

A Complaint System under the Climate Change Financial Mechanism: Using the GEF and the CDM as Examples

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A complaint system under the climate change financial mechanism (CCFM) will be critical if such a mechanism is to be perceived as legitimate. CCFM can adopt a wide range of institutional design options, depending on scale, sources of funding, and types of activities funded. The need for and institutional design of a complaint system will accordingly depend on the specific design choices. By using the Global Environment Facility (GEF) and the Clean Development Mechanism (CDM) as examples, this article will focus on one specific type of CCFM—multi-lateral CCFM for project-lending purposes with multi-stakeholders—and put forward several recommendations for the design of its complaint system.

I. Introduction

Estimates of the cost to address climate change in developing countries vary substantially from \$480 billion to US\$1.5 trillion per year.¹ Meanwhile, according to “The Global Landscape of Climate Finance 2014”, annual global climate finance flows are estimated to reach approximately US\$331 billion in 2013.² This clearly shows the importance and urgency of scaling up climate finance via the various types of climate change financial mechanisms (CCFM). The institutions entrusted with managing new flows of climate finance need to be perceived by both contributors and recipients as legitimate if they are to succeed in raising resources and investing these resources effectively.³ The legitimacy of a financial mechanism from the perspective of its gov-

ernance has been analysed along three dimensions: power, responsibility and accountability.⁴ Whether grievance and inspection mechanisms, i.e. a complaint system, are in place to ensure that standards are followed is one of the criteria to gauge whether the financial mechanism is accountable.⁵

Complaint mechanisms⁶ have been adopted by many international financial institutions (IFIs) such as the World Bank and regional development banks to respond to increasing demand for accountability.⁷ A complaint mechanism, in the context of these IFIs, can be defined as: “an independent mechanism that investigates complaints from affected people who allege either one or both of the following: that they have been harmed or will be harmed by an operation of an international organization, and that the harm has been caused by the failure of the organization to

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1 Smita Nakhooda, “How Much Money is Needed to Deal with Climate Change”, Thomson Reuters Foundation, 1 August 2012, available on the Internet at: <<http://www.trust.org/item/?map=how-much-money-is-needed-to-deal-with-climate-change>> (last accessed: 7 May 15).

2 Barbara Buchner et al., *The Global Landscape of Climate Finance 2014* (San Francisco, CA: Climate Policy Initiative, 2014).

3 Athena Ballesteros et al., *Power, Responsibility, and Accountability: Re-thinking the Legitimacy of Institutions for Climate Finance* (Washington, DC: World Resource Institute, 2010).

4 *Ibid.*, at 4-6.

5 *Ibid.*, at viii.

6 Note that terms such as grievance mechanism, inspection mechanism, accountability mechanism, appeal mechanism are used interchangeably in the relevant literature.

7 Daniel D. Bradlow, “Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions”, 36 *Georgetown Journal of International Law* (2005), 403, at 403-409.

follow its own operating rules and procedures in the operation".⁸ CCFM such as the Global Environment Facility (GEF) plays a similar function to that of these IFIs. It is thus not surprising that whether a complaint system is in place is one of the criteria to determine whether a CCFM is accountable. On another front, CCFM such as the Clean Development Mechanism (CDM) channels resources from the private sector and interact directly with private sector participants in their governance structure. For example, decisions made by the Executive Board of the CDM will affect the interests of project applicants, many of which are private sector actors. As this distinctive feature closely resembles a global administrative body, criticisms concerning the lack of procedural safeguard and due process, including access to a complaint system, have been mounting. As a response, negotiations concerning the establishment of an appeal mechanism under the CDM were mandated by the fifth Conference of the Parties serving as the meeting of the Parties (MOP/COP) to the Kyoto Protocol in 2009.

CCFM encompasses a wide range of institutional design options depending on its scale, sources of funding, and types of activities funded. The need for and institutional design of a complaint system will accordingly differ. For example, CCFM operating at the national level⁹ can use the existing domestic institutions such as the courts or administrative review bodies as their complaint mechanism. CCFM for policy or programme lending purposes¹⁰ might not find it necessary to have a complaint mechanism as the impact on individuals might be less discernable considering the scale of activities, for example sectoral policies or strategies, that are being funded. However, multilateral CCFM for project-lending purposes, such as the GEF or the newly established Green Climate Fund, will need to consider the need for a complaint mechanism to address the concerns of affected local communities and non-governmental organisations (NGOs). A CCFM that relies on private sector sources to fund project activities, such as the CDM and Joint Implementation under the Kyoto Protocol, will also need a complaint system to give confidence and assurance to the private sector. Furthermore, as this article will demonstrate, multilateral CCFM with multi-stakeholders, such as the CDM, whose operation involves, directly or indirectly, more than one institution, or whose operation faces conflicting stakeholder interests, will face a more dif-

ficult challenge in designing a single complaint system. By using the GEF and the CDM as examples, this article intends to illustrate the controversies and complexities of designing a complaint system under such types of CCFM. Part 2 and Part 3 will respectively introduce the existing/proposed complaint system of the GEF and the CDM, i.e. the World Bank Inspection Panel and the proposed CDM appeals body. Part 4 will compare the World Bank's Inspection Panel with the proposed CDM appeals body. Based on these findings, Part 5 will point out specific complexities in the institution design of a complaint system under the CDM more specifically, as well as under one specific type of CCFM, i.e. multi-lateral CCFM for project-lending purposes with multi-stakeholders.

II. The World Bank Inspection Panel: A Complaint System for the GEF

1. The Inspection Panel as the Complaint System for the GEF

In response to the concerns with the efficiency of the Bank's work, as well as criticisms regarding the Bank's inadequate attention to the standards reflected in its rules,¹¹ the Executive Directors adopted the "Resolution establishing the Inspection Panel (No. 90-13 for the International Bank for Reconstruction and Development (the IBRD) and 93-6 for the International Development Association (the IDA))" (the "Resolution") in September 1993. The Inspection Panel was, thus, formally established.

According to paragraph 12 of the "Resolution", an affected party as a group or its local representative,

8 Ibid., at 410.

9 For example, many national climate funds have been set up domestically. See: Cassie Flynn, *Blending Climate Finance Through National Climate Fund: A Guidebook for the Design and Establishment of National Funds to Achieve Climate Change Priorities* (New York, NY: United Nations Development Programme, 2011).

10 For example, the programmatic approach adopted by the Global Environment Facility in 2008. GEF, *Adding Value and Promoting Higher Impact through the GEF's Programmatic Approach*, 2009, available on the Internet at: <http://www.thegef.org/gef/sites/thegef.org/files/publication/Programmatic_Approach.pdf> (last accessed: 7 May 15).

11 Ibrahim F.I. Shihata, *The World Bank Inspection Panel* (Oxford: Oxford University Press, 1994), at 5-9.

foreign representative of such a party in exceptional case and subject to the approval of the Executive Directors, and Executive Directors individually or acting as a Board, are eligible to request the Panel review. According to the same paragraph, the Panel can only review “requests related to actions or omissions of the Bank which demonstrate a failure by the Bank to follow its own operational policies and procedures with respect to the design, appraisal or implementation of a Bank-supported project.”¹² Operational policies and procedures¹³ are documents that “constitute instructions from the Bank management to its staff”.¹⁴ These documents are not policy papers submitted to the Board for approval. Only a small number of operational directives, including those on environmental assessment, poverty, and procedures for investment operations under the GEF, were discussed in draft in Board seminars before their issuance by Management because of the sensitivity or complexity of their subject matter.¹⁵

The procedures of the Panel, including the initiation of a request by eligible parties, investigation by the Panel, and follow-up action, are clearly stipulated in paragraphs 16—23 of the “Resolution”. In the

case of a request by an affected party or by one or more Executive Directors, the Panel must first determine whether its investigative function can be exercised. Any further action by the Panel will depend on the Board’s decision.¹⁶ After ascertaining the eligibility criteria and having reviewed all relevant documentations, the Panel may make a recommendation to investigate or not to investigate. The Panel’s recommendation to investigate needs to be authorised by the Board. The investigation phase, which is the substantive phase of the inspection process when the Panel evaluates the merits of the Request, begins if the Board approves the Panel’s recommendation to investigate.¹⁷ The Panel will submit its investigation report to the Board and the Bank Management will have six weeks to submit its report and recommendation in response to the Panel findings. The Board, having considered both the Panel’s investigation report and the Management’s recommendations, will decide whether to approve the Management’s recommendation that are intended to bring the project into compliance with the Bank policies and procedures.¹⁸

The “Resolution” explicitly states in paragraph 28 that its work covers both the IBRD and the IDA. The “Resolution” does not specifically mention whether the inspection function applies to the Bank’s activities as the trustee and main implementing agency of the GEF.¹⁹ The issue was not raised during the discussion of the proposal to establish the Panel. However, according to Ibrahim Shihata, a lead author on international development law and a former general counsel of the Bank, it seems that “the exclusion of GEF activities would run counter to the purpose of its establishment and would unduly restrict the scope of its coverage.”²⁰

In practice, complaints regarding projects funded by the GEF did arise before the Panel. For example, in the case of the *Ecodevelopment Project* in India,²¹ a project co-financed by the GEF, the Panel commented on the Bank’s departure from the GEF guidelines without indicating that it needed a specific authorization to investigate this matter.²²

In fact, as of February 2015, 5 out of the total 102 cases²³ in front of the Inspection Panel were projects funded (wholly or partly) by the GEF. Nearly all of these cases are brought by the affected parties.²⁴ These cases are mostly being challenged because of the alleged failure of the Bank Management to comply with the following safeguards policies and pro-

12 Ibid, at 41.

13 Detailed information is available on the Internet at: <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,menuPK:64142516~pagePK:64141681~piPK:64141745~theSitePK:502184,00.html>> (last accessed: 7 May 15).

14 Shihata, *World Bank Inspection Panel*, supra, note 11, at 42.

15 Ibrahim F.I. Shihata, *The World Bank Inspection Panel in Practice* (2nd ed.)(Oxford: Oxford University Press, 2000), at 41-42.

16 Shihata, *World Bank Inspection Panel*, supra, note 11, at 72.

17 Detailed information is available on the Internet at: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTION-PANEL/0,,content-MDK:20173251~menuPK:568196~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>> (last accessed: 7 May 15).

18 Ibid.

19 Shihata, *Inspection Panel in Practice*, supra, note 15, at 34.

20 Ibid.

21 Detail information is available on the Internet at: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTION-PANEL/0,,content-MDK:22515703~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>> (last accessed: 6 May 15).

22 Shihata, *Inspection Panel in Practice*, supra, note 15, at 35.

23 All the Inspection Panel cases are available on the Internet at: <<http://ewebapps.worldbank.org/apps/ip/Pages/AllPanelCases.aspx>> (last accessed: 6 May 15).

24 In the Parana Biodiversity Project, the requester asked to remain confidential.

cedures: Operational Policies and/or Bank Procedures on environmental assessment, physical cultural resources, natural habitats, forestry, indigenous people, and involuntary resettlement. Three of the five cases did not reach the investigation phase. In the 1998 India *Ecodevelopment* Project, the Board did not approve to initiate investigation despite the recommendation by the Panel. In the 2004 Mexico *Indigenous and Community Biodiversity* Project, the Panel decision on whether to investigate was deferred. In the 2006 Brazil *Parana Biodiversity* Project, the Panel did not recommend an investigation. In the two cases where investigations were undertaken, the 2009 Peru *Lima Urban transportation* Project and the 1999 Kenya *Lake Victoria Environmental Management* Project, the Panel concluded in both cases that the Bank was not in compliance with some of its own policies and procedures.

2. The World Bank's Bio Carbon Fund/CDM project before the Inspection Panel

As previously indicated, whether project funded by the trust funds administered by the Bank can have access to the Inspection Panel is not regulated in the "Resolution". In practice, however, such projects are indeed being subject to the jurisdiction of the Panel. The GEF cases were examples. In addition to the GEF Trust Fund, the World Bank also administered several so-called "carbon funds".²⁵ These trust funds raise money from both the governments and the private sectors and, on behalf of the contributors, purchase project-based greenhouse gases (GHGs) emissions reduction credits in developing countries and economies in transition. These GHGs emissions reduction credits include CERs generated out of a CDM project. According to the Bank, these carbon funds do "not lend or grant resources to the project, but rather contracts to purchase emission reductions similar to a commercial transaction, paying for them annually or periodically once they have been certified by a third party auditor."²⁶

In 2012, the Inspection Panel received a Request concerning a CDM project supported by the Bank's Bio Carbon Fund in India: the *Improving Rural Livelihoods through Carbon Sequestration*. The main concern of the Requesting party is the delay in payment of carbon revenue due to them under this Project.

The Bank Management has questioned the eligibility of the requester to file the request.²⁷ Nevertheless, the Inspection Panel determines that the Request "meet the technical eligibility criteria set forth in the Resolution that established the Inspection Panel and the 1999 Clarifications".²⁸ But the Inspection Panel did not recommend an investigation as the Panel did not find any indication of potential serious non-compliance by the Management "that contribute to delays in the verification and any resulting underestimation of the volume of CERs" or "that may have caused delays in the delivery of carbon revenue".²⁹

This project was also a CDM project, which makes it interesting to compare the Inspection Panel procedures with the proposed appeal body under the current CDM reform debate, as Part 5 will demonstrate.

III. Appeal Procedures Proposed Under the CDM

1. Discussion on the Establishment of an Appeal Procedure under the CDM

The private sector has unprecedented access to the CDM process, which is essentially an inter-governmental platform.³⁰ Private sector participants in the CDM project include, but are not limited to, project participants and designated operational entities (DOEs). Under the rules and practices of the CDM, the Executive Board "is the *de facto* regulator of the CDM, and in playing this role, it makes decisions

25 Detail information is available on the Internet at: <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTCARBONFINANCE/0,,contentMDK:21842339~menuPK:5213558~pagePK:64168445~piPK:64168309~theSitePK:4125853,00.html>> (last accessed: 6 May 15).

26 Ibid.

27 Paras 6-8 of the Management Response, which is available on the Internet at: <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Management_Response_India_ImprovingRuralLivelihoodsProject.pdf> (last accessed: 6 May 14).

28 Para. 64 of the Eligibility Report, which is available on the Internet at: <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Report&Recommendation_IndiaImprovingRuralLivelihoodsProj.pdf> (last accessed: 6 May 14).

29 Para. 66 of the Eligibility Report.

30 Jolene Lin & Charlotte Streck, "Mobilising Finance for Climate Change Mitigation: Private Sector Involvement in International Carbon Finance", 10 *Melbourne Journal of International Law* (2009), 70, at 82-85.

that affect the rights and interests of private entities.”³¹ Decisions made by the Executive Board can have massive financial consequences for these private sector participants. According to some commentators, the CDM is “an international administrative scheme, directly regulating the participants and encompassing sovereign functions, thus by defaulting limiting national participation and engaging private actors beyond the restraints of national interference.”³² As the Executive Board is akin to a global administrative body,³³ criticisms concerning the lack of procedural safeguards and due process in the practices of the Executive Board have been mounting.³⁴ As Lin & Streck argue, “If market-based global regulatory systems are to succeed, they must provide market participants with regulatory and legal certainty, including opportunities for independent review of decisions and timely resolution of disputes.”³⁵ Consequently, many legal scholars have argued for the creation of an independent panel to review claims by private entities against decisions of the Executive Board.³⁶ This is also the main reason behind the negotiation of an appeal procedure in the CDM process.

In addition to the private sector participants, academic discussion also highlighted that stakeholders in the CDM process include the local communities where the CDM projects are located. The livelihoods and human rights of these local stakeholders might

also be affected by the construction and implementation of the CDM projects. “If the COP/MOP accepts the argument that the Executive Board should be held publicly accountable for its decision, then the ‘public’ to hold it accountable should arguably include those communities that the CDM is intended to benefit, and not just the developers and investors who voluntarily participate in the mechanism,”³⁷ argues one commentator. From the perspective of local stakeholders, the CDM rules and practices relating to access to information, public participation in decision making, environmental impact assessment, and access to justice are inadequate in terms of providing procedural safeguards.³⁸ To improve the performance of the CDM, such as integrating local stakeholder’s needs, reducing environmental impacts, and contributing to sustainable development, stakeholders and NGOs should also be granted access to the impending CDM appeal procedures in order to challenge the registration of CDM projects and the issuance of CERs.³⁹

As can be shown, most of the academic discussion, mainly from the perspective of global administrative law, focuses on the establishment of an appeal procedure for the private sector participants. On the other hand, local stakeholders also should have the right to have access to the appeal procedure in the event that the implementation of the CDM project affect their livelihood, human rights, environmental quality and other social and environmental interests. All these illustrate the complexity of designing an appeal procedure under the CDM that can meet the demands of various stakeholders that, at times, might even have conflicting interests, as the following section will show.

2. Controversial Issues in the Proposed Appeal Procedure

In view of the massive interests private stakeholders participating in the CDM process held, many actors have long sought an appeals body to review the decision of the CDM Executive Board.⁴⁰ At COP/MOP 5 in Copenhagen in 2009, the CMP adopted decision 2/CMP.5⁴¹ requesting the CDM Executive Board to “establish ... procedures for considering appeals that are brought by stakeholders directly involved, defined in a conservative manner, in the design, approval, or implementation of CDM project activities

31 Ibid, at 72.

32 Ludger Giesberts, Alexander Sarac and John Wunderlin, “The Institutional Design of the CDM Appeals Body: Recent Development and Key Considerations”, 5 *Carbon & Climate Law Review* (2011), 277, at 279.

33 See discussion in Richard B. Stewart, “US Administrative Law: A Model for Global Administrative Law?”, 68 *Law and Contemporary Problems* (2005), 63.

34 See, for example, Charlotte Streck & Jolene Lin, “Marking Markets Work: A Review of CDM Performance and the Need for Reform”, 19:2 *European Journal of International Law* (2008), 409, at 422-428.

35 Lin & Streck, “Mobilising Finance”, supra, note 30, at 85-86.

36 Kylie Wilson, “Access to Justice for Victims of the International Carbon Offset Industry”, 38 *Ecology Law Quarterly* (2011), 967, at 987 and footnote 115.

37 Ibid, at 988.

38 Ibid, at 997-1006.

39 Ibid, at 1017.

40 Giesberts et al., “Institutional Design of the CDM Appeals Body”, supra, note 32, at 279.

41 Decision 2/CMP.5, Further Guidance relating to the Clean Development Mechanism, UN Doc. FCCC/KP/CMP/2009/21/Add.1, 30 March 2010.

or proposed CDM project activities ...". This sets the stage for the creation of an appeals body to review certain decisions of the Executive Board. At COP/MOP 6 in Cancun in 2010, the CMP adopted decision 3/CMP.6⁴² that further requests the Subsidiary Body for Implementation (SBI) to make recommendations to COP/MOP "with a view to its adopting a decision at its seventh session on procedures, mechanisms, and institutional arrangements" under the COP/MOP to "allow for appeals against Executive Board decisions based on decision 2/CMP.5, paragraph 42..." At COP/MOP 7 in Durban, the CMP adopted decision 8/CMP.7⁴³, requesting the CDM Executive Board, "in consultation with stakeholders", to revise the draft procedure "based on its findings, taking into account conclusion, if any, on the appeals process" under consideration of the SBI, "with the aim of avoiding duplication and promoting efficiency", for adoption by the COP/MOP 8.

Paragraph 42 in Decision 2/CMP.5 states:

"Requests the Executive Board to establish, following the consultation with stakeholders, procedure for considering appeals that are brought by stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of CDM project activities or proposed CDM project activities in relation to:

(a) omitted]

(b) ruling taken by or under the authority of the Executive Board in accordance with the procedures referred to in paragraph 39 above regarding the rejection or alteration of requests for registration or issuance."

Under this mandate, it is unclear whether the appeals procedures are available only to the private sector participants, or to the local stakeholders as well. On the one hand, "stakeholders" are qualified by the term "directly involved, defined in a conservative manner". In sub-paragraph (b), only rulings by or under the authority of the Executive Board regarding "the rejection or alteration" of requests for registration or issuance are to be subject to the appeal procedures. Local stakeholders are not "directly involved" in the CDM project in the sense that they are not the principal parties in the design, application, financing and implementation of a CDM project. Furthermore, it is mostly the private sector participants that are affected by the "rejection or alteration" of requests for registration of a project or issuance of CERs. It seems, thus, that only the private sector par-

ticipants can have access to the appeal procedures. On the other hand, it is also stated that appeal procedures that are brought by stakeholders, "in the design, approval or implementation of CDM project activities or proposed CDM project activities". (emphasis added) Private sector participants are usually the beneficiary of the approval of CDM project activities. It is the local stakeholders that might be affected by the approval of a proposed CDM project.⁴⁴ Therefore, it seems that the mandate does not rule out the possibility that local stakeholders can also have access to the appeal mechanism.

Despite calls from various NGOs,⁴⁵ the recommendation put forward by the Executive Board⁴⁶ in 2010 only permits the private sector stakeholders to have access to the appeal procedures. The Board recommended that the proposed appeals body should consider appeals filed by the following stakeholder: 1) project participants, and 2) the designated national authorities of the host country and of Annex I Parties that are involved in the request for registration.⁴⁷ And only "ruling of the Executive Board that rejects or requires an alteration to a request for issuance or registration"⁴⁸ can be appealed by the eligible parties. On the other hand, in the heavily bracketed SBI

42 Decision 3/CMP.6, Further Guidance relating to the Clean Development Mechanism, UN Doc. FCCC/KP/CMP/2010/12/Add.2, 15 March 2011.

43 Decision 8/CMP.7, Further Guidance relating to the Clean Development Mechanism, UN Doc. FCCC/KP/CMP/2011/10/Add.2, 15 March 2012.

44 For example, the environmental and social impact of dam was one of the driving forces behind the establishment of the Inspection Panel. Shihata, *Inspection Panel in Practice*, supra, note 15, at 5-8. Hydropower projects make up for 30% of the registered CDM projects as of November 2011. The environmental and social impact on the local communities of such type of CDM projects have also raised many concerns. See, for example, Barbara Haya & Payal Parekh, *Hydropower in the CDM: Examining Additionality and Criteria for Sustainability*, 2011, available on the Internet at: <http://www.internationalrivers.org/files/attached-files/haya_parekh-2011-hydropower_in_the_cdm.pdf> (last accessed: 7 May 15) Under this circumstance, the interests of local stakeholders might be affected by the approval of such types of CDM projects.

45 The official UNFCCC website has documented a list of documents that provide comments to the proposal CDM appeal procedure. These comments are available on the Internet at: <https://cdm.unfccc.int/public_inputs/2010/cmp5_para42_43/index.html> (last accessed: 7 May 15). Some of the NGOs position paper advocating broadening the scope of the appeal procedure can be found here.

46 *Annual Report of the Executive Board to the Clean Development Mechanism to the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol*, UN Doc. FCCC/KP/CMP/2010/10, 3 November 2010.

47 *Ibid*, at paragraph 4, Annex II.

48 *Ibid*, at paragraph 6, Annex II.

report⁴⁹, draft paragraphs on “establishment and powers” and “commencement of an appeal” still leave the option of permitting local stakeholders to have the right to appeal open. For example, paragraph 1 states that: “An appeals body is hereby established that considers appeals against decision of the Executive Board of the clean development mechanism (CDM) regarding the [approval,] rejection or alteration of requests for the registration of project activities and the issuance of CERS.” (emphasis added) Paragraph 38 states: “Any Party, project participant [or Designated Operational Entity] directly involved in [or stakeholder or organization referred to in decision 3/CMP.1, annex, paragraph 40(c), which has submitted comments with regard to] a CDM project activities or a proposed CDM project activity with respect to which the Executive Board has [registered or]made a rejection or alteration decision relating to the registration of such a project activity or the issuance of CERs may file, individually or jointly, a petition for appeal against such a decision.” (emphasis added) “Stakeholders or organization referred to in decision 3/CMP.1, annex, paragraph 40(c)” are “stakeholders and UNFCCC accredited non-governmental organisations”.

From the analysis on the texts of the relevant COP decisions and negotiation draft, it seems that accommodating both the private sector participants and the local stakeholders to have access to the proposed CDM appeal procedures is legally feasible. Whether it is desirable or practicable will depend on how the rules and procedures of the appeal procedures are designed. Before the issue is settled, it might be worthwhile to note that, as illustrated in Part 2, local stakeholders in the CDM projects supported by one of the World Bank’s carbon funds seem able to have access to the Bank’s Inspection Panel. The implication of this finding on the proposed CDM appeals body, as

well as on the complaint mechanism under the type of multilateral CCFM for project-lending purposes with multi-stakeholders will be explored next.

IV. Comparison between the Bank’s Inspection Panel and the proposed CDM appeals body

Both the GEF and the CDM are CCFMs in the broad sense. Both mechanisms have close link with the climate change regime—the GEF being the financial mechanism of the UNFCCC and the CDM being one of the market mechanisms under the Kyoto Protocol. Both mechanisms are multilateral CCFMs for project lending purposes with multi-stakeholders. However, they exhibit different features. First, they have different sources of funding. The GEF is funded by mostly the public sector, whilst the CDM mobilises resources from the private sector. Second, the institutional design of these two mechanisms also differs. The GEF has its own governing body under its constituent instrument that is separate from the climate change regime,⁵⁰ whilst the Executive Board of the CDM has to act under the authorities and guidance of the COP/MOP. Another institutional difference concerns the involvement of the World Bank. The World Bank has a formal relationship with the GEF by acting as the Trustee of the GEF Trust Fund and as one of its Implementing Agencies. The World Bank plays a more indirect role in the CDM only when CDM projects are supported by one of the World Bank’s carbon funds. Last but not least, the degree of private sector involvement also differs. The private sector participants play a major role in the CDM process as either project participants or DOEs that are directly involved in the CDM project. The private sector plays a more limited role in the GEF mostly through direct projects support under mainly the Public Private Partnership (PPP) Programme.⁵¹ This last point of difference could influence the functions and types of the complaint system required for these two mechanisms, especially from the perspectives of the private sector participants.

Part 2 pointed out that parties affected by project funded by the GEF Trust Fund can request for review from the World Bank Inspection Panel. Meanwhile, it seems legally feasible to accommodate both the private sector participants and the local stakeholders to have access to the proposed CDM appeal procedures.

49 Report of the Subsidiary Body for Implementation on its thirty-seventh session, held in Doha from 26 November to 2 December 2012, UN Doc. FCCC/SBI/2012/33/Add.1, 7 March 2013, at Appendix: Procedures, mechanisms and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism.

50 But, note that when acting as the financial mechanism for the UNFCCC, the GEF has to, according to Article 11 of the UNFCCC, “function under the guidance of and be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention.”

51 More detail is available on the Internet at: <<http://www.thegef.org/gef/PPP>> (last accessed: 7 May 15).

Nevertheless, the recommendation put forward by the CDM Executive Board only permits the private sector stakeholders to have access to the appeal procedures. The following points of comparison between the Inspection Panel and the CDM appeals procedures proposed by the Executive Board are worthy of further analysis.

First, the purpose of the Inspection Panel is to review Bank-funded project that is alleged to have caused material adverse effect because of the failure of the Bank's staff to follow its own operational policies mostly concerning social and environmental safeguards.⁵² The CDM appeal body is to give confidence to the market by providing an opportunity to appeal against unfavourable rulings of the CDM Executive Board that might affect the financial and investment interest of the private sector participants.

Second, in accordance with the purpose of the system, eligibility requirements also differ. The Inspection Panel can receive request for review from individual Executive Director, the Executive Board, local communities, and NGOs representing the local communities. The CDM appeal body will hear appeal from any Parties to the Kyoto Protocol and "stakeholders directly involved, defined in a conservative manner". The latter will include, for sure, project participant directly involved in a CDM project. It might also include other private sector participants such as the DOEs. However, as Part 2 pointed out, local stakeholders of a CDM project might have access to the Inspection Panel if the CDM project in question is supported by one of the carbon funds administered by the Bank.

Third, the Inspection Panel does not review the decisions of the Executive Board *per se*. Rather, it hears request to review "an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank". Furthermore, the Inspection Panel can also review a project that is still under consideration for Bank financing.⁵³ The proposed CDM appeal body hears appeal against "decisions" of the CDM Executive Board regarding the rejection, alteration, or possibly, the approval of requests for the registration and issuance.

Fourth, as the subject matter under review differs, the ground for complaint also differs. The Inspection Panel reviews whether the Bank staffs fail to implement the Bank's internal operational policies and pro-

cedures on mainly environmental and social safeguard and, as a result, cause material adverse effect on the local communities. In the heavily bracketed SBI report,⁵⁴ the potential subject matter under review seems quite broad according to paragraph 32 ("Grounds for appeal"). The CDM appeal body is to decide whether the Executive Board has exceeded its jurisdiction or competence, committed an error in procedures that would materially affect the decision in the case, has erred on questions of fact, and its interpretation or application of CDM modalities and procedures. The Bank's internal operational policies and procedures are instructions from the Bank management to its staff and usually do not require the approval of the Executive Board. The CDM modalities and procedures as prescribed in the Annex to Decision 3/CMP.1 are the rules that govern the operation of the CDM. The Executive Board is delegated by the COP/MOP to perform rule-making, adjudicatory and decision-making power.⁵⁵ The Executive Board, thus, has the power to adopt or review CDM rules and requirements.⁵⁶ There is one difference between these two set of documents that might have some implication to the proposed CDM appeal body: many of the World Bank operational policies and procedures relate to social and environmental safeguards concerning the proposed Bank-funded project,⁵⁷ whilst most of the CDM modalities and procedures do not specifically focus on such safeguards. Under the CDM modalities and procedures, project participants must submit "documentation on the analysis of the environmental impacts of the project

52 For example, "environmental assessment" and "involuntary resettlement" are two of the top three policy issues that are being raised most frequently in the Inspection Panel cases. Inspection Panel, *Inspection Panel Annual Report 2012-2013* (Washington D.C., Inspection Panel, 2013), at 65.

53 Shihata, *Inspection Panel in Practice*, supra, note 15, at 35-36.

54 *Supra* note 49.

55 Lin & Streck, "Mobilising Finance", supra, note 30, at 87.

56 Annex 4, CDM Executive Board Decision and Documentation Framework (version 04.0), UN Doc. EB67 Report, at para 7. This document is available on the Internet at: <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOP-MANU-AL/0,,menuPK:64142516~pagePK:64141681~piPK:64141745~theSitePK:502184,00.html>> (last accessed: 7 May 15).

57 For example, there are operational policies on environmental impact, natural habitats, indigenous peoples, involuntary resettlement, forests, and safety of dams...etc. The Operational Manual is available on the Internet at: <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOP-MANU-AL/0,,menuPK:64142516~pagePK:64141681~piPK:64141745~theSitePK:502184,00.html>> (last accessed: 7 May 15).

activity, including transboundary impacts and, if those impacts are considered significant by the project participants or the host Party, have undertaken an environmental impact assessment in accordance with procedures as required by the host party. In addition, the DOE shall have received from the project participants “written approval of voluntary participation from the designated national authority of each Party involved, including confirmation by the host Party that the project activity assists it in achieving sustainable development.”⁵⁸ These two requirements seem to be the only environmental and social safeguards. Yet, they seem far more limited and abstract than those contained in the more detailed operational policies and procedures of the Bank in setting environmental and social safeguard standards. As a result, if the proposed CDM appeal body permits local stakeholders to have access to the appeal procedures, the lack of environmental and social safeguards in the current CDM modalities and rules might cause some difficulties to the local stakeholders to present a clear case demonstrating such type of negative effect, as the current CDM modalities and rules do not provide a basic standard or clear instruction in this regards.

From the comparison between the GEF and the CDM, it is understandable that a complaint system designed for the GEF and the CDM will exhibit great differences. The most decisive difference between the GEF and the CDM that influence the respective complaint system might be that nearly all the resources of the GEF comes from the public sector whilst nearly all of the resources of the CDM come from the private sector. The interests of the private sector are not greatly at stake in the GEF. On the contrary, the interests of the private sector participants are greatly at stake in the CDM as they have invested heavily in securing a CDM project. Therefore, the main purpose of the complaint system under both mechanisms will have different considerations. This is also being reflected on the abovementioned comparison between the two types of complaint systems regarding their purposes and power. The purpose of the World Bank Inspection Panel is mainly designed to address public interests such as the social and en-

vironmental impact of the Bank-funded projects. On the other hand, the call for an appeal procedures under the CDM process stem from the perspective of global administrative law where due process and access to review are crucial in an administrative body acting on a global scale, i.e. the CDM Executive Board. Not to mention that, as a market mechanism, the success of the CDM will largely depend on the confidence of the private sector players that the CDM process is an impartial one where their financial and investment interests can be protected. As a result, the function of the complaint system under different types of CCFMs will no doubt vary, as the above-mentioned comparison has illustrated.

However, to the extent that the CDM provides funding for specific projects, it serves similar function to that of the GEF in terms of the types of activities funded by the CCFM. This is also part of the reason why civil society has been demanding for a CDM appeal procedures that is available to local stakeholders. Part 2 has pointed out the possibility of permitting local stakeholders of a CDM project to have access to the Inspection Panel if the CDM project in question is supported by one of the carbon funds administered by the Bank. What, then, are the implications of these considerations for the design of a complaint system under the CDM in particular and multilateral CCFM for project-lending purposes with multi-stakeholders in general?

V. Implications for Designing the Complaint System under the CDM and Multilateral CCFM for Project-lending Purposes with Multi-stakeholders

1. Implications for the Proposed CDM Appeals Procedures

The current position of the Executive Board seems more inclined to limit the access of the appeals procedures to private sector participants, despite calls from mainly the NGOs for wider access. On another front, CDM projects supported by the World Bank's carbon funds can have access to the Bank's Inspection Panel. This might affect the integrity of the complaint system of the CDM, as the following scenario will show. Should the COP/MOP to the Kyoto agree with the current and more conservative position of

58 Decision 3/CMP.1, *Modalities and Procedures for a Clean Development Mechanism as defined in Article 12 of the Kyoto Protocol*, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, at paragraph 40(a) in the Annex.

the CDM Executive Board, situation might arise where local communities adversely affected by the CDM projects activities will be treated differently depending on the source of funding supporting the CDM project in question. If the project is supported by the World Bank's carbon funds, affected local communities can have access to the Bank's Inspection Panel. If the project is supported by other private funding, the affected local communities will have no access to any complaint system. This uneven treatment will no doubt affect the perception of accountability and fairness of the CDM from the perspective of the local communities.

Furthermore, a dilemma will occur if the following scenario (Scenario A) occurs. Suppose a project applicant appeals against the decision of the Executive Board to reject the registration of a CDM project supported by one of the Bank's carbon funds. The appeal body reverses the decision and grants the registration of the CDM project. Subsequently, affected local communities request the Bank's Inspection Panel to review whether the Bank Management has followed its operational policies and procedures with respect to this project. The Panel finds that the Bank policies are not complied with and recommends the withdrawal of the Bank's support, and the Bank's Executive Board approves the Panel's recommendation. As a result, the Bank's carbon funds can no longer purchase CERs generated from this CDM project.⁵⁹ This will no doubt greatly affect the project applicant's financial interests, which, ironically, have previously been upheld by the CDM appeal body. Another irony is that the interests of the affected local communities might not be protected, either. The CDM project can still be implemented if the project applicant obtains funding from other sources.

What if, on the other hand, the COP/MOP to the Kyoto Protocol decides to adopt a more comprehensive set of appeal procedures where local communities can also appeal against the decision of the CDM Executive Board? Will this be a more ideal situation? Not necessarily. A more complex situation might arise if the affected local communities file complaints to both complaint systems regarding the same CDM project and different decisions are rendered.⁶⁰ Scenario 1: the CDM appeals body rejects the claim and the CDM project proceeds to be registered, whilst the World Bank Inspection Panel and the Bank's Executive Board agree with the claim and withdraw the Bank's support. Under this circumstance, the inter-

ests of the private sector participant and the local communities will both be partially undermined. The project applicant will lose the support from the Bank's carbon fund. The local communities will still be affected by the implementation of the CDM project if the project applicant can obtain other funding to carry out the CDM project. This is very similar to Scenario A indicated in the previous paragraph. Scenario 2: the CDM appeals body accepts the claims and reverses the decision to register this CDM project, whilst the World Bank Inspection Panel rejects the claim and finds that the Bank Management has complied with its internal operational policies and procedures. Under this circumstance, the interests of the private sector participants will be affected as the CDM project is rejected. This might affect the willingness of the private sector to use the CDM in the future. On the other hand, it seems that the interests of the local communities will be protected as no CDM project will be implemented. However, the likelihood of Scenario 2 is very remote for the following reason. Part 4 has indicated that, in comparison to the operational policies and procedures of the Bank, there are very few CDM modalities and procedures on environmental and social safeguards. As a result, the CDM appeals body might not have a set of environmental and/or social safeguards standards against which to accept the claims of the local communities and reverses the decision to register the CDM project.

Table 1 summarises the three mock complaints.⁶¹

The findings in Part 2 that local communities affected by a CDM project that is supported by the Bank's carbon fund might have access to the Inspec-

59 This will, of course, also depend on the contractual obligations under the Emission Reduction Purchase Agreement between the project entity and the Bank.

60 Note that the private sector participants will have no access to the Bank's Inspection Panel.

61 A note of caution regarding all the mock complaints discussed here should be noted. The main concern of the requester in the Inspection Panel case regarding a CDM project supported by the Bank Bio Carbon fund is the delay in payment of carbon revenue, rather than negative environmental and/or social impact as a result of the implementation of the CDM project. In addition, the operational policies in questions related to OP13.5 on Project Supervision, rather than a series of OPs on environmental or social safeguards. But this case set a precedent on the eligibility of CDM projects supported by the Bank's carbon fund in the Panel process. Nevertheless, whether future cases where violation regarding OPs on environmental and/or social safeguard is at issue will be admitted by the Panel will depend on the factual background of individual case. In other words, whether all the mock complaints discussed here will have access to the Inspection Panel will be determined on a case-by-case basis.

Table 1

		Interests of private sector	Interests of local communities
Only private sector is eligible	Scenario A	X (loss of financial support from Bank's carbon fund)	X (private sector finds other source of funding)
Both private sector and local communities are eligible	Scenario 1	X (loss of financial support from Bank's carbon fund)	X (private sector finds other source of funding)
	Scenario 2	X (no CDM project to carry out)	? (unlikely to happen as CDM modalities and procedures contain very limited environmental and social safeguards standers)

Scenario A: CDM appeals body accepted the complaint and proceed to register. Inspection Panel finds violation and Bank withdraw the support of carbon funds.

Scenario 1: CDM appeals body rejects claim from local communities and proceeds with the registration of the CDM project.

Inspection Panel agrees with the claim and Bank withdraws its financial support.

Scenario 2: CDM appeals body accepts claim from local communities and rejects the registration of the CDM project. Inspection Panel rejects the claim.

tion Panel greatly affect the design of the CDM appeal procedures. Adopting the more conservative position where only the private sector can have access to the CDM appeal procedures will not necessarily protect the interests of all the stakeholders, as indicated in Scenario A, as long the possibility of having another complaint system that can be authorised to deal with complaints from the CDM stakeholders regarding the same project. On the other hand, Part 3 indicated that, from the negotiation texts and mandates, it is legally feasible to accommodate both the private sector and the local communities to have access to the CDM appeals procedures. But the interests of both the private sectors and the local communities might not be fully protected under this circumstance as Scenario 1 and 2 demonstrate. As long as the CDM modalities and procedures contain few or limited environmental and social safeguards, the complaint system cannot adequately address the concerns of the local communities. To summarise, as Table 1 shows, having potential parallel complaint systems under the CDM where limited environmental and social safeguards are in place, the CDM appeals procedures, regardless of its scope, might be unable to adequately guarantee the interests of the private sector participants and the local communities. All these complications will need to be taken into considerations when the COP/MOP reaches its decisions

regarding the appeal procedures of the CDM. These also bring out some systematic issues regarding the design of a complaint system under similar types of CCFM, i.e. multilateral CCFM for project-funding purposes with multi-stakeholders.

2. Implications for the Design of a Complaint System under Multilateral CCFM for Project-lending Purposes with Multi-stakeholders

The experiences of the CDM bring out two systematic issues in designing a complaint system for similar types of CCFM, i.e. multilateral CCFM for project-lending purposes with multi-stakeholders. The first issue relates to parallel complaint systems within one CCFM. The second issue relates to addressing different, sometimes even conflicting interests within a complaint system.

Should the COP/MOP decides to adopt the CDM appeal procedures regardless of its scope, the experiences of the CDM as discussed previously will be a case in point where parallel complaint systems will operate. Parallel complaint systems within one CCFM might affect the perception of consistency, effectiveness, efficiency, and reliability of this mechanism, as has been illustrated in the case of the CDM.

Careful institutional design, the detail of which will depend on individual circumstances of each case, will need to be articulated under this circumstance. Coordination arrangements or at the very least an agreement on jurisdictional matters will have to be taken into consideration so that conflicting results can be avoided. By using the CDM as an example, coordination arrangement or agreement between the CDM Executive Board (or its Appeals Body) and the Bank's Executive Board (or the Bank's Inspection Panel) might be concluded so that jurisdictional issues can be discussed and/or agreed to avoid conflicting findings from different complaint systems. Considering the lead role of the CDM Executive Board regarding all CDM projects, and a more limited role of the World Bank in only a small portion of the CDM projects via its carbon funds, the Bank's Inspection Panel might consider yielding more deference to the proposed CDM Appeals Body.

Second, CCFM with multi-stakeholders might face different and, sometimes, even conflicting interests from different stakeholders. Complaint systems that need to address different interests require careful institutional design to make sure that the operation of the complaint system can address such diverse interests. Take, again, the CDM appeals procedures as an example. Suppose the COP/MOP decides to adopt a set of appeals procedures that permit both the private sector participants and the local communities to appeal against the decisions of the CDM Executive Board regarding the approval, rejection or alteration of the registration of a CDM project. What kind of procedures should be in place to enable the appeals body to address both sets of concerns? For example, can the local communities appeal against the decision of the CDM Executive Board to approve the registration of a CDM project, which has been subject to a previous appeal by the project applicant regarding the rejection of registration and the appeal body make a remand decision? Or, alternatively, can the project applicant appeal against the decision of the CDM Executive Board to reject the registration of a CDM project which has been subject to a previous appeal by the local communities regarding the initial approval of registration of the project? Furthermore, if the CDM appeals body is granted the power to reverse, rather than remand, the decision of the CDM Executive Board, can this decision be appealed? All these complications illustrate the difficulties, and even dilemmas, a complaint system is expected to ad-

dress if the interests of all types of stakeholders are to be addressed equally. This issue might be less contentious for CCFMs that generate mostly public sector resources, such as the GEF, as the interests of the private sectors are not greatly at stake. However, this will be a daunting task for those types of CCFM that depend largely on private sources of funding, such as the CDM and the newly established Green Climate Fund.⁶² A more complex set of complaint procedures might be put in place. For example, a two-level complaint system might be set up. The first level could consist of two branches to deal with complaints from different types of stakeholders. The second level could be entrusted with the authority to review conflicting decisions from the lower branches. Such a complaint system might be perceived as costly, time-consuming, or inefficient. Nevertheless, it could enhance the accountability and legitimacy of the type of CCFM that have to take into consideration different and sometimes conflicting interests of all types of stakeholders. How to reach a fine balance will be a huge challenge.

The above-mentioned two issues should be carefully considered in setting up a complaint system within multilateral CCFM for project-lending purposes with multi-stakeholders. One final concern relates to the design of a CCFM in a wider context: the importance of adopting a comprehensive set of social and environmental safeguards policies. The major purpose of any CCFM is, first and foremost, to provide resources to implement climate change mitigation and adaptation policies and activities. It is, thus, imperative that institutional safeguards should be built in in any CCFM to ensure that activities funded will not cause adverse environmental or social effect. Having a complaint system similar to the Inspection Panel is one such safeguard. However, other safeguards such as adopting a set of environmental and social safeguard policies, as the World Bank has done, should also be considered.⁶³ In particular, as Part 4 illustrated, the complaint system might be unable to provide meaningful redress if such social and environmental safeguard policies are not adopted, as there will be no standards or guidance against

62 An independent redress mechanism will be set up in the Green Climate Fund to "receive complaints related to the operation of the Fund and will evaluate and make recommendation." *Governing Instrument for the Green Climate Fund*, at paragraph 69.

63 Wilson, "Access to Justice", *supra*, note 36, at 1021-1024.

which the complaint system can be used as a yardstick to evaluate the decisions of the CCFM. When such set of environmental and social safeguards policies are in place, the complaint system should be put in place to make sure that these safeguards policies are followed and implemented. Conversely, the purpose of a complaint system to protect the environmental and social interests of the local communities can be difficult to achieve if concrete and specific environmental and social safeguards policies and standards are not adopted in the first place.

VI. Conclusion

CCFMs can adopt a wide range of institutional designs, depending on their scale, sources of funding, and types of activities funded. The need for and institutional design of a complaint system will accordingly differ. By using the GEF and the CDM as examples, this article sets out to analyse the design of a complaint system under one specific type of CCFM: multilateral CCFM for project-lending purposes with multi-stakeholders. Part 2 concluded that the GEF used the World Bank Inspection Panel as its complaint system, and further found that CDM projects that are supported by carbon funds administered by the World Bank might be eligible to have access to the Inspection Panel. Part 3 summarised the debate surrounding the negotiation of a CDM appeal procedures. Taking into account the similarities and differences between the GEF and the CDM, Part 4 made a comparison between their respective complaint systems. As the degree of private sector involvement differs, the main purposes of the complaint system under both mechanisms differ, resulting in different el-

igibility requirement and subject matter under review. However, as a project-lending CCFM with multi-stakeholders whose interests might be different, more complexities arose as to the design of the CDM appeal procedures. Based on these findings, Part 5 analysed the implications for designing the complaint system for the CDM in particular, as well as for similar multilateral CCFM for project-lending purposes with multi-stakeholders more generally. Regarding the proposed CDM appeal procedures, Part 5 concluded that, having potential parallel complaint systems under the CDM where limited environmental and social safeguards are in place, the CDM appeals procedures, regardless of its scope, might be unable to adequately guarantee the interests of the private sector participants and the local communities. From this observation, two systematic/institutional issues in designing a complaint system for multi-lateral CCFM for project-lending purposes with multi-stakeholders are noted: how to deal with parallel or multiple complaint systems within one CCFM, and how to design a complaint system to address different and/or conflicting interests. Part 5 also identified the importance of adopting substantive environmental and social safeguard policies in the CCFM for project-lending purposes.

As Part 1 indicated, having a complaint system is one of many indicators to determine whether a CCFM is accountable. This article focused on one specific type of CCFM—multi-lateral CCFM for project-lending purposes with multi-stakeholders—and put forward several recommendations as to the design of its complaint system. There will be no single complaint system that is suitable for all types of CCFM. Further research will need to be carried out to analyse different complaint systems for different types of CCFM.