



### Annex 3

## **DRAFT RECOMMENDATION TO CMP ON THE PROCEDURE FOR APPEALS AGAINST ADVERSE RULINGS BY THE CDM EXECUTIVE BOARD REGARDING REQUESTS FOR REGISTRATION OR ISSUANCE**

### **I. Background**

1. The Modalities and procedures for a clean development mechanism (annex, decision 3/CMP.1) mandate the CDM Executive Board (hereinafter referred to as the Board) to supervise the CDM. In this regard the Board is responsible for the registration of CDM project activities and the issuance of certified emission reductions (CERs). Through its supervision of these activities the Board may reject request for registration and issuance
2. This procedure provides for a mechanism for directly affected stakeholders to appeal such decisions.

### **II. Notification of the ruling of the Executive Board**

3. Within three days of the Board's adoption of the ruling, the secretariat shall publish the ruling on the UNFCCC website, and shall notify the following parties of the publication of the ruling: the project participants (as identified in the modalities of communication form); the designated operational entity (DOE), and the Parties involved through each Party's designated national authority (DNA).

### **III. Stakeholders allowed to appeal**

4. The [Appellate Body] shall only consider appeals filed by the following stakeholders (also referred to hereinafter as appellants):
  - (a) Project participants as identified in the modalities of communication form;
  - (b) DNAs of the host and Annex I Parties, identified as being Parties involved in the request for registration or subsequently included as Parties involved;
  - (c) [The DOE that conducted the validation, if the ruling rejected or required an alteration to the request for registration;]
  - (d) [The DOE that conducted the verification, if the ruling rejected or required an alteration to the request for issuance.]
5. Stakeholders allowed to file a written appeal may file appeals individually or jointly. Multiple appeals (individually or jointly) may be against the same ruling, so long as no single stakeholder is a signatory to more than one appeal.

### **IV. Grounds for filing an appeal**

6. A stakeholder allowed to file an appeal may file a written appeal against a ruling of the Board that rejects or requires an alteration to a request for issuance or registration on the following, and only the following grounds:
  - (a) Factual grounds, as specified in paragraph [XX] below;

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- (b) Grounds of interpretation or application of one or more CDM rules and requirements as specified in paragraph [XX] below;
  - (c) Grounds that the reconsidered ruling of the Board is inconsistent with the previous judgement of the [Appellate Body] of the request for registration or issuance, as specified in paragraph [XX] below.
7. For an appeal based on factual grounds, all of the following elements must be present and argued:
- (a) The ruling contained a clearly misstated a fact, or set of facts, and/or did not consider a fact, or set of facts;
  - (b) The fact, or set of facts, was sufficiently validated or verified as part of the Record of the request for registration or issuance;
  - (c) The fact, or set of facts, if corrected and considered, would not have resulted in the ruling that rejected or required an alteration to the request for registration or issuance.
8. For an appeal grounded on the interpretation or application of one or more CDM rules and requirements, all of the following elements must be present and argued:
- (a) The ruling contained an unreasonable interpretation or application of one or more CDM rules and requirements, in light of the text of CDM rules and requirements, and past judgements of the [Appellate Body];
  - (b) The CDM rules and requirements, if interpreted or applied differently, would not have resulted in the ruling that rejected or required an alteration to the request for registration or issuance.
9. For an appeal based on grounds that the reconsidered ruling of the Board is inconsistent with the previous judgement of the [Appellate Body] for the same request for registration or issuance, all of the elements must be present and argued:
- (a) The reconsidered ruling is inconsistent with the judgement of the [Appellate Body];
  - (b) The reconsidered ruling, if consistent with the judgement of the [Appellate Body], would not have resulted in the reconsidered ruling that rejected or required an alteration to the request for registration or issuance.

**V. Filing of an appeal****A. Actions required by appellants**

10. If a stakeholder wishes to file an appeal against a ruling of the Board, then it shall within [60] days of receipt of the notification of the publication of the ruling:
- (a) File an appeal with the [Appellate Body];
  - (b) Pay the required filing fee.
11. The appeal shall include the following information: (a) the grounds for the appeal as specified in paragraph [XX] above, (b) a list of each stakeholder appealing the ruling; (c) the relationship of each stakeholder to the project activity; (d) the signature of each stakeholder; (e) the person who shall

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act as the focal point for all communications with the [Appellate Body] regarding the appeal; (f) the e-mail address, phone number, and physical address of the focal point; and (g) the signature of the focal point.

12. For an appeal based in part, or whole, on factual grounds, the appeal must:
  - (a) State each fact, or set of facts, that forms the grounds of the appeal;
  - (b) Provide references to where each fact, or set facts, can be located in the Record by the [Appellate Body];
  - (c) Explain how each fact, or set of facts, meets each element specified in paragraph [XX] above.
13. For an appeal grounded in part, or whole, on the interpretation or application of one or more CDM rules and requirements, the written appeal must:
  - (a) State each CDM rule and requirement that forms the grounds for the appeal;
  - (b) Explain how each CDM rule and requirement meets each element specified in paragraph [XX] above.
14. For an appeal based on grounds that the reconsidered ruling of the Board is inconsistent with the previous judgement of the [Appellate Body], the written appeal must:
  - (d) State each fact, or set of facts, that is inconsistent with the judgement of the [Appellate Body];
  - (a) Provide references to where each fact, or set facts, can be located in the Record by the [Appellate Body];
  - (c) State each interpretation or application of a CDM rule and requirement that is inconsistent with the judgement of the [Appellate Body];
  - (d) Explain how the reconsidered ruling meets each of the elements specified in paragraph [XX] above.

**B. Consideration by the [Appellate Body]**

15. The [Appellate Body] shall undertake an initial consideration of the appeal to determine if it meets all of the requirements contained in this procedure for filing an appeal.
16. If the [Appellate Body] determines that the appeal has been filed by an entity that is not a stakeholder allowed to appeal, then the [Appellate Body] shall dismiss the appeal and shall notify the appellant and the Board of the dismissal.
17. If the [Appellate Body] determines that the appeal does not comply or sufficiently comply with all of the requirements this procedure, then the [Appellate Body] shall take one of the following actions:
  - (a) Dismiss the appeal;

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- (b) Order the appellant to clarify its appeal by a specified date, in accordance with the direction provided to it by the [Appellate Body] in its order. Such an order for clarification may require the submission of additional information;
- (c) Find that the appellant has substantially complied with the requirements of this procedure, but nevertheless strike portions of the appeal from further consideration that do not comply with the requirements of this procedure (e.g. the facts that are not referenced, that are not contained in the Record, or that have not been validated/verified).

18. If the [Appellate Body] has ordered the appellant to clarify its appeal then, upon resubmission of the appeal, it shall determine whether the appeal complies, or sufficiently complies, with the requirements of this procedure. If the appeal does not comply, or sufficiently comply, the [Appellate Body] shall either:

- (a) Dismiss the appeal; or
- (b) Find that the appellant has substantially complied with the requirements of this procedure or an order for clarification, but nevertheless strike portions of the appeal from further consideration that do not comply with the requirements of this procedure or an order for clarification (e.g. the facts that are not referenced, the facts that are not contained in the Record, the portions of the clarification that are insufficient).

19. If the [Appellate Body] determines that the appellant has complied with all of the requirements for filing an appeal (or substantially complied, but has stricken portions of the appeal from further consideration), then it shall notify the Board and the appellant of its determination. The notification shall include the determination, which shall explain the reasons for the determination and shall identify any portions stricken.

20. If the [Appellate Body] dismisses the appeal, then it shall notify the Board and the appellant of the dismissal, which shall include an explanation for the reasons of the dismissal.

**VI. The Executive Board's response****A. Actions required by the Executive Board**

21. After receiving notice that the appellant complied with all of the requirements for filing an appeal (or substantially complied), then the Board shall file a written response to the appeal.

22. If the notice is received more than 21 days prior to the next Board meeting, then the Board shall file its response by the last day of the second Board meeting following its receipt of the notice; otherwise, it shall file its response by the last day of the third Board meeting following its receipt of the notice.

23. The response shall be signed by the Chair of the Board.

24. The response shall:

- (a) Be limited to addressing the issues raised by the appellant in the appeal;
- (b) Provide references to where each fact, or set of facts, can be located in the Record by the [Appellate Body];

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- (c) Provide a reference for each CDM rule and requirement relied upon in the response.

**B. Consideration by the [Appellate Body]**

25. The [Appellate Body] shall undertake a review of the response to determine if it meets all of the requirements contained in this procedure for filing a response.

26. If the [Appellate Body] finds that the response does not comply, or sufficiently comply with the requirements this procedure, then the [Appellate Body] shall take one of the following actions:

- (a) Dismiss the response;
- (b) Order the Board to clarify its response by a specified date, in accordance with the direction provided to it by the [Appellate Body] in its order. Such an order for clarification may require the submission of additional information;
- (c) Find that the response substantially complies with the requirements of this procedure, but nevertheless strike portions of the response from further consideration that do not comply with the requirement of this procedure (e.g. the facts that are referenced that are not contained in the Record, the portions of the response that are not limited to addressing the issues raised by the appellant in the appeal).

27. If the [Appellate Body] has ordered the Board to clarify its response, then upon resubmission of the response, it shall determine whether it complies, or sufficiently complies, with the requirements of this procedure. If the response does not comply, or sufficiently comply, the [Appellate Body] shall either:

- (a) Dismiss the response; or
- (b) Find that the Board has substantially complied with the requirements of this procedures or an order for clarification by the [Appellate Body], but nevertheless strike portions of the response from further consideration that do not comply with the requirements of this procedure or an order for clarification (e.g. the facts that are referenced that are not contained in the Record, the portions of the clarification that are insufficient).

28. If the [Appellate Body] determines that the Board has complied with all of the requirements for filing a response (or substantially complied, but has stricken portions of the appeal from further consideration), then it shall notify the Board and the appellant of its determination. The notification shall include the determination, which shall explain the reasons for the determination and shall identify any portions stricken.

29. If the [Appellate Body] dismisses the response, then it shall notify the Board and the appellant of the dismissal, which shall include an explanation for the reasons of the dismissal.

**VII. The Record****A. Appeals of requests for registration**

30. For appeals of requests for registration and except as provided in paragraph [XX] below, the following, and only the following, may be introduced into the Record by the Board or by an appellant:

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- (a) Any previous judgements by the [Appellate Body] on the same request for registration under appeal;
- (b) The Board's ruling, and any previous Board ruling on the same request for registration under appeal;
- (c) Any appeal, response or reply that was previously filed with the [Appellate Body] by the same appellant as part of a previous appeal of the same request for registration currently under appeal;
- (d) All written information submitted to the Board as part of the current request for registration under appeal;
- (e) All written information submitted to the Board as part of any previous request for registration for the same proposed project activity;
- (f) The project design document submitted and published for global stakeholder consultation (GSC);
- (g) Any other written information submitted to the Board by a project participant or DOE regarding the request for registration under appeal, as required or allowed by the CDM rules and requirements.

31. The information specified in subparagraphs [XX] [e] through [g] above, may only be submitted into the Record for the purpose of:

- (a) Asserting, in the Board's ruling or response, that the previously submitted information is inconsistent with, or contrary to, the information submitted as part of the request for registration under appeal, without sufficient explanation; or
- (b) Rebutting, in the appellant's appeal or any reply, an assertion by the Board, in its ruling or response, that the previously submitted information is inconsistent with, or contrary to, the information submitted as part of the request for registration under appeal, without sufficient explanation.

32. All information specified in subparagraphs [XX] [(e)] through [(d)] above shall automatically be deemed introduced into the Record. Within 7 days of the filing of an appeal, the Board shall file that information with the [Appellate Body].

33. In addition, any other of the information specified in paragraph [XX] above, on which the ruling is based, shall automatically be deemed to be introduced into the Record. Within 7 days of the filing of an appeal, the Board shall file that information with the [Appellate Body].

34. The appellant shall attach to its appeal, and thereby introduce into the Record, all of the information specified in paragraph [XX] above that it relies on in its appeal.

35. The Board shall attach to its response, and thereby introduce into the Record, all of the information specified in paragraph [XX] above that it relies on in its response.

**B. Appeals of requests for issuance**

36. For appeals of requests for issuance and except as provided in paragraph [XX] below, the following, and only the following, may be introduced into the Record by the Board or by an appellant:

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- (a) Any previous judgement by the [Appellate Body] on the request for issuance under appeal;
  - (b) The Board's ruling; and any previous Board ruling on the request for issuance under appeal;
  - (c) Any appeal, response or reply that was previously filed with the [Appellate Body] by the same appellant as part of a previous appeal of the same request for issuance currently under appeal;
  - (d) All written information submitted to the Board as part of the current request for issuance under appeal;
  - (e) All written information submitted to the Board as part of any previous request for issuance for the same project activity;
  - (f) All written information submitted to the Board as part of the request for issuance for the project activity;
  - (g) The monitoring report published prior to and for current request for issuance;
  - (h) Any other written information submitted to the Board by a project participant or DOE regarding the request for issuance under appeal, as required or allowed by the CDM rules and requirements.
37. The information specified in subparagraphs [XX] [e] through [h] above, but only for the purpose of:
- (a) Asserting, in the Board's ruling or response, that the previously submitted information is inconsistent with, or contrary to, the information submitted as part of the request for issuance under appeal, without sufficient explanation; or
  - (b) Rebutting, in the appellant's appeal or any reply, an assertion by the Board in its ruling or response, that the previously submitted information is inconsistent with, or contrary to, the information submitted as part of the request for issuance under appeal, without sufficient explanation.
38. All information specified in subparagraphs [XX] [(e)] through [(d)] above shall automatically be deemed introduced into the Record. Within 7 days of the filing of an appeal, the Board shall file that information with the [Appellate Body].
39. In addition, any other of the information specified in paragraph [XX] above, on which the ruling is based, shall automatically be deemed to be introduced into the Record. Within 7 days of the filing of an appeal, the Board shall file that information with the [Appellate Body].
40. The appellant shall attach to its appeal and any reply, and thereby introduce into the Record, all of the information specified in paragraph [XX] above that it relies on in its appeal and any reply.
41. The Board shall attach to its response, and thereby introduce into the Record, all of the information specified in paragraph [XX] above that it relies on in its response.

**DRAFT****VIII. Consideration and Judgement of the [Appellate Body]**

42. In considering the merits of the matter and formulating its judgment, the [Appellate Body] shall only take into consideration:
- (a) The Record;
  - (b) The appellant's appeal;
  - (c) The Board's response;
  - (d) Any factual information from a source, the accuracy of which cannot be questioned (e.g. the day of the week on a certain date).
43. In considering the merits of the matter and formulating its judgment, the [Appellate Body] shall:
- (a) Defer to the Board's finding of facts, unless they are clearly erroneous;
  - (b) Defer to the Board's interpretation and application of the CDM rules and requirements, unless they are unreasonable in light of the text of the CDM rules and requirements, and past judgements of the [Appellate Body].
44. The judgement of the [Appellate Body] shall conclude by:
- (a) Affirming the ruling of the Board;
  - (b) Remanding the request for registration or issuance to the Board for further consideration.
45. The [Appellate Body] shall prepare a written judgment explaining the rationale for its conclusion.
- (a) If the judgement is based in whole or part on factual grounds, then it shall address each of the elements specified in paragraph [XX] above;
  - (b) If the judgement is based in whole or part on grounds of interpretation or application the CDM rules and requirements, then it shall address each of the elements specified in paragraph [XX] above;
  - (c) If the judgement is base in whole or part on the grounds that the reconsidered ruling is inconsistent with the previous judgement, then it shall address each of the elements specified in paragraph [XX] above.
46. The [Appellate Body]'s judgment may provide for a conclusion of multiple appeals for the same request for registration or issuance.
47. The [Appellate Body] shall notify the Board and the appellant of its judgement. The notification shall include the judgement.



**DRAFT****IX. Reconsideration by the Executive Board upon remand****A. Reconsidered decision on request for registration or issuance**

48. After receiving notice of the [Appellate Body]'s remand, the Board shall reconsider and decide on the request for registration or issuance. The reconsidered decision shall be consistent with the judgement of the [Appellate Body].

49. If the notice is received more than 21 days prior to the next Board meeting, then the Board shall conclude its reconsideration by the last day of the second Board meeting following its receipt of the notice; otherwise, it shall conclude its reconsideration by the last day of the third Board meeting following its receipt of the notice.

50. In concluding its reconsideration, the Board shall decide to either:

- (a) Register the proposed project activity or approve the request for issuance; or
- (b) Reject the request for registration or issuance.

**B. Reconsidered ruling upon decision to reject**

51. If the Board's reconsidered decision rejects the request for registration or issuance, then on the same date of the Board's reconsidered decision, it shall adopt and provide a reconsidered ruling.

52. The reconsidered ruling shall be consistent with judgement of the [Appellate Body] and shall contain an explanation of the reasons and rationale for the reconsidered decision including, but not limited to:

- (a) The facts and any interpretation of the facts that formed the basis of the reconsidered 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;
- (d) How the reconsidered ruling is consistent with the judgement of the [Appellant Body]

53. Within three days of the Board's adoption of the reconsidered ruling, the Board shall publish the ruling on the UNFCCC website, and shall notify the following parties of the publication of the reconsidered ruling: the project participants (as identified in the modalities of communication form); the DOE, and the Parties involved through each Party's DNA.

**C. Reconsidered decision to register the proposed project activity**

54. If the Board's reconsidered decision is to register the proposed project activity, then the secretariat shall register the proposed project activity as a CDM project activity on the first working day subsequent to the finalization of the reconsidered decision.

55. The effective date of registration shall be date on which the latest revisions to the validation report or supporting documentation were submitted.

**DRAFT****D. Reconsidered decision to approve the request for issuance**

56. If a reconsidered decision is to approve the request for issuance, then the Board shall instruct the CDM registry administrator to issue a specified quantity of CERs into the pending account of the Board of the CDM registry, in accordance with decision 3/CMP.1, annex, paragraph 66.

57. The Board's instructions to the CDM registry administrator shall be communicated to the project participant(s), as identified in the Modalities of Communication form. The secretariat will make the instructions publicly available on the UNFCCC website.

**X. Filing Fee****A. Appeals of requests for registration**

58. For appeals of request for registration, the filing fee shall be USD 0.10 per tonne of expected emission reductions of carbon dioxide equivalent for the entire crediting period of the proposed project activity, as identified in the project design document and as validated by the DOE.

**B. Appeals of requests for issuance**

59. For appeals of request for issuance, the filing fee shall be the sum of the following:

- (a) USD 0.10 per tonne for the first 15,000 emission reductions certified by the request for issuance under appeal; and
- (b) USD 0.20 per tonne for the quantity of emission reductions certified in excess of the first 15,000.

**XI. Compensation and damages**

60. The [Appellate Body] shall not have the authority to award any monetary compensation or damages, other than reimbursement of the filing fee as provide in paragraph [XX] below.

61. If the judgement of the [Appellate Body] remands the ruling to the Board for further consideration, then the [Appellate Body] shall specify which appeal(s) led to the remand.

62. The appellant(s) whose appeal led to the remand shall be reimbursed the filing fee.

**XII. Other Procedural Matters****E. Notifications and filings**

63. The UNFCCC secretariat shall support the [Appeals Body]. The Executive Secretary shall appoint an official to act as Registrar to the Appeals Body. This official shall not support of the work of the Board on requests for registration or issuance, or on the substance of any appeal of a request for registration or issuance.

64. The Registrar shall be responsible for, among other things, transmitting notifications and filings, receiving filings, recording the date of receipt of notifications and filings, and maintaining the Record.

65. Where this procedure specifies that the [Appellate Body] or the Board shall notify the appellant within a specified timeframe, the Registrar shall be responsible for dispatching that notification (and any accompanying documentation) to the appellant within the specified timeframe.

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66. The filing of an appeal, response or reply shall be accomplished by transmitting it to the Registrar.

**F. Computation of time**

67. In calculating any period of time prescribed by this procedure:

- (a) Days shall mean calendar days, including Saturdays, Sundays, and holidays;
- (b) The date of the event from which the designated period of time begins to run shall be excluded (e.g. the date of receipt of the notification shall not be included in computing the time required to respond);
- (c) The date on which a document is required to be filed shall be included.

68. The date that a document is filed, received, or notification is provided shall be based on the date in the Greenwich Mean Time zone.

69. A filings shall be considered received by the [Appellate Body] on the date that the filing is received by the Registrar.

**G. Finality of determinations, dismissals, judgements and rulings**

70. All determinations, dismissals, and judgements of the [Appellate Body] shall be final, and shall not be further considered or appealed.

71. A reconsidered ruling that rejects or requires an alteration to a request for registration or issuance may be appealed by stakeholders allowed to appeal, in accordance with this procedure.

**H. Confidential Information**

72. Information obtained from CDM project participants marked as proprietary or confidential shall not be disclosed without the written consent of the provider of the information, as specified in decision 3/CMP.1, annex, paragraph 6, except for the information specified by paragraph [XX] below.

73. The following information, as specified in decision 3/CMP.1, annex, paragraph 6, shall not be considered proprietary or confidential:

- (a) Information required to be disclosed by national law;
- (b) Information used to determine additionality;
- (c) Information used to describe the baseline methodology and its application;
- (d) Information used to support an environmental impact assessment referred to in decision 3/CMP.1, annex, paragraph 37 (c).

74. In submitting information marked as proprietary or confidential, project participants shall provide an explanation, and DOE shall validate or verify, that the information does not fall into any of the categories specified in paragraph [XX] above.

75. If the [Appellate Body] determines that the information marked as proprietary or confidential does not constitute proprietary or confidential information, then it shall explain why such information does not constitute propriety or confidential information in its judgement.

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76. If the [Appellate Body] determines that the information marked as proprietary or confidential constitutes proprietary or confidential information, then it shall issue two judgements:

- (a) One for public consumption, with the confidential and proprietary information blacked out; and
- (b) One for the Board and the appellant, with the confidential information not blacked out.

**I. Motions and unsolicited submissions**

77. The [Appellate Body] shall not consider any motions.
78. The [Appellate Body] shall not consider any unsolicited submissions.

**J. Communications regarding the appeal**

79. Informal or formal communications regarding an appeal between or among a member of Board (including its support structure), the appellant, and the [Appellate Body], other than provided in this procedure, shall be strictly forbidden.

**K. Additional procedures established by the [Appellate Body]**

80. The [Appellate Body] may establish additional rules of procedures that are not inconsistent with this procedure.
81. The [Appellate Body] shall establish procedures for timely carrying out its obligations specified in this procedure.

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