

APPEALS UNDER THE CDM

Submission by Project Developer Forum to parties attending SBI / CMP

Scope of, and modalities and procedures for, an appeals process under the CDM

The scope of the appeals process has long been a source of intense negotiation and debate, with Host Parties, Project Participants and investors generally lining up in support of a narrow scope restricted to negative decisions by the EB only (i.e. rejections of requests for registration and issuance, rejection of meths etc) raised by involved entities (Parties, PPs, DOEs); and NGOs and some Annex 1 Parties supporting a broader based process whereby any decision by the EB could be appealed by any interested stakeholder.

Three factors are now affecting the debate, and prompting this further input:

- 1) In Durban, in particular, Parties have started to express a desire to exercise some form of control over projects' contribution to sustainable development in the host country. Although Non-Annex 1 Hosts have the right to request a review of requests for registration or requests for issuance, this option has seldom, if ever, been utilized and there have instead been proposals to make LoAs conditional or subject to some form of on-going approval by the Host Party. Whilst we understand and recognize concerns about the way projects are ultimately implemented, such a change to the modalities and procedures would take away one of the very fundamental foundations of the CDM.

CERs are a sovereign commodity and it is through the LoA process that they are allowed to be transferred offshore without further intervention from Host Governments. The CDM is the first international instrument to ever allow such access to a sovereign right and it is one of the fundamental reasons why the CDM has been so effective where other forms of development assistance have failed. Even Joint Implementation, in many ways simpler than the CDM, has been less successful, arguably because of the role of the Host Party in the issuance of ERUs.

Issuance of an LoA is the final step in the investment process and is often the trigger for financial closure and the release of funds to start construction. If the LoA is made conditional, then the risks of CER delivery will become much greater, possibly so great as to significantly reduce private sector investment – bearing in mind that these are projects which rely on the additional revenues from CERs to be financially viable or overcome other significant barriers.

- 2) The on-going discussions and the preparation of draft procedures for the treatment of significant deficiencies has highlighted the fact that an allegation of a significant deficiency in the registration of a project or the issuance of CERs is in fact an appeal against a positive decision by the CDM EB. With the exception of fraudulent behaviour or registry errors, the current registration and issuance processes (which includes local and global stakeholder consultation, country approvals, independent third party verifications, EB oversight, and conservativeness as a design parameter) effectively rule out any significant deficiencies. While errors need to be corrected, and fraudulent actions addressed, the environmental integrity of the mechanism is unlikely to be helped

APPEALS UNDER THE CDM

significantly by the proposed procedure whilst it is likely to cause DOEs to restrict their activities within the CDM or totally cancel their DOE status.

- 3) In order to protect the existing investments and ensure that the private sector remains committed to the CDM, it is necessary to ensure that a project which is found to have failed to meet the requirements of the CDM which were current at the time of the relevant decision, has a fair opportunity to correct the necessary elements and remove any suspension of registration or issuance.

In the light of these developments, Project Developer Forum would like to reiterate the stated need for one single, fair, transparent and fact-based appeals procedure; where decisions by the appeals panel form persuasive and binding precedents for future decisions of the appeals panel and EB respectively; with the requisite checks and balances to ensure that the system is not abused; that costs of successful and unsuccessful appeals are fairly apportioned; which covers the decisions by the CDM EB; which is carried out by an Independent Appeals Panel made up of external experts and Secretariat staff as appropriate; and which ensures a form of direct communication through which the directly affected stakeholders can interact with the appeals panel.

Consequently, we request the SBI to instruct the Executive Board to develop procedures which address the above design criteria and develop a process which works to strengthen the longevity, environmental credibility and integrity of the CDM.

For more information contact: gareth.phillips@pd-forum.net