# PUBLIC PARTICIPATION IN THE CLEAN DEVELOPMENT MECHANISM OF THE KYOTO PROTOCOL

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The Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)[1] is the first multilateral environmental agreement of global reach to establish a market-based mechanism allowing state parties to comply in part with their treaty obligations by investing in mitigation projects in developing countries. Since this mechanism—the Clean Development Mechanism (CDM)—will rely on international, national, and private-sector institutions to facilitate foreign investment and sustainable development and since these mitigation projects could significantly impact many stakeholders, the CDM poses novel questions of how stakeholders can adequately participate in its decisionmaking processes.

The Kyoto Protocol was adopted in 1997 by UNFCCC parties after they concluded that the Convention's largely aspirational commitments were too weak to accomplish its goal of stabilizing "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[2] The Protocol establishes binding greenhouse gas emissions ceilings, or targets, for Annex I parties, which include developed countries and most economies in transition of eastern Europe and the former Soviet Union.[3] However, the Protocol gives these Annex I parties significant flexibility in the means by which they may comply with their targets. This includes the ability to receive CDM credit for reducing emissions in developing countries, where the marginal cost of reductions may be markedly less than at home.[4] CDM projects may include a broad range of activities that produce net decreases in greenhouse gas levels compared to the existing baseline, including fuel-switching projects that convert coal-fired power plants to natural gas, the installation of solar panels in villages without access to electric grids, and planting and growing trees in areas that have previously been deforested (thus removing carbon from the atmosphere and sequestering it in the trees and soil of the new forest).

While opportunities for vigorous public participation in CDM governance and project planning and implementation will likely prove essential for the CDM's long-term success, neither the Convention nor Protocol texts provide much indication of what these public participation rights and mechanisms should entail. Under the Convention, all developed and developing country parties agreed to "promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations."[5] Implementation of these provisions has been left to the discretion of individual parties, with effectively no oversight from the Convention's Conference of the Parties (COP). Article 12 of the Protocol, which defines the CDM, contains no mention of any role for the public.

Accordingly, neither the Convention nor the Protocol contains provisions that properly can be described as creating "rights" to public participation in CDM processes. Instead, the CDM public participation rights that presently exist were established as part of the "Marrakech Accords," which were adopted by the COP

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[1] United Nations Framework Convention on Climate Change, May 9, 1992, entered into force Mar. 21, 1994, 31 I.L.M. 849 [hereinafter UNFCCC or Convention]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 [hereinafter Kyoto Protocol or Protocol].

[2] UNFCCC supra note 1, art. 2.

[3] For a complete list of these states, see Kyoto Protocol, annex B.

[4] The Protocol also establishes two other trading mechanisms. Joint implementation allows Annex I parties and companies to receive credit for mitigation projects in other Annex I countries. *See* Kyoto Protocol supra note 1, art. 6. For example, a Japanese company might receive credit for investing in an emissions reducing project in Russia. International emissions trading allows Annex I Parties and their private entities to trade parts of their "assigned amount," or emissions allocation, among themselves. *See id.* art. 17.

[5] Convention, supra note 1, art. 4.1(*i*); *see also* art. 6. (slightly elaborating on the art. 4.1(*i*) text).

in November 2001.[6] Based upon prior experience under the Convention, one can anticipate that the COP, the Protocol's "Conference of the Parties serving as the meeting of the Parties" (COP/MOP), and the CDM executive board may agree to additional opportunities for public participation in the CDM.[7] This may be through either formal decisions or by allowing informal practices to develop under the guidance of the secretariat.

This chapter first provides an overview of the main actors who will supervise, develop, or oversee CDM projects, and who in turn bear some responsibility under the rules for facilitating public participation. Next, the chapter reviews the CDM rules created under the Marrakech Accords that provide for access to information and public participation in decisionmaking. These sections also identify gaps in the current rules and include some of the recommendations that nongovernmental organizations (NGOs) have made to fill these gaps. Finally, the chapter discusses the limited opportunities for access to justice that presently exist under the rules and identifies those additional procedures that may or should be formally adopted soon.

Before proceeding it is important to bear two things in mind. First, CDM rules established at the international level under the auspices of the Protocol generally pertain either to CDM governance (e.g., the CDM executive board) or to the setting of minimum performance standards for projects. Since all CDM projects must be approved by both the "home" (investor/developer's) country and the "host" (project site) country,[8] Protocol parties that participate in the CDM will have an opportunity under their domestic laws to establish and enforce more liberal standards for public participation, if they wish.

Second, at the time of this writing, neither the Protocol nor the CDM are yet operational. The Protocol will enter into force 90 days after not less than 55 Convention parties, including Annex I parties that accounted for at least 55 percent of the total Annex I carbon dioxide emissions in 1990, have deposited their instruments of ratification, acceptance, approval, or accession.[9] While the CDM's executive board has been elected and has met several times, it has not yet completed—and neither the COP nor COP/MOP has approved development of the detailed procedures that will allow the appointment of the CDM's various "operational entities" or the approval of actual CDM projects. Accordingly, there is currently no actual CDM practice beyond that established in this preliminary planning and rulemaking phase.

## I. OVERVIEW OF CDM ACTORS

The CDM rules require the following four key CDM actors to make information publicly accessible or to invite public participation in their activities:

- *Project participants* are government or private entities who submit the initial project proposal and develop and implement the project.
- The *CDM executive board* is the primary supervisor of all CDM activities and is directly accountable to the Protocol's COP/MOP. The executive board is comprised of ten governmental representatives, who are elected on the basis of United Nations regional representation.[10]
- The *UNFCCC secretariat (secretariat)* provides administrative and logistical support to the Convention and Protocol parties and serves the CDM executive board in a similar capacity.
- *Designated operational entities (operational entities)* are contractors hired by project participants to validate, monitor, verify, and certify CDM projects. The executive board must approve operational entities.

In addition, *designated national authorities* selected by each Protocol party intending to participate in the CDM will provide the requisite national governmental endorsement of proposed CDM projects.[11]

As discussed below, these actors are obligated to provide stakeholders with access to information about CDM projects, CDM databases and registries, and some as-

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[6] *See* Report of the Conference of the Parties on its Seventh Session, *held at* Marrakech on 29 Oct. 29-Nov. 10, 2001, add., pt. 2: Action taken by the Conference of the Parties, vol. II, FCCC/CP/2001/13/Add.2 (2001), Decision 17/CP.7 [hereinafter Marrakech Accords, CDM rules].

[7] The Conference of the Parties (COP) is the governing body of the Convention. UNFCCC, supra note 1, art. 7.2. Since adopting the Protocol in 1997, the COP has been developing its implementing rules and institutions and will continue to do so until the Protocol enters into force. After that time, the members of the COP that have ratified or otherwise acceded to the Protocol will serve as the meeting of the Parties to the Protocol, the COP/MOP, which will generally be the supreme decisionmaking body of the Protocol. *See* Protocol, supra note 1, art. 13. The Convention secretariat will serve as the Protocol secretariat when the Protocol enters into force. *See* Id. art. 14. The secretariat will also "service the [CDM] executive board" and perform any other functions related to the CDM assigned to it under the Marrakech Accords. *See* Marrakech Accords, CDM rules, supra note 6, para. 18; *Id.* annex, para. 19.

[8] Kyoto Protocol, supra note 1, art. 12.5(a).

[9] *Id.* art. 25.1. As of July 12, 2002, 75 countries had ratified or acceded to the Protocol, including 22 Snnex I countries accounting for 36% of 1990 Snnex I emissions. The UNFCCC secretariat maintains and regularly updates a list of ratifications and accessions. *See* Kyoto Protocol Status of Ratification, *available at* unfccc.int/resource/kpstats.pdf (last visited July 12, 2002).

[10] For a complete list of executive board members and their terms, see UNFCCC, *Executive Board Members*, *available at* www.unfccc.int/cdm/members.html (last visited July 16, 2002).

[11] Marrakech Accords, CDM rules, supra note 6, annex, paras. 29, 40(a).

pects of CDM governance and policymaking. Additionally, they must allow for access to decisionmaking by inviting public comment on a limited number of CDM documents. There are presently no requirements that they provide stakeholders with any legal recourse when required procedures have not been properly followed, nor are there provisions for stakeholder-triggered review of CDM projects.

## II. ACCESS TO INFORMATION

The CDM rules created under the Marrakech Accords require designated operational entities, the executive board, and the UNFCCC secretariat to make certain information "publicly available."[12] This information can be classified into three general categories: (1) information that is related to a specific project; (2) information contained in a database or registry; and (3) information that is related to CDM governance, procedures, or policy. While this information must be made publicly available, the manner and timeframe for making specified CDM documents "publicly available" remain unelaborated.

Throughout the negotiations of the CDM rules, the Climate Action Network (CAN)—a coalition of more than 300 NGOs throughout the world committed to limiting human-induced climate change to ecologically sustainable levels—called on parties to clarify how and when CDM project information would be made publicly available.[13] CAN urged parties to require public CDM documents to be translated into the necessary relevant languages and communicated in a medium appropriate for the local communities that may be affected by a project. CAN also suggested that "making publicly available" should be defined to include capacity building, if necessary, to allow for meaningful participation.[14] To date, the executive board has not discussed any guidelines for making CDM documents "publicly available," although environmental NGOs continue to highlight the issue.[15]

### A. PROJECT-SPECIFIC INFORMATION

The CDM rules require operational entities to "make information obtained from CDM project participants publicly available, as required by the executive board."[16] No clear rules have been established that define the types of information the executive board will require to be made publicly available under this provision. CDM rules do, however, call for public access to several specific documents at the various stages or phases of a project, including the project proposal and validation phase, registration phase, verification phase, and certification phase.[17] The first of these, the project proposal and validation phase, includes rules regarding environmental impact assessments (EIAs).

#### 1. Project proposal and validation phase

The initial project proposal phase of the CDM is the least defined with respect to access to information and public participation. This gap is particularly troublesome because adequate access to information and public participation during the initial development phases are crucial to the long-term success and credibility of a CDM project. Project participants are required to invite input from local stakeholders during the preparation of the project design document.[18] However, there are no rules or standards regarding the information that should be provided to local stakeholders prior to the invitation for their informed comments or the manner or timeframe for providing the information.

Validation is defined as "the process of independent evaluation of a project activity by a designated operational entity against the requirements of the CDM."[19] During the validation phase of a CDM project, the rules require the validating operational entity to make three types of information publicly available: the project design document, any public comments received in response to it, and the validation report.

The validating operational entity hired by the project participants must make the project design document publicly available, subject to confidentiality limitations (discussed below).[20] The CDM executive board has not yet elaborated the manner or timeframe for making the project design document publicly available. The validating operational entity is also required to make public all comments that it receives during the 30-day validation comment period.[21]

The project design document requires information on environmental impacts to be addressed in one of two ways. At a minimum, the design document must include "documentation on the analysis of the environ-

[12] *Id.* para. 27(h).

[13] CAN non-paper, *Definition of "Publicly Available" in the CDM* (Nov. 2, 2001) (distributed to parties attending COP7 in Marrakech, Morocco).

[14] *Id.*

[15] CAN non-paper, *Key Public Participation Points for Consideration at EB4* (June 9, 2002) (distributed to CDM executive board members and parties attending SB16 in Bonn, Germany), *available at* www.climnet.org/sbsta16/CDMpp.pdf (last visited July 16, 2002). *See also Elaborate, don't Renegotiate*, ECO, vol. CVIII, Special CDM EB Edition (June 10, 2002), *available at* www.climnet.org/sbsta16/ECO_Issue_EB.pdf (last visited July 16, 2002).

[16] Marrakech Accords, CDM rules, supra note 6, annex, para. 27(h).

[17] *Id.* paras. 40, 41, 62, 63.

[18] *Id.* para. 37(b) and app. B, para. 2(g).

[19] *Id.* para. 35.

[20] *Id.* para. 40(b).

[21] *Id.* para. 40(c).

mental impacts, including transboundary impacts."[22] However, "if impacts are considered significant by the project participants or the host party [then] conclusions and all references to support documentation of an environmental impact assessment" must also be included. Accordingly, a complete EIA must be performed for a project only when the project participants or the host party believe that the project's environmental impacts will be "significant."[23]

Even when project participants do believe the impacts will be significant, the rules do not establish standardized EIA requirements for CDM projects. Instead, EIAs are to be performed according to "procedures as required by the host party."[24] The detail or extent of an EIA will thus vary depending on the domestic laws of the host country.

In the negotiations leading up to adoption of the Marrakech Accords, the parties failed to agree upon guidelines for establishing what types of environmental impacts should be considered "significant." This omission from the CDM rules continues despite repeated concerns voiced by the international environmental community. CAN urged parties to adopt detailed guidelines for the assessment of environmental and social impacts of CDM projects that are at least as strong as project guidelines required by international financial institutions implementing comparable projects.[25] At the latest round of climate negotiations in Bonn, Germany in June 2002, Greenpeace reiterated the need to clearly define EIA procedures and the qualifying term "significant" and called upon the CDM executive board to make the elaboration of EIA rules a priority.[26]

If the validating operational entity finds that the project design document meets the CDM requirements, it must submit a request for registration of the project to the executive board in the form of a validation report.[27] This validation report must be made publicly available.[28] The manner in which the validation report becomes publicly available remains undefined, though it must become public at the same time that the report is transmitted to the executive board. The validating operational entity is required to include an explanation in the report of "how it has taken due account of comments received."[29]

[22] *Id.* app. B, para. 2(e)(i).
[23] *Id.* para. 2(e)(i)-(ii).
[24] *Id.*
[25] *The Closed Development Mechanism: Don't Call Us, We'll Call You*, ECO, vol. CVII, no. 2 at 1 (Oct. 30, 2001), *available at* www.climatenetwork.org/eco/CoP7/en/ECO2.pdf (last visited July 16, 2002).
[26] Greenpeace, *Key Opportunities to Strengthen Public Participation in the CDM*, SB16 Briefing Paper 3-4 (June 2002), *available at* www.climnet.org/sbsta16/GPsb16-cdmpubpart.pdf (last visited July 16, 2002).
[27] Marrakech Accords, CDM rules, supra note 6, annex, para. 40(f).
[28] *Id.* para. 40(g).
[29] *Id.*

2. Registration phase

If the validating operational entity finds that a CDM project meets all the requirements of validation, the registration phase follows immediately thereafter. The registration of a CDM project results in the official recognition by the executive board of the proposed project activity as a validated CDM project.[30] If a review of the validation of the CDM project activity is requested by one of the project participants or by at least three members of the executive board, the results of the board's review and reasons for its decision to confirm or decline the registration of the project must be made publicly available.[31]

3. Verification phase

During the verification phase, the verifying operational entity conducts independent reviews of a CDM project to determine whether the project has achieved reductions in greenhouse gas emissions that would not have occurred in the absence of the project.[32] Two reports must be made publicly available during this phase: the monitoring report and the verification report.[33]

Prior to conducting the complete verification, the verifying operational entity must make the monitoring report publicly available.[34] Project participants must prepare the monitoring report according to the monitoring plan set out in the CDM rules. The CDM rules require project data, such as the amount of greenhouse gas emissions reduced, the manner by which the project baseline was determined, any potential sources of leakage (in which emissions reduction activities of the project result in additional emissions being produced somewhere else), and information pertaining to environmental impacts and the EIA (if required).[35]

The verifying operational entity will then complete the verification report, which must also be made publicly available upon completion.[36] The verification report will reflect the operational entity's findings in determining whether the project has met CDM requirements at each of its stages of development. The verifying operational entity must check if the project documentation and implementation were conducted according to the project design document and must review the monitoring results, methodologies, and documentation to confirm that the emissions reduced or sequestered

[30] *Id.* para. 36.
[31] *Id.* para. 41(b).
[32] *Id.* para. 61.
[33] *Id.* paras. 62, 63.
[34] *Id.* para. 62.
[35] *Id.* para. 53.
[36] *Id.* para. 62(h).

would not have occurred in the absence of the CDM project.[37]

### 4. Certification phase

Based on the findings of the verification report, the verifying designated operational entity will inform the project participants, the parties involved, and the executive board of its certification decision in writing and make this certification report publicly available.[38] The CDM rules currently provide no timeframe or manner in which the certification report should be made publicly available.

The certification report leads to the issuance of certified emission reductions (CERs), internationally tradable units representing emissions reductions accomplished by a project.[39] The parties involved in the project activity or three or more executive board members may request within 15 days a review of the proposed issuance of certified emission reductions.[40] If such a review is required, the executive board will perform it and then make its decision publicly available.[41] As with other CDM documents that are to be made publicly available, the process and timeframe under which the executive board will make its review of CER issuance remains undefined.

In addition to information that is related to, or required at, specific phases of a project, there are information access rules that apply more broadly to projects. These include rules related to confidentiality and the channels and timing of communication or notice to the public.

### 5. Confidentiality

CDM information that is marked as proprietary or confidential "shall not be disclosed without the written consent of the provider of the information, except as required by national law."[42] As with the situation regarding EIAs discussed above, this provision could allow project developers arbitrarily to withhold important information from public scrutiny, depending on the country in which the project is sited. This opportunity may induce some project developers to seek out those potential host countries with the weakest confidentiality laws.

Three types of information may not be considered proprietary or confidential and must instead always be made publicly available. These are information used to determine additionality,[43] information to describe the methodology for assessing the baseline for emissions,[44] and information to support an environmental impact assessment.[45] The rules place no other limitation on the types of information that CDM project participants may designate as confidential, nor is there presently any requirement that a project developer explain why it has designated information as confidential or provide notice that it has done so. Each operational entity is responsible for making all information obtained from project participants publicly available, subject to the confidentiality rules.[46]

### 6. Media, notice, and timing

The internet will likely serve as the primary channel of communication for all CDM project information. In January 2002, the UNFCCC secretariat launched a CDM website that presently features mainly executive board agendas and meeting reports, along with some information on baseline and additionality methodologies.[47] Since CDM rules do not specify the means by which project participants, operational entities, the executive board, and the secretariat must provide information, it is unclear whether other media will also be required for communications to stakeholders. The rules have not yet addressed how or whether culturally appropriate means of communication will be required to ensure that local communities without easy access to the internet will remain informed of CDM project development and implementation.

The rules also lack provisions for notification to stakeholders (including NGOs) when CDM documents become publicly available for informational or review purposes. Since almost all CDM information will become publicly available only after most decisionmaking has taken place, stakeholders may be unaware of, or excluded from, key stages of CDM policymaking and project development.

At the start of the 7th Conference of the Parties (COP7) climate negotiations in Marrakech, CAN con-

[37] *Id.* para. 62(a)-(h).
[38] *Id.* para. 63.
[39] *Id.* para. 64.
[40] *Id.* para. 65.
[41] *Id.* para. 65(c).
[42] *Id.* para. 27(h).

[43] Additionality is the difference in greenhouse gas emissions between a scenario with the CDM project and business as usual, i.e., without the project. Thus, additionality represents the reduction in emissions resulting from the CDM project, which may then offset excess emissions by another party.
[44] A baseline establishes or estimates what emissions would be in the absence of the CDM project, taking into consideration economic, political, and technical trends in the CDM host country.
[45] Marrakech Accords, CDM rules, supra note 6, annex, para. 27(h).
[46] *Id.*
[47] The UNFCCC CDM website is www.unfccc.int/cdm. More project-specific CDM documents are expected to be posted to the site once CDM projects are actually under way.

tinued to encourage parties to address the issue of confidentiality in the CDM in a manner that would ensure the public adequate access to information while also maintaining appropriate standards of business confidentiality. CAN presented suggested draft text that defined the term "publicly available" to mean not just availability on the UNFCCC website, but also "other methods that are consistent with the social and cultural context of the affected communities, including translation into the six UN languages and the appropriate local languages for the project site."[48] To date, neither the parties nor the executive board have explicitly addressed the manner and timeframe by which CDM documents must be made publicly available under the CDM rules.

## A. Databases and Registries

CDM rules require the executive board, secretariat, and each operational entity to maintain various databases and registries that will be available to the public.

### 1. Executive board

The executive board is required to develop and maintain a CDM registry that tracks the issuance, holding, transfer, and acquisition of "certified emission reductions."[49] All non-confidential information must be publicly available through the CDM registry maintained by the executive board. As in other parts of the rules, the terms "confidential" and "publicly available" are not elaborated for the CDM registry, and therefore leave room for confusion and inconsistency in their interpretations. The CDM registry provides an internet interface by which the public may query and view registry information and track the trading of CDM-certified emissions reductions.[50] The registry will use unique serial numbers to enable public identification of each account and certified emission reduction. These serial numbers will identify the CDM project activity, the party for which the registry account is maintained, the commitment period for which the certified emission reduction is issued, and the party that hosted the CDM project.[51] The CDM registry is currently the most well-defined of the publicly available information databases being created for the CDM.

The executive board must also maintain a registry of CDM projects.[52] While the CDM registry will track the trading of CDM-certified emissions reductions, the database of CDM projects is intended to include more detailed information on individual CDM projects. For each CDM project, the CDM project database will include information on the project design document, public comments received during the design and validation stage, the verification report, executive board decisions as applicable, and information on CDM credits issued.[53] Presumably the public will be able to query the CDM project database in a similar manner to the CDM registry. However, unlike the CDM registry, the rules do not explicitly provide for a publicly accessible query function for the database.

The executive board must also maintain a publicly accessible list of all designated operational entities it has accredited.[54]

### 2. Secretariat

The CDM rules mandate the UNFCCC secretariat to make two types of CDM information publicly available. First, the secretariat must maintain lists containing the names of those countries that are eligible to participate in CDM projects. These lists will include a list of developing countries that are party to the Protocol and a list of Annex I parties that have failed to meet the requirements for, or have been suspended from, CDM participation.[55]

Second, the secretariat must publish the recommendations by the executive board and the decision by the COP/MOP regarding the suspension or withdrawal of a designated operational entity's accreditation.[56] While the UNFCCC CDM website may be the most likely place for such information to be posted, the CDM rules offer no specific guidance on the timing, the manner, or the language in which such information will be made publicly available.

### 3. Designated operational entity

In addition to the project phase-specific documents discussed above, each designated operational entity must maintain a publicly available list of all the CDM projects for which that operational entity has carried out validation, verification, or certification.[57] The CDM rules are unclear as to the extent of information to be included in this list. Moreover, the relationship and potential interface between the CDM information provided on the UNFCCC CDM website and that of the operational entity's list have not yet been defined. The most effi-

[48] CAN non-paper, *Definition of "Publicly Available" in the CDM* (Nov. 2, 2001) (distributed to parties attending COP7 in Marrakech, Morocco).
[49] Marrakech Accords, CDM rules, supra note 6, annex, para. 5(*l*); *id.* app. D, para. 2.
[50] *Id.* app. D, para. 9.
[51] *Id.* paras. 5, 7.
[52] *Id.* para. 5(m).
[53] *Id.*
[54] *Id.* para. 20(c).
[55] *Id.*, annex, para. 34.
[56] *Id.* para. 21.
[57] *Id.* para. 27(f).

cient use of resources and most user-friendly presentation of the data would be realized by maintaining the various lists as separate pages on the UNFCCC CDM website and including numerous hyperlinks or other references between them and/or the individual data entries.

### B. Information Related to CDM Governance, Procedures, or Policy

In addition to maintaining the CDM registry and the CDM project database, the executive board must also publicly post and maintain a repository of CDM rules, procedures, methodologies, and standards once they are approved.[58] CDM rules do not yet elaborate detailed guidelines or requirements for the repository. Presumably, it will be available on the UNFCCC CDM Web site. Distributing it in CD-ROM format might also help expand availability of the information to stakeholders who have computer access but lack an adequate internet connection with which to download long documents.

Specifically with respect to the CDM rules that require the executive board to publish any new methodologies for baseline determination or monitoring that it has reviewed and approved, the full text of these and all other board decisions must be made publicly available in the six official UN languages.[59] This is the only provision in all of the CDM rules that requires any information to be made publicly available in any language other than English. While publication of executive board decisions in the six UN languages may be an important way to enable non-English speaking stakeholders to follow the CDM process, it will not ensure any meaningful participation at the early stages of project development or in the executive board's decisionmaking processes because the rules do not give stakeholders any opportunity to provide further comment on, or request a review of, the issue at hand once the executive board has taken its decision.

There are also several general provisions that require the executive board to report on its work and that call on the Convention's COP or the Protocol's COP/MOP to review the CDM. The executive board must "report on its activities" to each session of the annual COP/MOP.[60] The CDM rules do not define the executive board's report as an official UN document requiring translation into the six UN languages or as a less formal submission to be publicly released in English only. The scope of information presented in the executive board's reports is unclear because the board's reporting requirements deal with process only; they do not yet specifically refer to content or time frames.

As the previous sections have illustrated, the CDM rules for transparency and access to information are currently inadequate to ensure meaningful participation of stakeholders. It is therefore even more important that the overall reporting and review procedures for the CDM be clearly defined and appropriately disseminated. While such general CDM reporting is not, by itself, an adequate means of providing information to stakeholders, it could help inform interested members of the public who are unaware of the implementation of a particular CDM project.

In the CDM decision taken in Marrakech, the COP assigned itself the duty to assess "progress made regarding the [CDM] and to take appropriate action, as necessary."[61] The parties in Marrakech agreed upon a draft decision to be adopted at the first COP/MOP that convenes after the Protocol enters into force. This draft COP/MOP decision provides that the first review of the modalities and procedures for the CDM "shall be carried out no later than one year after the end of the first commitment period" (2008-2012), and that "further reviews shall be carried out periodically thereafter."[62] The COP/MOP will also be responsible for reviewing the executive board's annual reports and the geographic distribution of operational entities and CDM projects.[63]

The CDM rules as they currently stand risk excluding stakeholders from the CDM process by failing to make key information available, making it available too late, and using culturally inappropriate modes of communication to notify and inform stakeholders of CDM governance developments. The CDM rules make no mention of how project information will be communicated to local stakeholders early during a CDM project. As the World Resources Institute (WRI) has observed, a number of international financial institutions, such as the members of the World Bank Group, have come to appreciate the value that public access to information and public involvement at the early stages of project development add to the overall success of a project.[64] WRI suggests measures such as translating project documents into local languages, holding meetings in communities that may be affected by the project, and giving stakeholders an opportunity to provide their input orally or in writing.[65] However, the CDM does not require project participants to translate documents into local languages or convene community meetings to gather feedback from stakeholders.

Rather than encourage local stakeholder engagement during the early stages of project development and dur-

[58] *Id.* para. 5(k).
[59] *Id.* para. 17.
[60] *Id.* para. 5(c).
[61] Marrakech Accords, Decision 17/CP.7, para. 19.
[62] Marrakech Accords, Draft decision -/CMP.1 (Article 12), para. 4.
[63] *Id.*
[64] *See id.* paras. 2-3.
[65] *Id.*

ing CDM policymaking processes, all CDM documents become publicly available only after CDM decisionmaking has taken place. The only exceptions are the project design document and the validation report, which could potentially be revised in response to public comments received.

At the June 2002 climate negotiations in Bonn, Germany, CAN urged the CDM executive board to address public participation proactively by including it as an official agenda item for the next board meeting.[66] Though the executive board has not, at the time of this writing, agreed to add public participation to its next meeting agenda, the board chairman offered to raise CAN's points for discussion at the next meeting.

## III. PUBLIC PARTICIPATION IN DECISION-MAKING

While the CDM rules relating to access to decisionmaking begin in a broad, promising way, they ultimately allow only a limited role for the public to influence how a project will be developed. The rules define "stakeholders" as "the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity."[67] This definition of stakeholder does not encompass as wide a spectrum of individuals and organizations as does the Aarhus Convention or other international instruments;[68] nevertheless, it potentially creates a significant platform from which the public may gain access to, and participate in, the development and implementation of CDM projects.

The rules pertaining to public participation in decisionmaking, however, currently contain numerous gaps that could leave that potential unrealized. These gaps include a failure to specify how or when stakeholder comments on projects should be solicited; a lack of clarity as to what standards validating operational entities should apply in deciding whether project participants satisfy the notice and comment provisions under the rules; no guidance as to where, when, or how the validating operational entity must make the project design document publicly available; uncertainty about the applicability of EIA requirements; and confusion regarding how the executive board will comply with the requirement that its meetings be open to attendance by NGO observers.

### A. Project-Specific Opportunities for Participation

CDM rules establish two mandatory and two optional opportunities for stakeholders to comment on projects. The mandatory opportunities occur early in the development phases of a CDM project, namely the project proposal and validation phases. If stakeholders miss these initial opportunities for comment, there may be no other chance to provide input into a CDM project at a later stage.

#### 1. Mandatory public comment periods

The first mandatory public comment period occurs during the preparation of the CDM project design document.[69] Project participants must invite local stakeholders to provide comments on the proposed CDM project.[70] The rules do not specify how project participants should extend this invitation; however, the project design document must include a brief description of the process by which the comments were solicited.[71] The project design document must also include a summary of the comments received and a report on "how due account was taken of [them]."[72] While this latter provision is important, the lack of any clear guidelines on how the invitation to local stakeholders should be extended could result in few, if any, local stakeholder comments being received, which would render moot the requirement to take "due account" of them.

The validating designated operational entity must review the project design document to confirm that the project participants complied with these requirements and invited the local stakeholders to comment. If the operational entity finds that the project design document fails to include any of the requirements, the document cannot be validated.[73] The manner in which each operational entity implements this validation rule may thus be critical in determining how effective the public com-

[66] CAN Non-paper, *Key Public Participation Points for Consideration at EB4* (June 9, 2002) (distributed to CDM executive board members and parties attending SB16 in Bonn, Germany), *available at* www.climnet.org/sbsta16/CDMpp.pdf (last visited July 16, 2002). *See also Elaborate, don't Renegotiate*, ECO, *supra* note 15.

[67] Marrakech Accords, CDM rules, supra note 6, annex, para. 1(e).

[68] Article 2, Paragraph 5 of the Aarhus Convention (relating to public participation in decisionmaking) reads: "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, nongovernmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest." *See also* Svitlana Kravchenko, *Aarhus, Espoo, and London: Promoting Public Involvement In the UN/ECE Region*, in this volume.

[69] Marrakech Accords, CDM rules, supra note 6, annex, app. B. (As discussed earlier in this chapter, the project design document is a detailed technical description of the proposed project, prepared by the project participants and reviewed by the validating operational entity as part of the project validation process).

[70] *Id.* para. 34(b).

[71] *Id.* app. B, para. 2(g).

[72] *Id.* para. 37(b).

[73] *Id.* para. 40(f).

ment period is in providing a genuine opportunity for local stakeholder involvement. For example, if the operating entity is willing to sign off on the project design document so long as it includes any description of how the project participants solicited and took comments into account, then project participants could circumvent the intent of these rules. On the other hand, the operational entity could give the rules teeth by requiring participants not only to supply the information but also by requiring the information to demonstrate substantively that the project participants took steps to ensure that local stakeholders had a meaningful opportunity to provide their opinions and comments on the project. Moreover, the operational entities could make the rules stronger by taking steps to verify with local stakeholders that the information supplied does, in fact, reflect what the project participants actually did.

The second mandatory public comment period occurs when the validating operational entity releases the project design document. The validating operational entity must make the design document publicly available for comment prior to submitting it to the executive board for final validation and registration.[74] Stakeholders, UNFCCC-accredited NGOs,[75] and parties have 30 days after the release of the design document to provide their comments.[76] The CDM rules offer no guidance on where, when, or how the validating operational entity must make the project design document publicly available.

The validating operational entity must make all of the comments it receives publicly available.[77] Again, the term "publicly available" is not defined to explain how, when, or where the documents must be made available. There are no rules yet regarding how stakeholders will be notified of the start of this comment period, and there are also no details on how the project design document will be made available to interested stakeholders and parties. The most likely medium will be by posting it on the internet. However, it is unclear whether the validating operational entity will post the design document on its own website, and whether the executive board or UNFCCC will provide a tracking database or schedule to help stakeholders stay informed of current public comment periods.

At the close of the validation public comment period, the validating operational entity must decide whether to propose to the executive board that it validate the CDM project, based upon the information in the project design document and taking into account the comments that have been received.[78] In submitting its validation report to the executive board, the validating operational entity must also explain how it took due account of all the comments it received.[79]

### 2. Additional Public Comment Opportunities Potentially Available

Additional public participation may be required if an environmental impact assessment (EIA) is performed or if the verifying operational entity elects to include interviews with local stakeholders when conducting an on-site inspection.

As discussed earlier in this chapter, an EIA is required in the initial development stage of a CDM project only if the environmental impacts "are considered significant by the project participants or the host party."[80] It is difficult to assess at this point how much additional information and input stakeholders may gain through this rule. First, the EIA requirement depends upon a finding of "significant" environmental impacts by interested parties, rather than an independent third party. The rules provide no guidance on what types or scale of environmental impacts should be deemed "significant." Second, the procedures for public input into the EIA process may vary depending on where the proposed project is sited. If the project participants or host party decide that an EIA is warranted, they must undertake it "in accordance with procedures as required by the host party."[81] Climate Action Network members have interpreted this provision to require a standard EIA procedure according to the host country's national laws. However, the CDM rules offer no alternative in situations in which the host country lacks mandatory EIA procedures. Moreover, the rules do not establish any process to ensure that the CDM project participants comply with the required host party's EIA procedures. The national EIA laws of CDM host countries can and should be an important safeguard of the right of local stakeholders to participate in project decision-making. However, the failure of CDM rules to provide some consistent, minimum EIA standards could create an incentive for some project developers to seek CDM host countries with the weakest EIA laws or practices.

The remaining potential public comment period occurs during the verification phase of a CDM project. The verifying operational entity may conduct on-site inspections of a CDM project during the process of verification. As part of the on-site inspections that a verifying operational entity may or may not elect to under-

[74] *Id.* para. 40(a).

[75] The UNFCCC secretariat grants accreditation to NGOs generally working on climate change issues. Accreditation also requires approval by parties, although parties rarely object to the accreditation of a requesting NGO. *See* Glenn Wiser, *Transparency in 21st Century Fisheries Management*, 4 J. INT'L WILDLIFE L. & POL'Y 95, 109 (2001).

[76] Marrakech Accords, CDM rules, supra note 6, annex, para. 40(c).

[77] *Id.*

[78] *Id.* para. 40(d).

[79] *Id.* para. 40(f).

[80] *Id.* para. 37(c).

[81] *Id.*

take, the operational entity may conduct interviews with local stakeholders.[82] The CDM rules offer no additional guidance on the process for such interviews nor suggestions for criteria in determining when they might be appropriate. There is also no notification procedure to alert the public that a CDM project is being verified. The only public notification currently required during the verification phase regards the release of the project monitoring report that the verifying operational entity is required to publish sometime during the verification stage.[83]

### B. Opportunities for Participation at the Programmatic Level

Opportunities for direct public participation in the further elaboration of CDM policies and procedures are extremely limited. Subject to the authority of the COP/MOP, the CDM executive board will be the primary entity responsible for CDM-rulemaking.[84] Though the executive board is required to make all of its decisions publicly available in the six UN languages, minimal public participation or input is invited into the CDM decision-making process under the CDM rules as currently elaborated.[85] In particular, no public participation is required prior to executive board decisionmaking. Accordingly, the only opportunity available for interested stakeholders to try to influence the development of new CDM rules may be through their informal contacts with national government officials before the COP/MOP ratifies the executive board decision. However, because the COP/MOP's approval of these board decisions will likely be pro forma in most instances, this participation opportunity may generally be ineffective.

The CDM rules do require CDM executive board meetings to be "open to attendance" by parties and NGO observers, unless the executive board decides otherwise.[86] At the last two executive board meetings in April and June 2002, observers were provided space in a separate room where they were allowed to watch the executive board meetings on a closed-circuit broadcast that was also webcast simultaneously. That represented a marginal improvement over the earlier executive board meeting in January, in which no space was provided on-site for any observers. The only option for observers then was to view the webcast, which requires advanced viewing software and a high-speed internet connection and thus is not practically available to many interested stakeholders, especially those in developing countries.

There is one public comment period that relates to executive board decisionmaking. Public comment is required for all technical reports that the board commissions. The public will have at least eight weeks to provide input on draft methodologies and guidance before documents are finalized or recommendations are put forward to the COP/MOP for their consideration.[87] There are no provisions yet for notification of this public comment period on technical reports. However, it is likely the executive board will post the draft technical report on the secretariat's CDM website for comment, as other executive board-commissioned papers have recently been posted.

While the Climate Action Network was initially encouraged when this provision was added to the CDM rules in Marrakech, recent elaboration on the details of the technical reports indicates that the executive board may, in fact, attempt to avoid opening technical reports up to public comment. The draft rules of procedure for the executive board define "technical reports" as all reports commissioned by outside experts, except reports of the CDM technical panels.[88] Since a sizeable percentage of technical reports could be prepared by the CDM technical panels, the Climate Action Network urged the executive board to consider the valuable input from stakeholders and parties who do not have representatives on the executive board, which would be excluded if this provision of the draft rules of procedure is adopted as currently written.[89]

## IV. Access to Justice

The CDM currently does not provide stakeholders any opportunities to seek redress if authorities fail to comply with their duties to provide access to information or participation in decisionmaking. Moreover, unlike the World Bank Inspection Panel or the Compliance Ombudsman of the International Finance Corporation and the Multilateral Investment Guaranty Agency, the CDM has no mechanism allowing local stakeholders to register complaints about the procedures or impacts of specific projects.

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[82] *Id.* para. 62(b).
[83] *Id.* para. 62.
[84] *Id.* para. 5.
[85] *Id.* para. 17.
[86] *Id.* para. 16.
[87] *Id.* para. 5(j).
[88] "Draft rules of procedure of the executive board of the Clean Development Mechanism" (version 21-01-02, 10:58), § II, para. 12.
[89] *Elaborate, don't Renegotiate*, ECO, *supra* note 15. The ten members and ten alternates of the executive board are nominated by parties from each of the five United Nations regional groups and the small island developing states. Marrakech Accords, CDM rules, supra note 6, annex, para. 7. Though the rules stipulate that they will serve in their personal capacities, most parties view the members as de facto representatives of their respective governments, so that Protocol parties who do not have an executive board member, or governments that are not party to the Protocol, will have participatory rights in executive board decisionmaking that are closer to those of NGO observers than to parties who have representatives on the board.

Nevertheless, the CDM rules adopted in Marrakech do include a few placeholders for the possible, future adoption of procedures that could provide stakeholders with varying rights of redress.

One of the most important placeholders could enable stakeholders to trigger—indirectly or possibly even directly—a review of a CDM project. CDM rules presently do not provide for any stakeholder-triggered review of projects during their development or implementation. Yet the executive board (at the request of three or more members) or a state party involved in a CDM project may demand project reviews either at the time a project is registered or when certified emissions reductions are issued.[90] At COP7 in Marrakech, parties inserted an important placeholder into the rules that requires the executive board to elaborate procedures to include stakeholder input into these two review options: the executive board shall "elaborate and recommend to the COP/MOP for adoption at its next session procedures for conducting the [two] reviews, including *inter alia*, procedures to facilitate consideration of information from Parties, stakeholders and UNFCCC accredited observers."[91] At the very least, the board could recommend that stakeholders be able to provide relevant information after a review is triggered. The board could bring the CDM closer to accord with the practices of international financial institutions, such as the World Bank Group, by recommending that stakeholders have the right to provide information that could directly trigger a review or commence a process that ultimately leads to a review.

Another access-to-justice placeholder may be found in the rule that permits a verifying operational entity to seek input from local stakeholders if it conducts an on-site inspection of a CDM project. The rules provide that the verifying operational entity shall conduct on-site inspections, "as appropriate," that may include interviews with project participants and local stakeholders.[92] Depending on how these rules are interpreted and the practices that emerge under them, local stakeholders could use this opportunity to register substantive or procedural complaints about a project. However, it will be important that operational entities receive detailed guidance regarding when, exactly, it is "appropriate" for them to conduct the on-site inspections and interview stakeholders. Without such guidance, the opportunities for local stakeholders to express their views on a project could depend on the whim of whatever operational entity has jurisdiction over it.

The rules for reviewing the accreditation of an operational entity also fail to allow for stakeholder input. Given the central role that operational entities will play in the different phases of CDM projects, their performance will have significant impacts on the integrity of projects. The executive board has prepared a draft technical paper that details procedures for accreditation of operational entities. Significantly, in the section addressing unscheduled surveillance, or spot-checks, of operational entities that may be initiated by the executive board, the current draft would allow spot-checks to be triggered by "a written complaint regarding the failure of a designated operational entity to comply with its terms of accreditation by another designated operational entity and/or NGOs accredited with the UNFCCC."[93]

## V. CONCLUSION

The CDM decision from Marrakech outlines a work plan for the executive board to complete by COP8, which will be held in Delhi in November 2002. This work plan includes specific tasks such as accrediting designated operational entities and developing draft rules of procedure. However, the work plan also includes a catch-all paragraph mandating the board to "prepare recommendations on any relevant matter … for consideration by [COP8]."[94] This broad provision gives the executive board the flexibility to add the issues of transparency and public participation to its agenda and to ensure that the CDM lives up to its potential as an instrument for environmental protection and sustainable development that can bring long-term benefits for people throughout the Global South.

This chapter has identified gaps in the existing CDM rules that could result in a significant narrowing of opportunities for local stakeholders, NGOs, and other interested members of the public to be informed of, and participate meaningfully in, CDM decisionmaking processes. While it may be understandable that these gaps exist at this early stage of CDM implementation, they are worrisome because project developers and governments are planning and initiating CDM projects now[95] and because the Protocol allows back-dated crediting of emissions reductions accomplished by projects beginning in the year 2000.[96]

[90] Marrakech Accords, CDM rules, supra note 6, annex, paras. 41, 65.
[91] *Id.* para. 5(*o*).
[92] *Id.* para. 62(b).
[93] Technical Paper (Revision 1), *Detailed Procedures to Operationalize the Accreditation of Operational Entities* (Version: 25-03-02, 4:09), para. 59(c), *available at* www.unfccc.int/cdm (last visited July 16, 2002).
[94] *Id.*
[95] For example, the World Bank's "Prototype Carbon Fund" has already completed preparations for two planned CDM projects, including the negotiation of "emissions reductions purchase agreements" with the host governments. *See* Prototype Carbon Fund, "List of Projects," *available at* http://prototypecarbonfund.org/router.cfm?Page=ProjList (last visited July 10, 2002).
[96] Protocol, supra note 1, art. 12.10.

Moreover, the lack of any opportunities for stakeholders to initiate complaints about a project (beyond any existing procedures under the national law of the host country) render the CDM out of step with emerging principles of international law as exemplified by the Aarhus Convention and with established practices of international financial institutions, such as the World Bank Group.

To remedy these shortcomings, we recommend that the CDM executive board develop, and the COP (or Protocol's COP/MOP) approve, a "Good Practice Manual for Public Consultation and Disclosure." This good practice manual would optimally address the gaps we have identified as well as others that may emerge and would provide project participants, operational entities, the executive board, the UNFCCC secretariat, and the general public with specific guidance on how to incorporate effective public involvement in all phases of CDM project development and implementation. The executive board should commit to developing the good practice manual immediately to minimize the number of CDM projects that are developed without its guidance. During the time when the manual is being developed, the executive board should address the CDM public participation gaps on an interim basis. Such steps should include providing clarification to operational entities that, when verifying the project design document, they should ensure not only that project participants have supplied the required information about public participation and comments, but also that the information demonstrates that stakeholders were given a genuine opportunity to participate meaningfully and that their concerns were in fact taken into account.

Additionally, the executive board should immediately begin to study and consider the establishment of a watchdog mechanism for CDM projects analogous to the World Bank's Inspection Panel or the Compliance Ombudsman of the International Finance Corporation and the Multilateral Investment Guaranty Agency. While neither of these bodies has a direct enforcement mandate, they do provide important fora in which stakeholders may seek redress if they believe they are being harmed by a project participant's failure to abide by the rules. The CDM, which is dedicated to assisting developing countries in their quest to achieve sustainable development, should offer an opportunity to stakeholders that is at least as vigorous as the bodies of these international financial institutions. The establishment of such a body would improve the quality of CDM project decisionmaking by increasing incentives for project participants to take the needs and views of stakeholders into account. Of equal importance, by fostering an expectation that CDM project participants may be held accountable for ensuring adequate involvement by the public, it would strengthen overall public support for the CDM and increase its prospects for success.