁵ For example, UNFCCC accredited NGOs.

⁶ For example, the Office of the Compliance Advisor/Ombudsman (“CAO”) is the independent recourse mechanism for IFC and MIGA, the private sector lending arms of the World Bank Group. CAO’s mission is to address complaints by people affected by IFC/MIGA projects and to enhance the social and environmental accountability of both institutions.

⁷ See e.g., Comments submitted by Earthjustice, March 5, 2010, available at http://cdm.unfccc.int/public_inputs/2010/review_proc_rev/cfi/LQ1SSQ8K9ZA8TYB6JB7N2222MTP9RV.

⁸ Prior to submitting the a request for registration to the EB, the DOE is required to make the project design documents publicly available, and allow a 30-day comment period wherein the Parties, stakeholders, and UNFCCC accredited NGOs are permitted to submit comments on the validation requirements. CDM Modalities and Procedures, ¶ 40(b) & (c).

documentation remains incomplete or inaccurate, there is no right of the public to request a review of the registration request. In other words, the public is only permitted to comment on the PDD, which is prepared by the project developer and often incomplete and inaccurate, rather than the complete application for registration (in the form of the DOE's validation report). It is important that the public have the opportunity to comment on the complete application as contained in the validation report because it is the report, not the PDD alone, that provides the basis of the EB's decision whether or not to approve the project. The right to comment only on the PDD is insufficient because it does not include all of the information and data justifying the project, thereby depriving the public of the ability to ensure that all of the requirements have been met and to effectively act as a check on the integrity of the CDM approval process.

Allowing the public to request a review of a DOE's request for registration will provide the DOE and project participants the chance to address concerns before the EB decides whether to approve or reject the project. Without the right to raise issues early on at the registration stage, the public must wait for the EB to approve the project and then lodge an appeal. Providing the public an opportunity for input and to participate in the registration approval process at the early stages of review will avoid later appeals that will only serve to further delay the process.

C. Grounds for Appeal

According to Decision 2/CMP 5, the appeal must be in relation to: (a) situations where a DOE may not have performed its duties in accordance with the rules or requirements of the CMP and/or EB; and (b) rulings taken by or under the authority of the EB in accordance with the procedures referred to in paragraph 39 (requests for review of a request for registration of a CDM project) regarding the rejection or alteration of requests for registration or issuance.

1. *Appeals should be allowed on EB decisions to approve a registration and issuance request following a review, not just rejections.*

The appeals procedures adopted by the EB must allow appeals both from EB decisions to reject and approve a proposed CDM project following review. Allowing appeals from positive EB decisions to register a project or issue CERs is key to ensuring the climate integrity of the CDM process, as well as the legitimacy and accountability of the EB. The alternative would be an appeals process that merely provides another venue for project developers to push for registration of questionable projects without an equal opportunity for civil society to voice concerns about evidence of violations of key requirements in the EB decision-making process. Moreover, coupled with the right of the public to trigger a review of registration and issuance requests, the possibility of a subsequent appeal of a positive EB decision following review will promote greater compliance by project developers, whereas the absence of such a mechanism will promote fraud and gaming by project developers and poor performance by DOEs.

The right of stakeholders to appeal from EB decisions to register a project is supported by the language of Decision 2/CMP 5, which states that stakeholder appeals procedures should be established in relation to "[s]ituations where a designated operational entity may not have performed its duties in accordance with the rules or requirements of the [CMP] and/or the Executive Board." *Id.*, ¶ 42(a). This does not preclude situations, and in fact is likely to include situations, where the EB has decided to approve a project, but where questions nonetheless remain regarding whether the project meets the CDM rules and requirements. Moreover, it is also worth noting that while subparagraph (b) refers back to paragraph 39, which relates to requests for review of a registration request, subparagraph (a) does not, indicating that the right to appeal in situations where the DOE has not performed its duties could arise at an earlier stage.

Given the significant number of EB-approved CDM projects that have been proven non-additional or otherwise not in compliance with the CDM rules and procedures, an appeals process that only allows project developers to appeal EB decisions to reject a proposed project would not serve its primary purpose of ensuring the integrity of the system.

2. Appeals should be allowed on both substantive and procedural grounds.

The appeals procedures adopted by the EB should allow appeals for violations of both substantive and procedural rules and requirements. For example, failure to invite stakeholder participation and/or take due account of any comments received, failure to undertake an environmental impact assessment where project impacts are considered significant,⁹ or where the PDD has not been made publicly available,¹⁰ should provide grounds for an appeal. Lesser penalties only encourage developers to violate procedural requirements. Likewise, the appeals procedure must entertain substantive challenges to the project's additionality, baseline calculations, crediting period,¹¹ contribution to sustainable development, and other issues that lie at the core of the CDM's mission.

3. Stakeholders should be allowed to lodge an appeal from a registration or issuance decision at any time based on the discovery of new, previously undisclosed facts.

It is likely that the EB will set a time limit within which stakeholders may lodge an appeal on an EB registration or issuance decision.¹² However, stakeholders should be allowed to lodge an appeal at any time after the EB decision where facts come to light that indicate that the project does not meet the core requirements of the CDM (e.g., additionality, permanence, erroneous calculation of baseline or CERs). This is necessary to ensure that the appeals process is an effective check on the integrity of the CDM.

D. The Scope of Review – Compiling a Complete Record

Should the EB determine that the appeal body will base its review on a "record" developed by the EB during the registration review process, it is vital that procedures be in place to ensure that a complete, written record is compiled and made available for public review. Such a record is key not only to the extent that it will provide a basis upon which the appeals body will then make its determination as to whether the EB decision was warranted, but also to ensure transparency in the EB's decision-making. In order to be accountable, the EB must ensure that its decisions are fully understood by the public.

The current CDM procedures are insufficient in this regard. For example, as noted in comments on the *Draft Procedures for Review*, there needs to be a requirement that the secretariat, when preparing its "assessment of responses and recommendation," maintain a written record of discussions with and submissions from the DOE which will become part of the record and must be made publicly available along with the assessment and recommendation. The same should be true with respect to the independent technical assessment prepared by the member of the RIT.¹³

⁹ CDM Modalities and Procedures, ¶ 37(b) & (c).

¹⁰ *Id.*, ¶ 40(b).

¹¹ *Id.*, ¶¶ 43-52.

¹² This time period should be long enough to ensure that stakeholders are given sufficient advance notice of the decision and time within which to review the EB decision and the record upon which it was based (e.g., at least ninety days).

¹³ *Supra*, note 8.

In addition, as noted in Decision 2/CMP 5, the procedures will need to ensure that the EB has provided an adequate justification for its decision by “[p]ublishing detailed explanations of and the rationale for decisions taken, including sources of information used, without compromising the confidentiality of the opinion of any individual Executive Board member or alternate member; ...” *Id.*, ¶ 7(b). Such opinions must explain the EB’s findings and conclusions on material issues with sufficient specificity to advise the parties and any reviewing court of their record and legal basis.

Under the current procedures for review, the EB makes a decision on whether to approve or reject a CDM project for which review has been requested at its meetings. While some parts of the EB meetings are open to the public, discussions about individual projects are kept behind closed doors. Subsequent EB meeting reports, which are supposed to provide complete information about decisions taken during the meeting, are kept very general and superficial. The reports provide little to no information on the reasoning or rationales behind the EB’s decisions on registration and issuance reviews, and omit any reference to the sources of information relied upon. The appeals procedure should also specify the degree of deference or standard of review to be employed by the appeals body when deciding whether to uphold or set aside an EB decision. Where the review is based on the record, the appeals body should determine whether the EB decision was based on substantial evidence, and in making that determination, should review the whole record – that is, review all of the evidence, not merely evidence favorable to one side.

E. Rules, Procedures, and Codes of Conduct are Needed to Ensure that the Appeals Body is Independent, Competent, Impartial, and Accountable.

The requirement that an appeals body or tribunal be competent, independent and impartial is well recognized under international and national law, and widely reflected in judicial conventions and traditions across the globe.¹⁴ This stems from the recognition that the protection of fundamental rights and the fair administration of justice are dependent upon the ability of the reviewing body and its members to act independently and impartially. Moreover, independence and impartiality are necessary to instill public confidence in the appeals process and in the moral authority and integrity of the appeals body.

In order to meet these standards, the CDM appeals body must be comprised of persons who are independent from the EB and UNFCCC Secretariat. Their members should be required to abide by codes of conduct and ethics that guarantee that they are able to act impartially. Procedures for their selection, and removal, should also be imposed with an eye towards ensuring their independence, impartiality and competence. In addition, they should have expertise and knowledge of the technical and procedural requirements for CDM project activities. They should be compensated sufficiently, and provided with appropriate resources to allow them to do their job in a timely manner. Procedures must be put in place for their recusal where conflicts of interest arise. Moreover, the rules and procedures to guide their work should ensure not only actual impartiality in their decision-making, but the appearance of impartiality in order to maximize public confidence in their authority. CAN strongly recommends that the EB develop rules and procedures – including codes of conduct and ethics – to ensure that the CDM appeals body is comprised so as to meet these standards.

Respectfully submitted,

CAN International

¹⁴ See, e.g., The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct.