

Overview of the Information Note on the Appeals Procedures for Appeals Against Adverse Rulings

To enable a discussion of the most fundamental elements and provide guidance to the secretariat to further develop the appeals procedures.

Bonn, Germany, 26-30 July 2010



1. Who should act as the appellate body?

Context for question: The CMP did not specify who should act as the appellate body.

1. The procedures will assume, for the sake of drafting, that the Executive Board will act as the initial decision maker (and absent an appeal, the final decision maker).
2. The procedures can and will be revised if the Executive Board instead wishes to act as the appellate body.
3. The above assumes that the Executive Board will request the CMP to appoint an appellate body.
4. Alternatively, If the Executive Board wishes to act as the appellate body, appropriate revisions will need to be made to the CDM Modalities and Procedures, *inter alia*, Paragraphs 36, 41, and 65.

2. What should be the scope of appeals allowed?

Context for question: The Executive Board may wish to tailor the scope of appeals allowed for: “Rulings taken by . . . the Executive Board in accordance with the procedures referred to in paragraph 39 above regarding the rejection or alteration of requests for registration or issuance” (decision 2/CMP.5, paragraph 42 (b)).

Options:

1. The initial decision maker failed to consider or clearly misinterpreted a material fact that:
 - (a) would have changed the result;
 - (b) was clearly and unambiguously validated/verified as part of the original record submitted as part of the request for registration/issuance.
2. The initial decision maker misinterpreted or misapplied a CDM requirement that, if correctly interpreted or applied, would have changed the result.
3. General, or specific due process claims related to the fulfilment of the requirements of decision 2/CMP.5, paragraph 39.



3. Who should be allowed to appeal?

Context for the question: The CMP did not specify the entities that should be allowed to appeal, but instead provided the below guidance to the Executive Board.

Relevant CMP text: “Stakeholders directly involved, **defined in a conservative manner**, in the design, approval or implementation of a clean development mechanism project activities or proposed clean development mechanism project activities” (decision 2/CMP.5, paragraph 42).

Options: Stakeholder allowed to appeal could include PPs, DOEs, Parties involved, Parties involved who wish to be considered PPs, DNAs, and communities affected, or likely to be affected by the proposed project activity.

Note: The Executive Board may wish to read the above CMP text in conjunction with the definition of “stakeholders” in decision 3/CMP.1, annex, paragraph 1 (e), which means: “**the public**, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism activity”.

4. What information should the appellate body take into consideration?

Context for question: The appellate body must have a record on which to base its decision. The CMP did not specify what information the appellate body should consider in making its decision.

Note: There are essentially two groups of entities that hold information that is potentially relevant to an appeal: (1) the **Executive Board and its support structure**, and (2) the **PPs and the DOE** with which the PPs contracted.

1. Options -- Executive Board and its Support Structure:

The Executive Board may wish to **limit** the consideration of the records of the Executive Board and its support structure **to the ruling of the initial decision maker** – so long as the ruling sufficiently explains the reasons and rationale for its conclusion, including the facts it relied on and its interpretation of the CDM rules and requirements as applied to the facts.



4. What information should the appellate body take into consideration? (cont.)

2. Options -- PPs and DOEs:

For request for registration: Executive Board may wish to limit the record **only to** information submitted by a PP/DOE as part of the request for registration (e.g. **PDD**, **VR**, responses to requests for review).

For requests for issuance: In addition to the above, the Executive Board may also wish to allow the appellate body, at the request of the initial decision maker, to consider information submitted by a PP/DOE as part of a past requests for issuance/registration.

Information provided by the PPs, but not validated/verified: The Executive Board may wish to provide the appellate body with the authority to either: (a) to find the information **not credible** or, (b) **find as fact** the information provided by the PPs that is unfavourable to the request for issuance/registration.



5. Generally, what should be the type of appeals process?

Context for question: (1) The CMP did not specify the type of appeals process. (2) In addition, the CMP did not specify what authority, if any, the appellate body should have to request additional information.

1. Options – type of appeals process: Two-party system, inquisitional system, or hybrid

Two-party system: The appellant would be required to file a brief in which it would be required to present the information and arguments that support its appeal in terms of the scope of allowed appeals. The initial decision maker (with the potential support of the secretariat) would then be required to file an opposing brief limited to addressing the arguments raised by the appellant in its brief.

Inquisitional system: The appellant would be required to file a brief in which it would be required to present the information and arguments that support its appeal in terms of the scope of allowed appeals. The process would end there unless the appellate body requests further action from either party under the authority provided to it.

5. Generally, what should be the type of appeals process? (cont.)

2. Options: Authorities of the appellate body:

- (a) Where the DOE provides a citation to a document that it relied on to validate/verify a fact or set of facts (but does not provide the document), the appellate body could request the document from the DOE.
- (b) If the appellant does not provide a sufficient information and arguments for its appeal, the appellate body could either:
 - (i) dismiss the appeal with prejudice (i.e. the appellant would be prohibited from re-filing the appeal), or
 - (ii) could require the appellant to make clarifications to its appeal.
- (c) The appellate body could require additional explanation of the ruling from the initial decision maker.



6. What deference should the appellate body owe to the initial ruling?

Context for the question: The CMP did not specify the level of deference that the appellate body should have in reviewing the ruling of the initial decision maker.

Note: This should be considered in conjunction with the scope of allowed appeals.

Options:

1. The Executive Board may wish to provide that the appellate body owes no deference to the initial decision maker's conclusions, finding of facts, or interpretations of the applied CDM rules and requirements.
2. In the alternative, the Executive Board may wish to provide that, unless shown by the appellant to be clearly erroneous or patently unreasonable, the appellate body should defer to the initial decision maker's conclusions, findings of facts, and interpretations of the applied CDM rules and requirements.



7. What obligations, if any, should be placed on the appellant in order for it to receive a favorable ruling?

Context for question: The CMP did not specify what obligations, if any, should be placed on the appellant in order for it to receive a favourable ruling.

Note: This should be considered in conjunction with the scope of allowed appeals.

Options:

1. The Executive Board may wish to place the **obligation on the appellant to present information to and persuade the appellate body that initial decision maker's ruling was incorrect.** (e.g. presenting the facts that the initial decision maker failed to consider, persuading the appellate body that the initial decision makers ruling misinterpreted the applied CDM requirement)
2. Alternatively, once the appellant comes forward with its presentation of information and argument, the Executive Board may wish to place the **obligation on the initial decision maker to persuade the appellate body that its ruling was correct.**



End

Thank You.

