Governance Reform of the Clean Development Mechanism after Poznań

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The Kyoto Protocol’s Clean Development Mechanism (CDM) has proven to be a very successful instrument, which is remarkable considering the fact that the climate change regime had no such global market mechanism or market experience just over seven years ago. Now it has become established and has engaged stakeholders, and there has been increased scrutiny of its governance structures and performance as a regulatory approval system. This paper explores the key outputs from the Poznań negotiations in December 2008, and considers which governance reforms could be driven in 2009 and beyond to make the CDM a more effective and credible international instrument.

I. Introduction

The Clean Development Mechanism is the first international attempt to address climate change using a global emissions trading market mechanism involving both developed and developing countries. When it was originally created, it could not have been envisaged that it would become so large and lucrative so quickly, creating a market in a regulated commodity that would be worth billions of euros. In 2007, the value of the CDM market was estimated to total approximately €12 billion, more than double the previous year’s figure. There are currently more than 1240 registered CDM projects in 51 countries, with approximately 3000 further projects in the fast-growing registration pipeline. The CDM market is expected to generate more than 2.9 billion Certified Emissions Reductions (CERs) by the end of the first commitment period in 2012, making a significant contribution to climate change efforts.

There has obviously been sizeable progress in implementing the CDM, and whilst it should be considered a success overall, it has also created complex challenges. It is clearly debatable whether it has met its sustainable development objectives, and questions have also been raised as to its environmental integrity. Although these challenges are critical to the long-term progress of the CDM, much has already been said elsewhere on issues such as additionality and perverse incentives. Therefore, the sole focus of this article is on governance reforms.

Governance first arose as an issue at the Montreal negotiations in 2005. Since then, aspects of the CDM’s structural organisation and operational effectiveness have come under increasing scrutiny, with questions raised as to whether current regulatory structures are robust enough to meet the challenges of regulating a fast-expanding international market mechanism. Some of its operational problems have undoubtedly occurred because when it was born, it meant creating new models of governance; meaning that it had to be controlled by an untested set of rules, and administered by what was

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3 Annual report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, 14 November 2008, UNFCCC Doc FCCC/KP/CMP/2008/4, p.4.

originally an inexperienced body, the new Executive Board (EB). The EB, which approves the projects and issues CERs, was forced into learning-by-doing in a previously uncharted area. It is also clear that the United Nations Framework Convention on Climate Change Secretariat, charged with providing the support role in the CDM process, was also an inexperienced regulator which had to grow into the role just like the EB.

Clearly there have been significant challenges in taking what was originally an experimental mechanism forward. There has been a growing recognition that there is a need to strengthen some of the CDM governance processes and improve the quality of the existing model. Kyoto parties spent a considerable amount of time in Poznań negotiating proposals on a number of key reforms to the CDM, with mixed results. Whilst they were able to agree some proposals for reforming and improving the operation of the CDM under Decision CMP.4, there was a collapse of reform talks under the structures in the Article 9 review of the Kyoto Protocol on the final day. This was in part because some developing country parties wanted the 2% levy on CDM projects allocated to the Adaptation Fund to be extended to other Kyoto credits, in order to boost adaptation financing. As this was rejected by many developed countries, the Article 9 review was concluded without any formal outcome.

This article examines some of the adopted Poznań reforms under Decision CMP.4, alongside the reform proposals resulting from the Article 9 review, which are expected to be negotiated further in Copenhagen. It considers whether these new and proposed reforms to key CDM institutions and general regulatory process will strengthen existing arrangements, and makes a number of recommendations for improving on these.

II. Reform of the Key CDM Institutions

1. The Executive Board (EB)

a. Membership of the EB

The EB is the key body in the CDM governance system. At Poznań, there was some discussion concerning reforming its actual membership. Brazil proposed having a bigger EB, containing representatives of the larger market players, which was rejected by many Kyoto parties. There appears to have been little mention of further reform, even though some project participants have suggested that the EB itself should have more business people sitting on it. Generally, the key concern within business is that the people in charge of decision-making on the EB do not have the skills that reflect the realities of business.

The argument implicit in this criticism, that the EB membership needs reform because it consists mainly of government negotiators with no other experience, is in part a misrepresentation of reality. The EB has had a mix of skill-sets on it, including a consultant, a meteorologist, a lawyer, an engineer and an economist. There are a number of possible reasons negotiators and individuals with technical knowledge have been elected in the place of more business-orientated representatives. EB meetings can be technical and time-consuming, and thus to some extent unattractive to senior individuals. The meetings can also necessitate the understanding of complex scientific documents; business representatives have inappropriate skills for this sort of meeting. Finally, the EB does not receive enough financial reward for the time taken at the meetings to attract a high-level management membership.

Increasing the number of business associates on the board, or replacing the EB entirely with business representatives, does not have benefits which are obvious enough to support a complete overhaul.
of the CDM constitution. As a result of the international political compromise and make-up of the EB, it also seems likely that broadening the current Board with a business presence is not going to be seen as acceptable in many quarters. Asking regions to provide published written statements on the relevant experience of a suggested EB appointee, as was proposed in Poznań, or appointing people to the EB on the basis of certain skill sets, as the Kyoto parties have done in the past, is more pragmatic and probably more acceptable, but it does not address the real underlying issue.

The issue of membership of the EB is still a systemic, structural problem; solved more readily by deciding what one wants from such a Board, before considering dictating what its actual membership should comprise. One has to decide if the role of the Board is to be politically accountable to countries themselves or to other interests. Further, one must also consider what the supervisory purpose of the Board is and what the limits of such a function should be. Should membership and its supervisory role be framed in terms that it should have regulatory expertise, business expertise, technical expertise, executive decision-making expertise, or all of these? Depending on what one expects and wants from the EB, this will result in different answers in terms of the sorts of desired qualifications for membership.

It seems that at the current time there is clearly no shared conception as to what the EB is. Different actors involved in the CDM often value one form of supervisory expertise over another. A key outcome in Poznań is that the Kyoto parties appear to want to leave the EB as it is presently constituted, but to take steps to define the role of the EB. Once there is clarity as to what EB members are meant to do, an examination of its membership itself can resume.

b. A Full-Time EB

In the Article 9 review in Poznań, Kyoto parties considered replacing a part-time EB with a full-time EB. The European Union proposed that the Chair and the Vice-Chair of the EB might be full-time appointments, to enable policy supervision of delegated supervisions, but this was rejected by Kyoto parties. The EB, during the current intervening period of reform, has undertaken the initiative of delegating greater responsibilities to the ten alternate Board members.

There is a strong argument in favour of making all Board members full-time, particularly if it could speed up decision-making and get rid of any perceived bias if people are made to resign from existing government jobs. Industry bodies such as IETA have endorsed this. A consequence of this would be that EB members must then be paid full-time.

It is not clear whether a transition to a full-time Board would be a significant improvement. There needs to be clarity about the actual problem that needs to be addressed, as the answer could change in relation to question. If the problem is the fact that a part-time board meets less frequently then a full-time board would, and this slows down decision-making, that is one problem. If the problem is that Board members who are currently appointed part-time also have other jobs, then this is another. If the latter is the real problem, then the independence of EB members might be addressed with the introduction of a formal code of conduct. If the problem is rather the former, then to avoid major reform in the first instance, one could keep the EB part-time, but adequately support it. Greater delegation to a strong secretariat could do a lot in terms of speeding up decision-making, if this enabled part-time EB members to distinguish between supervision and execution. At the moment EB members and alternates also do not have any formal support arrangements. A system could be introduced whereby they each had one or two permanent support staff dedicated personally to them, to assist and leverage their effectiveness, manage their available time, and advise where necessary on case-loads and policy questions.

Whether to press ahead with a transition to a full-time board, making just the EB Chair and Vice-Chair full-time, or to continue with a part-time board with formal support arrangements, is something that needs careful consideration before negotiations continue in Copenhagen.

c. Terms of Reference

The role of EB members is primarily to make decisions on individual project applications, in accor-
dance with the Marrakesh Accords. However, this is not a function that would typically be associated with a Board of a regulatory agency. It seems from an analysis of the EB annual reports that they are involved in discussions on a very technical level. Whilst the EB is performing its case-specific role adequately, policy and strategic decisions are not case-specific. Most boards oversee the whole process to provide transparency and accountability, and the EB should not be setting the criteria at the various stages, but rather approving them and overseeing issues of governance.

The EB has itself admitted that, under current structures, it cannot always find the time to systematically address policy and strategic needs. Obviously, to do this it has to have a support structure it can rely upon, but in developing such a working support structure the EB also needs to be clear about its role, responsibilities and accountabilities. Again, at the current time it is not obvious that there is consensus that these roles are clearly defined. Some commentators have said that the EB has sometimes assumed responsibilities not assigned to them.

It is clear that a firmer commitment is required here, and a key outcome of the Article 9 review in Poznań was that parties have begun to consider introducing clear terms of reference for EB members. The importance of resolving this can then clearly be linked to reforms as to the membership of the EB and whether to press ahead with a full-time Board.

Having terms of reference could make CDM processes more efficient and more accountable. What is needed to develop this further is a plan in the first instance laying down the respective roles of the EB Chair and members. This needs to indicate clearly and succinctly what their role in the process is, and what they should focus on in terms of governance, policy and supervisory functions. This would not only make their roles clearer, it could help in managing their regulatory discretion, eliminate accusations of political interference, and allow them to focus on whether the current system is working further down the regulatory chain. One suggestion would be for existing Board members in the first instance to state what they see as the role of the EB and whether it has achieved this. It would clearly help to see what the EB is actually doing, what it is not, and to use this as a basis for discussions in the lead up to Copenhagen. To be most effective, reform in this area should also be undertaken in parallel with reforms of the role of the Secretariat and other support structures.

d. Creation of a Code of Conduct for EB members

A further suggestion coming from the Article 9 review in Poznań was the creation of a code of conduct for EB members. Presently, to make sure that national representatives who are appointed to the board show no bias, EB members take an oath. This offers some protection against specific biases and conflicts of interest relating to financial or political interest. Some EB members have also asked that written conflict of interest declarations be attached to the annexes of meeting reports.

Although EB members are officially appointed by regional groups, they are appointed to, and sit on, the Board in a personal capacity. However, the fact that they still have dual roles, with many having a negotiating role, still leaves it in part open to accusations that they have inherent biases, and leaves the conduct of EB members open to question from those outside the process.

Clear rules about how to handle potential conflicts of interests are needed. Having some form of published code of conduct is a normal part of the terms of reference at executive board level; in the UK, for example, the regulators Ofgem and Ofcom

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14 Ibid.
15 Neredgaard and Stehr, supra, note 10, p.16.
16 E.g. Decision 2/CMP.3, supra, note 11, para. 11.
17 Decision -/CMP.4, supra, note 6, para. 16.
18 Streck, supra, note 9, p.96.
19 CDM Executive Board, “Conflict of interest declarations of Mr. Pedro Martins Barata, Mr. Martin Hession, Ms. Ulrika Raab and Mr. Hugh Sealy”, EB Report 44, Annex I, 2008.
have these. Having a code of conduct could be resisted, but there are compelling reasons why it should be introduced and its content made very clear. Of course, a code of conduct would not in itself completely remove the risk of bias, but it would allow for greater legitimacy and transparency, as well as less suspicion in the process.

Kyoto parties still have to consider what form the code of conduct should take. This might require EB members to demonstrate their independence, asking that they will exert no influence on other members, or sit, or comment on, any application in which an organisation of their government is involved. Breach of this code of conduct could lead to suspension or termination of their membership of the EB. An examination of other board’s codes is a good starting point in considering what a code might contain, and a debate is also needed as to who should have responsibility for writing them.

2. The Support Role of the UNFCCC Secretariat

As the carbon market matures and the level of investment regulated becomes even more significant, there is an argument that the regulatory role might have to be put on a more professional footing. Under existing arrangements, the Secretariat plays a pivotal role in the CDM process, even though originally it probably did not have the experience or knowledge base to run a regulatory operation of this scale. The expansion of the CDM raises question marks as to whether it should continue in this role in the future, what specific regulatory skills and expertise are needed, and whether alternative funding mechanisms exist to best support the CDM.

Whilst replacing the Secretariat and starting from a blank canvas might be appealing to some, this would prove difficult in practice. Having a new independent body, or an existing body such as the World Bank, running the regulatory affairs of the CDM could be seen by some as a precursor to privatising the CDM. A further suggestion has been to discard the market-based approach of the CDM and adopt a compensating fund-based approach, best exemplified by the Montreal Protocol’s Multilateral Fund.

Although there are obvious difficulties with the current role of the Secretariat, it seems it will retain the key regulatory support role; not least because there is no clear alternative, and putting a new regulatory model in place would be politically contentious. Continuity and stability also continue to be important. Kyoto parties in Poznań favoured focusing on upgrading and resourcing the current institutional actors and structures, and the focus for reform at Poznań was clearly on “ensuring effective use of its support structure”, including the Secretariat.

The details and practicalities of ensuring the more effective use of the support structure are unknown, but generally there are compelling reasons why such institutional change needs to be supported. The EB has quite aptly pointed out that the pressure to ensure timely consideration of requests for registration, whilst continuing to enhance consistency and environmental integrity, has given it little time to systematically focus on policy aspects which will allow the CDM system to expand further.

In the early stages of the CDM, the Secretariat had no familiarity of working in a decision-making context, because its purpose had traditionally been to provide support to negotiations and facilitate international dialogue. This presented some difficulties because the EB needed clear submissions, accompanied by recommendations, not advice, from the Secretariat. Since the Montreal negotiations, the Secretariat has matured in its ability to analyse cases and prepare recommendations to the Board as to the answer that should be given. Delegation of decision-making was raised again in
Poznań, with some Kyoto parties asking that all decisions be left to the Secretariat, with the EB retaining the option of the final say, such as the right of veto, or serving as the arbiter of appeal. This was rejected by a clear majority of Kyoto parties. China, in particular, expressed deep scepticism for the proposal, demonstrating a general problem with Secretariat scrutiny. There is a perception amongst some Kyoto parties that the Secretariat has a western bias, although this appears to be unfounded.

In addition to the preparatory decision-making function, the Secretariat needs to accept a greater leadership role and supply the EB with a stronger regulatory operational arm; a body built upon an experienced core of professional regulators to carry out the day-to-day running of the CDM. Should extra resources be required they should be directly contracted to this body and clearly under their control. A review by the Secretariat in 2008 indicates clearly that there is scope to build on the current personnel in this way.

The Secretariat clearly has the technical expertise necessary for the job in hand, it just needs to improve its regulatory expertise. It seems the skill set of current staff covers the first, whereas new staff would need to cover the second. Acquiring a new set of skills and experience will become critical, especially in the areas of financial and regulatory background and executive decision-making experience. The Secretariat has technical experts, but also needs to recruit regulatory specialists and managers who can communicate effectively, provide institutional memory, impartial substantive analysis, and regulatory consistency. These skills of business conduct and regulatory management can be developed through hiring new permanent staff with a different skill base, or by bringing in outside consultants.

The Secretariat also needs more senior and mid-level managers, not merely more technical experts. The staff already in place need not be replaced; the Secretariat just needs to add to the process people with strong management abilities and experience of running regulatory functions at a high-level. They could employ a former senior regulator, or adopt a system like the European Commission, where experienced government staff are seconded for a fixed period. In recruiting new staff and consultants, there is also a clear need for a relaxation of the political bureaucracy and rules that the United Nations has on employment and quotas. It takes too long to appoint through the current tender processes, as they are not reactive to financial or regulatory changes or needs. The Secretariat needs to be able to employ the right people quickly, and not have to wait six months or a year, which is often the case under current practice.

It is also clear that the Secretariat needs to substantially increase the actual numbers of permanent and temporary staff to manage the CDM processes. It is logical to assume that increased staffing would reduce bottlenecks. Presently, there does not seem to be excessive bureaucracy, but rather a lack of bureaucrats. When the CDM started operating, six people in the Secretariat were responsible for regulating it, and only three of these at a senior level. Despite a recent recruitment drive, the Secretariat currently only has approximately sixty employees. This, alongside the fact that there is a part-time EB, begs the question as to whether this level of staffing is adequate to manage a billion-dollar global financial system. Table 1 below shows the budgets and staffing levels of three major regulatory bodies in the UK, demonstrating that comparative bodies are probably better staffed and financially resourced than the Secretariat is under the CDM process.

Table 1: Regulators in the UK

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<thead>
<tr>
<th>Regulator</th>
<th>Sector</th>
<th>Budget</th>
<th>Staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Services</td>
<td>Finance</td>
<td>£301.7 million</td>
<td>2800</td>
</tr>
<tr>
<td>Authority</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Ofcom</td>
<td>Communications</td>
<td>£133.7 million</td>
<td>802</td>
</tr>
<tr>
<td>Ofgem</td>
<td>Energy</td>
<td>£34.7 million</td>
<td>Between</td>
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<tr>
<td></td>
<td></td>
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<td>270 – 320 at any one time</td>
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The Secretariat simply must be funded adequately, and a proper allocation of resources to specific tasks, staff and consultancy activities made.
EB’s most recent annual report shows that the last annual budget appears to be $21.7 million, and their expenditure during this period appears to be $12.9 million\textsuperscript{28}. Although the expenditure only covers the first nine months of 2008, it appears that they have made a substantial profit in the last accounting year. Achieving a profit over the core budget is also consistent with every other year. It also appears that they will carry over an overall balance in the region of $25 to $30 million in early 2009\textsuperscript{29}.

The Secretariat, which controls the finances, therefore, currently appears to have more money than it needs – it cannot spend it under existing structures. These windfall profits from running the CDM currently go into a trust fund, whereas there is a strong argument that this money should from now on be further utilised, legitimately, as the cost of maintaining and improving levels of service in the regulatory system. There is a counter-argument that the Secretariat should manage the money cautiously because the revenue from the share of proceeds for administrative expenses may not continue at present levels. A healthy financial reserve would allow the Secretariat to retain the staff it needs and guarantee secure employment contracts. Whilst having such a reserve is financially prudent, it seems plausible that more money could still be spent on improving current structures. I would argue that closer budgetary supervision should be undertaken by the Kyoto parties and by the EB. There is also a compelling argument that the EB itself should be charged with overseeing financial control, as this is clearly a normal function of a supervisory executive board.

### 3. Entities Involved in Validation

Problems exist with the standard of verification and validation of projects because the EB have been slow to communicate to Designated Operations Entities (DOEs) any clear rules of behaviour and procedures. At the current time there is scant oversight of the integrity of the verification process and no record of sanctions. Clear standards and procedures of verification and validation are required. The Kyoto parties in Poznań requested in Decision CMP.4 that the EB take action to both strengthen the role of the DOEs and to monitor their performance, in order to make sure they were complying with the requirements and standards of the EB\textsuperscript{30}.

There is a need for transparent and acceptable professional standards in the bodies involved in the process. For example, the EB is already enforcing the rule that the DOEs should not prepare the documents they are assessing, as this would clearly be a conflict of interest. Whilst this is a start, it is crucial to tell the verifiers and validators in clear, precise terms what the EB wants them to do. It is not clear, however, that the EB has recognised that this is their responsibility, and it seems to be currently relying on the ingenuity and professionalism of the individual DOEs, with consequent variations in performance.

Once clear standards for assessment and procedures are put into place, these must then be adequately communicated to DOEs. Implementing training programmes for DOEs was on the agenda at the EB in 2008, but it is not known what level of discussion has taken place. There is little point in training DOEs without transparent standards and procedures being introduced first, but once they are, implementation of training programmes for entities involved in the verification and validation process should improve timings, because if proper structures are already in place, projects should move through the process more quickly (e.g. they would not have to be sent back by the Secretariat or the EB). Implementation again should be adequately funded to attract well-qualified, authoritative people to train and run programmes. It would again be highly desirable to prioritise funds for this use, if any can be made available from the financial reserve collected by the Secretariat.

The new verification and validation training manual (VVM) is one of the best things to have come out of the CDM regulatory process, because it has engaged DOEs in discussion over a wide range of extremely important issues which were previously only discussed sporadically within the EB. This should be built on, because it is important to having a more managed process where there can be open development of policy decisions, consultations and training.

\textsuperscript{28} EB Annual Report 2008, supra, note 3, para. 104, p. 27.

\textsuperscript{29} Ibid.

\textsuperscript{30} Decision -/CMP.4, supra note 6, paras. 5(b) & 26.
III. General Regulatory Process Reform

1. Having an Appeal Mechanism

A common criticism with CDM procedures is that they do not allow aggrieved entities to appeal a decision made by the EB. It is clear that if a decision taken by the EB was unfair in the eyes of the project participant that they would want the opportunity to appeal. It has been reported that the EB allegedly received twelve threats of legal proceedings from project developers in 2007; prompting calls for incorporating an appeal mechanism which would promote procedural fairness, and improve transparency and accountability in the CDM decision-making process. A key reform proposal in Poznań under the Article 9 review was therefore the introduction of an appeal mechanism against decisions of the EB.

The Marrakesh Accords and CDM procedural rules do not provide for an appeals process, thus from a legal standpoint it is not formally necessary. Throughout the whole of the CDM process there are opportunities to provide further information or ask for points to be considered or reconsidered, however this process is ambiguous. Whilst introducing a formal appeals procedure to the process might seem a good idea, it begs the question as to who hears the appeal. It seems inappropriate for the EB to hear appeals against decisions which they have already been intimately involved in making. If the appeal goes to an independent tribunal, this would have to be set up under international law procedures. This could bring about an extra layer of bureaucracy and delays, inviting questions as to whether the ensuing decision would be any improvement upon the EB’s original decision. If an Ombudsman is appointed to oversee appeals, as has been suggested by IETA in the past, there are also questions as to whether any recommendations would be binding on the EB.

The Kyoto parties negotiating an appeals mechanism in Copenhagen have a difficult choice to make. They can either introduce a new appeals procedure to an independent tribunal or Ombudsman, which will require additional funding and might cause conflicts with the EB. Alternatively, as part of the other reforms, if the EB operated as a more conventional supervisory board, then any questions raised by participants about the regulatory arm’s decisions would be a natural pretext for scrutiny as special cases, or part of a systematic quality-control process. I would endorse the latter if a more transparent appeals procedure could be developed than currently exists.

Standards will also only improve if decision-making is improved, and an appeal will then only be as good as the initial reasoning. There are dangers in specifying an external authority which may merely repeat the failures of the EB itself. The key issue is that there should be detailed substantiation of EB decisions and what precedents were relied upon. This will then allow for more transparent and criticisable decisions.

2. Having Performance Indicators

The Kyoto parties in Poznań agreed a proposal to “make use of and further develop performance and management-level indicators and enhance the provision of information derived from these.”

Indicators to measure the success of the CDM and the EB, so as to promote continued improvement in performance, are a reasonable idea, but they require very careful consideration. If they are to be developed further then the EB needs to be clear of their ultimate purpose and what the indicators are. They should reflect the key parameters which govern efficiency and effectiveness, and should not be confused, or replaced, with headline targets such as processing times or numbers achieved. They need to provide an entirely accurate picture of overall performance as diagnostic rather than public-relations material.

3. Improving Knowledge and Communication

Better knowledge and communication has been somewhat neglected in the early stages of CDM development. A lack of predictable, objective and
routine interaction, combined with insufficient communications between the EB, regulator and project participants, has probably resulted in frustration and inefficiencies. Under Decision CMP.4, the parties requested the EB to "explore ways and means to enhance the effectiveness of its communication with project participants without going through the designated operational entities."

There was no further clarification as to how they should do this. Good communication seems pivotal in this process, but the key question that needs to be considered before the Copenhagen negotiations is: at what level would this be most effective?

Discussion and communication between the key parties has been sporadic in practice, and because this is so important in making the CDM process work, clear policies do need to be developed. It is clear that project participants would like some way of incorporating, at appropriate points in CDM processes, regular and direct interactions between stakeholders and the EB or its Panels.

There is a definite need for better written communication, particularly in decision-making, which should greatly improve transparency and trust in the process. One can sympathise with why the project developers would like to talk to the EB itself, but it deals with many projects with a small number of part-time members. My view is that good written communication is preferable to face-to-face meetings, which rather reinforce the ad-hoc nature of current decisions and decision-making. I also believe that such contact would be inappropriate and unnecessary if the EB operated as other, similar, supervisory boards. The boards of some regulatory agencies, such as the Environment Agency in the UK, sometimes meet publicly, and find that this successfully improves the quality of communications, transparency, and accountability to the general public. However, these boards rarely allow formal proceedings to be disrupted by question and answer sessions.

I would endorse the possibility of a formal annual open meeting, along the lines of an AGM, which could allow project participants to discuss their opinions of CDM processes with the EB and the Secretariat. This could be attended by project developers, DOEs and other interested parties, and feedback, suggestions or other general concerns raised, rather than specific project cases. The EB organised a meeting in Poznań where it reported on its activities and allowed for questions and answers from the audience, and something like this could be formalised further.

In respect of specific project cases, project participants should be talking to the regulatory arm, which is the Secretariat. The communication channels between the regulator, the DOEs and project participants could obviously be overhauled. Whilst there are frustrations within the current system, if written communication was improved, the frustrations of project participants would probably diminish. Much of the lack of communication must have inevitably stemmed from having an inexperienced regulator with not enough staff. If more money was made available under future budgets, this could be used to improve communication channels by employing more staff to focus on this, and establishing proper project helpdesks.

4. Tackling Delays and Introducing Timelines

A further common criticism of the current CDM regime has been the time taken for projects to go through the decision-making process. The time-lag from submission of project documentation to registration was at the beginning extremely large, but the length of time has recently generally been falling. Although there have been efforts to speed things up by the EB, there are still criticisms from business of significant bottlenecks throughout the process.

Kyoto parties in Poznań, under Decision CMP.4, noted their “serious concern” with the timings in project registration and CER issuance, caused by the completeness check process used by the EB. They requested the EB to “take effective action to speed up the completeness check processes … and to establish timelines for each of its procedures including revision of a deviation from approved methodologies and approval of revised monitoring plans by the EB, its supporting structures and the secretariat.” Analysing how long it takes projects to go through each stage is good if they identify where time-lags are in practice. This analysis

35 Ibid, para 18(c).
36 Streck, supra, note 9, at p.99.
37 Decision -/CMP.4, supra note 6, para. 8.
38 Ibid, paras. 9 and 10.
should not be used to apportion blame, but to enable resources to be targeted in an attempt to fix problems. It seems that the UNEP Risoe Centre has already been charged with the task, and it is unclear whether any further timeline monitoring will be established on top of this.

Implementing sectoral and policy-based approaches and fast-track procedures for certain projects have been suggested as possible remedies, and will probably be championed by project developers in the lead up to Copenhagen, particularly if the timelines that are established provide proof that the procedural system in place is inefficient and complex. A personal suggestion for reform in Copenhagen in this regard is to keep a project-by-project approach for now, but if the process is taking too long for business, then perhaps the project applications could have the credited date changed, so that credits apply from when the application was first put in, rather than when the decision was made. This could create new problems, not least in terms of funding, but it would potentially seem fairer. If the CDM is running at good profit levels, then the implications of this could be investigated and discussed further.

5. Better Reviews

The EB was requested under Decision CMP.4 to make recommendations for improving the operation of the CDM. For the above request to be effective, I believe the EB would have to agree to a stronger and more formal annual review process being undertaken than is already in place; as currently it does not seem to be that thorough. There are other procedures already in place to review practice which can influence development or reform of the CDM, such as reviews under Article 9, or those undertaken by the Ad-Hoc Working group on the Kyoto Protocol. I would argue that money should be made available for a more substantial governance and management review than is undertaken by the above. A personal suggestion might be to hire external consultants to review current processes and make suggestions for professionalising systems. Seeking a fresh perspective from outside agencies might produce interesting insights, and there is nothing in legal terms to stop the EB deciding to get external assistance in looking at processes and systems in place.

6. Transparency and Consistency

Decision-making by the EB has been on a learning-by-doing basis because of the start-up and evolving nature of the CDM. There were no precedents in the beginning to rely on, so the EB had to treat each case as different and there was an understandable need to exercise discretion. Project participants have argued that even though the CDM is now evolving, the EB’s decision-making practice is often still unpredictable; with many of its decisions coming as a surprise to project participants and technical project experts. Industry has continued to lobby for greater certainty in decision-making, so it came as no surprise that a major focus of reform in Poznań was on improving transparency and consistency in the decision-making process.

The parties at Poznań welcomed the work started by the EB to enhance consistency and transparency in its decision-making, such as the adoption of a workplan to categorise documentation, including a clear history of changes in documents approved by the EB in order to improve the transparency of, and access to, EB documents. However, they requested as a priority for 2009 that the EB “classify, index and publish decisions, clarifying the hierarchy of its decisions, to demonstrate the relationship between new and previous decisions, to further substantiate decisions and make public the rationale for its decisions.”

In practice it is hard to show inconsistencies in decision-making, but they are easy to allege. The current way of operating on a micro-management case-by-case-level opens the Board up to the perception that decisions appear to be made by them then forgotten. There are basic issues relating to the credibility of the mechanism that are important here, particularly as there are external perceptions of bias. Therefore, the requests of the parties for the EB to make its processes more transparent, to publish decisions and cite past precedent, and to give reasons why they made a particular decision, are very encouraging.

39 Ibid, para. 3.
41 Streck and Lin, supra, note 32, at p.409.
42 Nedergaard and Stehr, supra, note 10, p.22.
43 Decision -/CMP.4, supra note 6, para 11.
44 Ibid, para 12.
Increasing transparency and consistency is key to the whole process. Implementing sectoral and policy-based approaches and fast-track procedures for certain projects have been suggested as possible remedies for time-lags in projects, but these need precedents in place in practice to be effectively implemented (e.g. properly reported and accessible case-decisions). The EB itself has recognised that transparency presents a major challenge, but has pointedly remarked that it is one which the Board alone cannot address\(^45\). As a starting point, the EB should therefore look to delegate the responsibility of compiling publicly accessible databases to the Secretariat, who could also use these to provide precedent based guidance to the EB on every individual project application.

IV. Conclusions

When the CDM was created, the regulatory structures reflected the direction along which Kyoto parties thought it would develop. It has since exceeded expectations in the speed of take-up and the sheer scope of its activities, with the consequence that the CDM now requires upgrading.

It seems that there will be no radical overhaul of CDM governance following Poznań, with the emphasis beyond these negotiations being to upgrade and build on current structures and personnel, not to make wholesale changes. The parties might consider adopting more radical reforms closer to 2012, but in the short-term, keeping existing structures in place would allow consistency in the financial markets and also mean that the parties would not have to make substantial changes to the Marrakesh Accords. Upgrading and resourcing the current institutional actors and structures to a more appropriate and professional status can clearly largely be done under existing procedures.

To allow more transparent oversight and avoid real or perceived conflicts of interest, the EB needs to recognise the governance requirements of accountability and clearly distinguish between supervisory and executive roles. It needs to be clear of its role so it can assure stakeholders that the CDM is being competently managed on their behalf. This also has the major advantage of keeping the EB members separate from the detailed regulatory decisions, so as not to fetter their discretion to approve, review, and objectively monitor the supporting structures.

In respect of the Secretariat, what is needed is not something new, but rather a change of culture and professional working practices to reflect the realities of regulatory approval and decision-making. It is becoming necessary to define more closely the role of the Secretariat, and to distinguish clearly between the separate functions of operational and secretarial support. For the whole of the CDM process to function better there also needs to be a greater delegation of responsibility from the EB to the Secretariat. The Secretariat should adapt this way, or it will come under increasing pressure to let a sub-agency come under its direction to do this.

The success of the CDM has meant that there is a possibility of re-examining and restructuring budgets. Performance could undoubtedly be significantly improved by making money available for hiring more permanent and temporary staff in the institutional structures; getting the right people in place, training them and turning them into a team; and having much better knowledge-bases and methods of communication. As part of its supervisory function, I would suggest that the EB has control of the finances.

Although the current regime does have its shortcomings, some of these problems can be viewed simply as growing pains that will disappear in time; still, as was discussed at Poznań, some will involve making current governance and structural issues tighter and more professional. It is a major step forward that proposals are beginning to come through that recognise how every stage of the CDM approval process needs to take on clear professional service standards. This should go some way towards improving transparency, clearing bottlenecks, accelerating the application of necessary procedures, and creating credibility and confidence in the system.

Although the reforms agreed in Poznań are a step in the right direction, many require further elaboration. Some do not impose clear deadlines on the EB to implement them, whilst others request actions without clarification as to how this should be done. The more substantive proposed reforms, discussed under the collapsed Article 9 review in Poznań, will also have to be resurrected at the negotiations in Bonn and Copenhagen, leading up to agreements being hammered out. In the context of governance reform under the CDM, 2009 could be a key year for its future development.

\(^{45}\) EB Annual report 2008, supra, note 3, para.17, p.9.