
Making Markets Work: A Review of CDM Performance and the Need for Reform

Charlotte Streck* and Jolene Lin**

Abstract

The Kyoto Protocol's Clean Development Mechanism (CDM) is the first global market mechanism in international environmental law. It has been much lauded for its success. However, doubts whether the CDM governance structure is robust enough to meet the challenges of regulating an international market mechanism in the long term are emerging. The Executive Board (EB)'s decision-making practice is often not predictable and many of its decisions have come as a surprise to project participants and technical project experts. Members of the EB often have multiple responsibilities which result in a complicated situation of conflicting interests. Finally, private sector participants in the CDM who have been adversely affected by EB decisions have no right of recourse and essentially little if any due process rights. This article argues that incorporating mechanisms to promote procedural fairness and creating an appeals process for aggrieved CDM participants will promote transparency and accountability in the CDM decision-making processes. This is essential for the sound operation of the CDM regulatory regime which will have a direct positive effect on the international carbon market. After conducting a comparative analysis of other regimes in which international bodies take decisions that directly affect individuals, most notably the system of targeted sanctions of the UN Security Council and the Anti-Doping Regime, as well as examining the World Bank Inspection Panel and the European Ombudsman as models of international review mechanisms, the authors set out proposals for reform of the CDM, including professionalizing the EB and the panels, securing better and more consistent funding, the elimination of political interference, and the introduction of administrative law-like processes.

* Director, Climate Focus, Minervahuis III, Rodezand 34, 3011 AN Rotterdam, NL. This article was jointly presented by the authors at the conference, *Crucial Issues in Climate Change and the Kyoto Protocol: Asia and the World*, organized by the Asia-Pacific Centre for Environmental Law (APCEL) of the Faculty of Law, National University of Singapore, 30–31 Aug. 2007. Email: c.streck@climatefocus.com.

** Assistant Professor, Faculty of Law, The University of Hong Kong. I would like to register a note of appreciation to Asst. Prof. Thomas Cheng for a very useful discussion on regulation of markets in general. Email: jolene@hku.hk.

Introduction

The Kyoto Protocol's Clean Development Mechanism (CDM) is the first global market mechanism in international environmental law. The success of the CDM thus far can only be described as breathtaking. Its performance has been beyond the imagination of its creators at the Kyoto Protocol negotiations who did not foresee that the CDM would spawn a market in a regulatory commodity that is worth billions of dollars,¹ not including the value of the ancillary service industries that this new market has engendered.²

There are few mechanisms that lend themselves better to pioneering the emerging legal discipline of international administrative law than the CDM.³ The authors are of the view that the climate change regime, particularly the CDM regulatory framework, is a good case study of the emergence of global administrative law. The CDM is unique in regulating a market dominated by private players that depend, in the creation of the market's underlying asset, on a United Nations committee, the CDM Executive Board, that approves calculation methods and projects.

Containing many commendable design features, the CDM serves as a useful model for other emission trading and off-set schemes. The conceptual underpinnings of the CDM are strong and it is likely that the idea of the CDM, or the mechanism itself, will survive in a post-Kyoto climate regime. However, despite its success and model character, serious doubts whether the CDM governance structure is sufficiently robust to meet the long-term challenges of regulating an international market mechanism are emerging. As more projects move from design to implementation, and more funds are not only promised but actually disbursed, the limitations of the CDM regulatory structure are becoming increasingly obvious. While the Executive Board (EB)'s decisions have direct effect on private rights, the Board's decision-making practice is often not predictable, and many of its decisions have come as a surprise to project participants and technical project experts. While the EB is effectively a regulatory agency the decisions of which have significant legal and financial consequences for private sector participants in the CDM, the EB is not subject to the usual political and legal controls to which a domestic regulatory agency would be subject. For example, there is no independent tribunal within the CDM regulatory framework to which aggrieved entities may appeal for review of an EB decision. This gives aggrieved entities, who may have suffered damage from EB decisions, no right of recourse and essentially few, if any, due process rights. That the EB received 12 threats of legal proceedings from

¹ Capoor and Ambrosi, *State and Trends of the Carbon Market* (2007), available at: http://carbonfinance.org/docs/Carbon_Trends_2007-_FINAL_-_May_2.pdf (accessed 15 June 2007).

² The creation of markets to reduce greenhouse gas emissions has itself led to the development of 'carbon finance', which has been described as being broader than the trading of carbon credits because new financial instruments are being developed to facilitate the transfer to a carbon constraint economy.

³ Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15, at 17. The authors have benefited from the research output of the Global Administrative Law Research Project at New York University School of Law and would like to register an acknowledgement of thanks.

project developers in 2007 alone, despite the lack of access to a review mechanism, is evidence of the growing discontent among private project participants.⁴

The type of governance undertaken by the EB can be understood and analysed as administrative action: rule-making, administrative adjudication between competing interests, and other forms of regulatory decision-making and management. To the extent that such administrative actions bear direct and significant impact on the rights of an individual, they should be subject to a body of rules and principles that ensure that when public officials take such action it is in accordance with the rule of law.⁵ The rule of law is an amalgam of standards, expectations, and aspirations that encompasses ideas about individual liberty and natural justice and, more generally, ideas about the requirements of justice and fairness in the relations between the government and the governed.⁶ Containing the values of legality, certainty, formal equality, accountability, due process, and access to justice, the rule of law establishes the background for a number of due process principles which form the backbone of constitutional and administrative law.⁷ Such principles include the right to be heard before a decision is made,⁸ the right to have the decision made in an unbiased and impartial manner,⁹ and the right to know the basis of decision so that it can be contested.¹⁰ These procedural rights may be said to fulfil the central aspiration of the rule of law – ‘the subjection of public power to controls that ensure it is exercised in the

⁴ See ‘Privileges and immunities for individuals serving on constituted bodies under the Kyoto Protocol: Implementation of decision 9/CMP.2. Note by the secretariat’, 3rd Session of the Meeting of the Parties to the Kyoto Protocol. 1F3CFCCC/KP/CMP/2007/2, 13 November 2007.

⁵ The rights to procedural justice and due process of law are guiding constitutional and administrative principles in common as well as civil law systems. The essence of these principles is that the government must respect a person’s legal rights when the government deprives a person of life, liberty, or property. The requirement to adhere to due process has been introduced into the US constitution with the 5th and the 14th amendments. It also forms part of the set of constitutional rights of citizens of the countries of the EU. References in community law can be found in Arts 6(1) (fair process) and 13 (right to appeal) of the European Convention on Human Rights (ECHR), as well as The Charter of Fundamental Rights of the European Union, OJ (2000) C 364/1, which establishes in Art. 41 the right to a good administration and in Art. 47 the right to an effective remedy and fair trial.

⁶ T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993), at 21.

⁷ Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *EJIL* (2006) 187, at 190; Jowell, ‘The Rule of Law and its Underlying Values’, in J. Jowell and D. Oliver, *The Changing Constitution* (2007).

⁸ The right to be heard emanates from the fundamental principle of procedural fairness. This includes the right to be notified of charges and given opportunity to be heard (e.g., Art. 41(II) of the EU Charter of Fundamental Rights (hereinafter ‘the EU Charter’), *supra* note 5, confirms this principle as one of the basic principles governing the interaction between EU institutions and citizens of the Union).

⁹ The rule against bias (*nemo iudex in re sua*) is one of long standing in the common as well as civil law. The prerequisite of any decision-making system that seeks to lay claim to any degree of fairness is the provision of unbiased tribunals and decision-makers. It can be said that no amount of procedural safeguards (such as the right to legal representation or to cross-examine witnesses) is likely to deliver fairness if the deciding tribunal is, in the first place, biased in the sense of being inherently predisposed against (or for) the individual who is the subject of the decision.

¹⁰ For the EU, Art. 253 EC formulates the requirement to state the reasons for any act, decision, directive, or regulation adopted by the Community or Community organs. The requirement to give reasons is also embodied in Art. 41(II) of the EU Charter, *supra* note 5. Most EU countries possess administrative procedure Acts, which contain the obligation of public authorities to give reasons for their acts (e.g., para. 39 of the German *Verwaltungsverfahrensgesetz*). See also Subchapter II of the US Federal Administrative Procedure Act.

interests of those affected by it'.¹¹ This article argues that incorporating mechanisms to promote procedural fairness and creating an appeals process for aggrieved CDM participants will promote transparency and accountability in the CDM decision-making processes. This is essential for the sound operation of the CDM regulatory regime which will have a direct positive effect on the international carbon market.

If the CDM is to form part of the international carbon market beyond the Kyoto Protocol's first commitment period which ends in 2012, the mechanism has to be brought in line with due process requirements and procedural justice guiding administrative processes in the majority of national legal systems. It is essential that the CDM is governed by rules and procedures which promote the rule of law in order to secure public legitimacy and to bolster market confidence. In this regard, the authors propose the introduction of additional administrative processes and rules into CDM decision-making.

A sound regulatory regime will go far in ensuring the successful creation of the first truly global environmental market-based mechanism. The call for sound regulation could not have come at a more opportune time as recent controversial findings about the performance of off-set projects has not left unaffected the international carbon markets. Rising criticism about the legitimacy of many carbon off-sets brought to the market has cast a shadow on the integrity of the CDM market.¹²

Section 1 of this article explains the conceptual origins of the CDM. The CDM regulatory framework is described in section 2. Section 3 analyses the role of the CDM EB as regulator in the international carbon market. The areas of concern that have given rise to doubt about the EB's ability to regulate the market in the long term will be explored. In section 4, we conduct a comparative analysis of other regimes in which international bodies take decisions that directly affect individuals, most notably the system of targeted sanctions of the UN Security Council and the Anti-Doping Regime. Section 5 looks at the World Bank Inspection Panel and the European Ombudsman as models for international review mechanisms. Section 6 draws lessons for a reform of the CDM. Amongst the proposed reforms are: professionalizing the EB and the panels, securing better and more consistent funding, the elimination of political interference, and the introduction of administrative law-like processes. Section 7 concludes.

¹¹ Dyzenhaus, 'The Rule of (Administrative) Law in International Law', 68 *Law & Contemporary Problems* (2005) 126, at 130; See also Le Sueur, 'Courts, Tribunals, Ombudsmen, ADR: Administrative Justice. Constitutionalism and Informality', in Jowell and Oliver, *supra* note 5.

¹² See Michaelowa and Purohit, 'Additionalty Determination of Indian Projects, Can Indian CDM Project Developers Outwit the CDM Executive Board?', 2007, available at: http://medias.lemonde.fr/mmpub/edt/doc/20070608/920594_additionalty_determination_of_indian_cdm_projects.pdf. Download press articles from the *Guardian* (UK) are available at: www.guardian.co.uk/environment/2007/jun/02/energy.business, *Le Monde* (French) at: www.lemonde.fr/web/article/0,1-0@2-3244,36-920043,0.html, *Tagesanzeiger* (German) at: <http://tages-anzeiger.ch/dyn/news/print/ausland/758571.html>; and the *Financial Times In-Depth report on Carbon Trading* at: <http://www.ft.com/indepth/carbontrading>. Also see Press Release by UNFCCC Executive Secretary, 'Confusion threatens to limit potential of key Kyoto Protocol mechanism', available at: www.unfccc.int (accessed on 25 July 2007).

1 Setting the Context

A *The Kyoto Protocol Mechanisms*

The Kyoto Protocol establishes three market mechanisms to help industrialized countries (so-called Annex I countries)¹³ meet their emission reduction commitments in a cost-effective manner. Joint Implementation, the Clean Development Mechanism, and Emissions Trading are established under Articles 6, 12, and 17 of the Kyoto Protocol respectively. The Clean Development Mechanism or the CDM, which is the focus of this article, establishes a mechanism under which an Annex I Party may receive carbon credits (Certified Emission Reductions) for an investment in an emission reducing project in a developing country. The aim of the CDM is not only to help Annex I Parties to meet their emission targets in a cost-effective way, but also to promote sustainable development in developing countries.¹⁴ The CDM thus establishes a scheme of joint implementation between industrialized and developing countries and provides an important tool for involving developing countries in the Kyoto Protocol processes. One of the most innovative features of the CDM is the direct involvement of private entities in the compliance framework of the Kyoto Protocol. The CDM allows countries to authorize private sector entities to sell and acquire emission reductions from projects in developing countries. Parties have made and are making use of this right. Private entities that have come to dominate the CDM market are thus directly involved in the implementation of the flexible mechanism and indirectly in treaty compliance.

B *The CDM's Conceptual Origins*

The CDM emerged as 'the Kyoto surprise' in the early hours of the final day of the negotiations at the third session of the UNFCCC COP.¹⁵ Few, if any, of the negotiators in Kyoto could have foreseen the far-reaching impact of the mechanism that was being created on the basis of international emissions trading. Most of the negotiators were from their countries' environmental ministries, and their experience lay in negotiating multilateral environmental agreements (MEAs), not in international trade and markets. As the negotiations were seen to pertain to a predominantly environmental problem, it was not deemed necessary to involve officials from the trade, industry, or energy ministries.

In designing the CDM, the negotiators drew on examples of financial mechanisms in other MEAs rather than examining how global markets operate. Many of the features of the CDM Executive Board were borrowed from the Executive Committee which manages the Multilateral Fund for the Implementation of the Montreal

¹³ Annex I refers to the Annex to the UN Framework Convention on Climate Change and the Kyoto Protocol which lists the countries which agreed to assume binding emission limitation and reduction targets. Such targets are set in Annex B of the Kyoto Protocol (hereinafter 'KP'), 37 ILM (1998) 22, which came into force on 16 Feb. 2005.

¹⁴ See Art. 12(2) of *ibid.*

¹⁵ Werksman, 'Unwrapping the Kyoto Surprise', 7 *Rev European Community and Int'l Environmental L* (1998) 147, at 151.

Protocol (MLF).¹⁶ Beyond the organizational structure, the ‘additionality’ requirement of both Joint Implementation and the CDM is a concept that is closely related to the incremental cost principle of the MLF and the Global Environment Facility.¹⁷

These analogies are not surprising, as the creation of a market to deal with an environmental externality is unprecedented in international environmental law. Yet, the CDM is not merely a burden-sharing mechanism whereby the industrialized nations cover the compliance costs of the developing world and offer financial assistance and technology transfer. The CDM instead provides entities from Annex I countries with an intrinsic incentive to invest in carbon abatement projects in non-Annex I countries where the costs of abatement are less than in the developed countries (which most Annex I countries are).

2 The CDM Regulatory Framework

A *The CDM Project Cycle*

An explanation of the CDM project cycle at this stage will help one understand the regulatory framework governing the CDM. The basic operational principle of the CDM is the rewarding of greenhouse gas (GHG) emission reductions generated by a project activity implemented in a developing country Party to the Kyoto Protocol by tradeable Certified Emission Reductions (CERs) that can be sold on international carbon markets. Examples of CDM projects include renewable energy, energy efficiency, and reforestation projects. The CDM project cycle consists primarily of eight stages:

- (1) *Project Development, Evaluating Feasibility, and Obtaining Permits.* There are no CERs without a project which realizes the reduction of GHG emissions compared to baseline emissions. Each issued CER is labelled with a project identifier which links it with the project that generated the corresponding emission reduction.
- (2) *Methodology Approval.* If the project uses a new methodology for calculating baselines and monitoring emission reductions, it must be submitted for approval to the EB before the project can be validated.
- (3) *Host Country (and Annex I) Approval.* Host country approval is a condition for the validation of the project design by an internationally accredited auditor. If the project owner wishes to add Annex I project participants to the project (e.g., the

¹⁶ The MLF is the financial mechanism created in 1990 by the London Amendment to assist developing (Art. 5) countries meet the agreed incremental cost of fulfilling the control measures imposed by the Montreal Protocol, 26 ILM (1987) 1541.

¹⁷ The additionality requirement may be explained thus: CDM project activities must result in reducing or absorbing (sequestering) GHGs that are ‘real and measurable and would not have occurred in the absence of the proposed project activity’ (UNFCCC, Report of the Conference of the Parties on its seventh session, Marrakesh, 29 Oct.–10 Nov. 2001, Addendum part two: action taken by the Conference of the Parties. Vol. II. FCCC/CP/2001/13/Add. 2, at 20). In other words, to qualify for credits a project activity must demonstrate that GHG emissions were reduced against the ‘baseline scenario’, a representation of GHG emissions under normal circumstances.

- buyers of the CERs), those entities have to present evidence of authorization and approval from an Annex I country.
- (4) *Validation.* An independent environmental auditor that has been accredited for that purpose (a Designated Operational Entity or DOE) validates the project design as described in a Project Design Document (PDD).
 - (5) *Registration.* Once the project has been validated, the DOE submits the project to the CDM Executive Board for registration. Provided that there are no objections regarding the registration, the project will be registered and thus formally approved as a CDM project.
 - (6) *Generation of CERs.* An operating CDM project has to calculate and monitor the emission reductions it generates.
 - (7) *Verification.* At periodic intervals, the project developer will contract an accredited independent auditor (a DOE different from the one that validated the PDD) to verify the emission reductions of the project.
 - (8) *Issue of CERs.* The verification and certification reports of the verifying DOE constitute the basis on which the Executive Board issues CERs. These CERs are issued into a pending account in the CDM registry, from where they are distributed to the accounts of the project participants. The project developer does not necessarily hold a registry account and often CERs are directly transferred to the accounts of the CER purchasers. CER accounts can be held in registries of Annex I countries.¹⁸

The majority of CDM projects are designed by project owners in developing countries. They prepare the relevant studies and documents, including the PDD, either alone or in cooperation with an entity from an Annex I country interested in acquiring the CERs. The acquisition of CERs, in most cases, takes the form of a forward purchase of CERs.

At the time of writing this article, an average of 150 projects are entering the validation stage each month. The CDM pipeline now contains 2,783 projects (excluding the 46 rejected and the nine withdrawn projects) that have entered the process of validation. 859 of the projects are now registered and a further 149 are in the registration process.¹⁹ The majority of the proposed projects (62 per cent) generate electricity from renewable energy sources, which reduce GHG emissions against electricity generation from fossil fuels. The high number of projects does not correspond, however, to a similarly high percentage in expected CER yield. Only 29 per cent of the projected CERs stem from renewable energy projects. More than 50 per cent of the expected CERs come from the abatement of non-CO₂ gases, such as HFC23, methane or nitrous oxide.

¹⁸ Non-Annex I (developing country) Parties have no obligation to establish and manage registries. This means that, unless they maintain an account in an Annex I registry, non-Annex I country entities do not hold accounts in national registries. CERs of non-Annex I countries are held in the international CDM registry, managed by the EB and administered by the UNFCCC secretariat.

¹⁹ UNEP Riso CDM Pipeline, available at: www.cdmpipeline.org/ (accessed 29 Dec. 2007).

B Entities Involved in the CDM

This section sets out to describe each of the entities involved in the CDM regulatory regime.

1 *The COP/MOP*

The CDM forms part of the compliance framework of the Kyoto Protocol, which is a protocol to the 1992 United Nations Framework Convention on Climate Change (UNFCCC). The COP/MOP is established under the Kyoto Protocol and refers to the ‘Conference of the Parties serving as the Meeting of the Parties’ to the Kyoto Protocol.²⁰ It is an assembly of all the Parties to the Protocol which convenes annually and is the governing body of the Kyoto Protocol. The mandate of the COP/MOP is broadly drafted. Article 13(4) states that the COP/MOP ‘shall keep under regular review the implementation of this Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation’. While engaging in rule-making and thus exercising legislative functions, the COP/MOP of the Kyoto Protocol does not have legislative powers *per se*. The decisions of the COP/MOP are not legally binding on any Party without its consent. The acceptance of COP/MOP decisions is founded on a Party’s consent rather than on the legislative authority of the COP/MOP.²¹

The CDM was established in Article 12 of the Kyoto Protocol. However, the limited provisions of the Protocol do not provide sufficient guidance for the creation of an operational mechanism as complex as the CDM. The COP/MOP has thus adopted, with the so-called Marrakesh Accords, the ‘Modalities and procedures for a clean development mechanism’.²² The Marrakesh Accords formulate a set of decisions that guide the implementation of the CDM. Even though the CDM modalities and procedures do not have any formally binding effect on the Parties participating in the mechanisms, there is general agreement amongst the Parties that the COP/MOP decisions determine their position under the mechanisms.

2 *The CDM Executive Board*

International bodies normally do not have the authority to take administrative or legal decisions that directly affect non-state actors. The Executive Board of the CDM is an exception. The EB is composed of 10 members and 10 alternate members from Parties to the Kyoto Protocol who are nominated by the COP/MOP. While the COP/MOP is the ultimate authority of the CDM, the day-to-day supervisory work is undertaken by the EB.²³

²⁰ See, e.g., Art. 2(1)(b) KP.

²¹ For a detailed review of law-making by COPs see Brunnée, ‘COPing with Consent: Law-making under Multilateral Environmental Agreements’, 15 *Leiden J Int’l L* (2002) 1, at 32.

²² The Marrakesh Accords were adopted by the 7th session of the UNFCCC COP held in Marrakesh, Morocco, in Dec. 2001 and confirmed by the 1st session of the COP/MOP in Montreal in Dec. 2005; FCCC/KP/2008/8/Add.1 Decision 3/CMP.1 (Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol).

²³ Art. 12(4) of KP: ‘The clean development mechanism shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Protocol and be supervised by an executive board of the clean development mechanism.’ The scope of its role and its powers is set out in Part C of Annex: ‘Modalities and procedures for a clean development mechanism,’ Decision 3/CMP.1, *supra* note 22, paras 2–4.

Pursuant to Article 12(4) of the Kyoto Protocol, the EB supervises the implementation of the CDM ‘under the authority and guidance of the COP/MOP’. The EB shall be ‘fully accountable’ to the COP/MOP.²⁴ Such language suggests a delegation of authority by the COP/MOP to the EB to act as the regulatory authority. In a domestic setting, such delegation of power is usually from the legislature to a regulatory agency that is recognized to possess the technical expertise to implement the regulatory framework, including the making of subsidiary legislation to complement primary legislation, the adjudication of licence applications, etc. Also, such delegation is common because the legislature usually does not have the requisite time and resources to undertake day-to-day supervision of the many areas in which the modern state now plays a role, for example, healthcare, monetary policy, welfare, environmental protection. This characterization of the EB as akin to a regulatory agency is not far-fetched.²⁵ In its daily operations, the EB clarifies and interprets the decisions of the COP/MOP. The Board takes decisions on methodologies and projects, and mandates reviews and revisions to project applications. It is assisted in this task by various expert panels. However, the recommendations of these panels are not binding and, increasingly, the Board’s decisions do diverge from their recommendations.²⁶ The EB is mandated to approve baseline and monitoring methodologies, review provisions with regard to simplified procedures for small-scale projects, and accredit DOEs. The Board also interprets the decisions of the COP/MOP and prepares technical and decision papers for review and adoption by the COP/MOP. In the process of interpreting the Kyoto Protocol and the COP/MOP decisions, the EB is effectively engaging in subsidiary law-making and adjudication. While the decisions of the EB are not legally binding in a formal sense, they have been accepted as *de facto* binding by entities that participate in the CDM, including both Parties to the Protocol and public and private legal entities. In this respect, the EB acts like a market regulator that is responsible for approving applications for licences to carry out any activity within its regulatory purview.

The EB also prepares annual reports for the COP/MOP.²⁷ The COP/MOP responds to requests of the EB and provides guidance to the EB on its operations.²⁸ The COP/MOP

²⁴ *Ibid.*, Annex, para. 5.

²⁵ Stewart, ‘U.S. Administrative Law: A Model for Global Administrative Law?’, 68 *Law & Contemporary Problems* (2005) 63, at 91, n. 11; Meijer, ‘The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice’, 39 *NYU J Int’l Law and Politics* (2007) 877, at 886.

²⁶ The EB’s divergence from the Methodologies Panel’s (MethPanel) recommendations in approving methodologies is an example of such divergence in interpretations between the EB and its panels. A concrete example is the pending issue of addressing the double counting of emission reductions generated by the use of biofuels. The MethPanel has developed several proposals to address this issue, the last one being rejected at the 30th session of the EB, which took place from 21–23 Mar. 2007. This renewed rejection of potential solutions to the double counting problem is likely to lead to a further indefinite delay in approval of such methodologies: see agenda item 3(b) of the Executive Board of the Clean Development Mechanism Thirteenth Meeting Report, available at: <http://cdm.unfccc.int/EB/030/eb30rep.pdf> (accessed on 15 June 2007).

²⁷ Pursuant to Decision 3/CMP.1, Annex, *supra* note 22, at para. 4(a). The EB reports are available at: <http://cdm.unfccc.int>. The latest report covers the period from end-Nov. 2005 to 21 July 2006 (accessed on 29 May 2007).

²⁸ Pursuant to Decision 3/CMP.1, *supra* note 22, Annex, paras 2–4.

therefore decides on the broader policy issues and on the strategic development of the CDM. It is the EB, however, which implements these policy directives at the project level.

3 Panels/Working Groups/Teams

To assist it in the performance of its functions, the EB is entitled to establish panels, working groups, or teams. In this regard, it 'shall draw on the expertise necessary to perform its functions, including from the UNFCCC roster of experts ...[and] take fully into account the consideration of regional balance'.²⁹ The expert panels do not take decisions. But they undertake the technical assessments upon which decisions of the EB will necessarily be based. Thus far, two panels, two working groups, and one team have been set up.³⁰

4 The UNFCCC Secretariat

The UNFCCC secretariat provides organizational support to the various actors in the Kyoto Protocol institutional framework, including the COP/MOP and the EB. It establishes the link between the various actors participating in the CDM.³¹ The Secretariat is responsible for, *inter alia*, preparing the minutes of meetings, drafting decisions and guidelines, arranging the meetings of the COP and the various Kyoto bodies, and monitoring the implementation of the UNFCCC through the collection and analysis of information provided by the Parties.³² The UNFCCC secretariat does not take any decisions. However, it serves to provide a collective institutional memory of the negotiation process and the evolution of the CDM. While the members of the EB and the technical panels change, the secretariat supplies the climate change regulatory regime with long-term career staff. Taking into account the increasing complexity of the various subjects, the secretariat staff often understands the context of the constellations of issues better than the members serving on the Board and panels. Through the preparation of decisions and interpretation of EB rulings, it communicates its positions and influences the process in the direction of its interpretation of the decision text. While the UNFCCC secretariat operates in the background, its role is nonetheless a powerful one.

²⁹ *Ibid.*, para. 18.

³⁰ See 'General Guidelines for Panels/Working Groups (version 02)', see <http://cdm.unfccc.int/Reference/Procedures/pnlguide.pdf> for more information (accessed on 27 July 2007). The panels include the Accreditation Panel and the Methodologies Panel; the Working Groups assist the EB in matters relating to Afforestation and Small Scale Projects respectively. The CDM Registration and Issuance Team (RIT) assists the EB to consider the requests for registration of project activities and the issue of CERS respectively that are submitted by DOEs.

³¹ Netto and Schmidt, 'CDM Project Cycle and the Role of the UNFCCC Secretariat', in D. Freestone and C. Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (2005), at 175.

³² More information about the UNFCCC Secretariat can be found at <http://unfccc.int/secretariat/items/1629.php> (accessed on 27 July 2007). It has been suggested that the in-depth review procedure of national communications under the UNFCCC (Arts 5, 7, and 8) gives the Secretariat a dominant position in evaluating and analysing Parties' national climate policies which strengthens the position of the Secretariat: see S. Oberthür and H.E. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* (1999), at 249.

5 Designated Operational Entities (DOEs)

The responsibility of a DOE is to validate a CDM project by independently evaluating the Project Design Document against the CDM requirements, including substantive review of the baseline and monitoring methodology, and ensuring that the CDM project has an adequate monitoring plan to prevent the overstatement of emissions reductions.³³ The DOE is responsible for validating that the project activity will result in a reduction of anthropogenic GHG emissions that are additional to any that would have occurred in the absence of the proposed project. During the implementation of a CDM project activity, the project participants prepare a monitoring report based on the registered monitoring plan and forward it to another DOE for verification/certification. After the second DOE has verified and certified the amount of emissions reductions, it submits a report to the EB which will then issue the CERs.³⁴

6 Designated National Authorities

Every country that wishes to participate in the CDM is required to set up a Designated National Authority (DNA). Project participants are required to obtain the written approval from the host country DNA before their projects can be registered by the EB. The DNA has to certify that a proposed CDM project contributes to its sustainable development.³⁵ Additional project participants, in most cases the purchasers of CERs, are required to have evidence of authorization and approval from an Annex I Party in order to participate in a CDM project.

7 Project Participants

Project participants may be either private or public entities. These entities are the ones that develop CDM project activities or are interested in acquiring the resulting CERs. In order to obtain the requisite approval by the EB, a project participant will have to prepare the relevant documents and channel them through the described CDM project cycle.

³³ The DOE's scope of work is set out in Section E of 'Modalities and Procedures for a clean development mechanism', *supra* note 22. The criteria that a Project Design Document must meet are set out in Appendix B of Decision 3/CMP.1, *supra* note 22.

³⁴ Information on the issue of CERs is found in Section J of the Marrakesh Accords. A list of all accredited DOEs can be found on the CDM website at: <http://cdm.unfccc.int/DOE/index.html>.

³⁵ To obtain the host country approval for CDM projects, most DNAs require the official Project Design Document (PDD), as well as compliance with local regulation. For Chile, Peru, Argentina, Ecuador, Honduras, Panama, and Korea, meeting these conditions is sufficient to demonstrate that the project contributes to sustainable development in the host country. Other countries have established additional sustainable development criteria that a CDM project has to comply with. Countries which require compliance with sustainable development criteria in addition to compliance with local environmental laws include Cambodia, Indonesia, the Philippines, Thailand, and Vietnam: Ministry of Foreign Affairs of Japan, FEALAC (Forum for East Asia-Latin America Cooperation), *Analysis of the Present Situation and Future Prospects of the Clean Development Mechanism (CDM) in the FEALAC Member Countries*, Study of EALAC for the 4th Economy and Society Working Group (7–8 June 2006), available at: www.mofa.go.jp/region/latin/fealac/index.html at 32.

3 CDM Market Regulation

A A Snapshot: The CDM and the Carbon Market

The CDM market was worth more than €12 billion in 2007 alone.³⁶ The asset creation takes place when registered CDM projects generate emission reductions, which can be issued as CERs. The ‘primary market’ is defined by the transactional relationship between the project and the purchaser of the emission right. Beyond these primary market transactions, a vibrant secondary and derivative market is emerging. The secondary market refers to transfers of issued CERs, while derivative trading involves the trading in options, futures, and carbon bonds.

The first CDM transactions were concluded between private project developers and sovereign carbon buyers (Annex I governments and international organizations). Today, an overwhelming majority of the entities trading in the CDM market are private entities.³⁷ They participate in the market either through investments in funds (for speculative purposes or compliance), through intermediaries, or through direct purchases. As of April 2008, there were (at least) 58 carbon funds in the market.

The Kyoto Protocol and the CDM have thus given rise to the first international market in an environmental commodity: certified emission reductions. The right that is created through the Kyoto Protocol is of a regulatory nature, and the market is a ‘permit’ market.³⁸ In the case of the CDM, CERs are treaty-based rights which exist only in the context of the Kyoto Protocol.³⁹

A functioning carbon market will direct money to the most cost-efficient ways to create CERs. This will in turn foster innovation in efforts to address climate change and create opportunities for market participants to take advantage of economies of scale. It is therefore important to create and maintain conditions that will encourage the deepening and increasing liquidity of the carbon market. Compared to traditional commodity markets, the success of a market in carbon rights (among others, in CERs) is more dependent on investor confidence in the robustness of the market and the regulatory framework simply because the creation, authenticity, and consequent value of the commodity in question are entirely dependent on the regulatory framework. The existence of a transparent governance structure, which ensures market oversight and fair market access to all market participants, is a precondition for

³⁶ Point Carbon, *Carbon 2008–Post 2012 is Now–*, Oslo, 11 March 2008.

³⁷ The market segmentation in 2006 is as follows: Governments – 8%, Funds – 34%, Private buyers – 58%: K. Røine and H. Hasselknippe (eds), *Carbon 2007 – A New Climate for Carbon Trading* (2007), at 17, Fig. 3.17. According to this same report, private buyers are dominating the market as more companies see the value of project credits. Most of the governmental buyers are European countries (at 19).

³⁸ See Yandle, ‘From Local to Global Commons: Private Property, Common Property, and Hybrid Property Regimes: Grasping for the Heavens: 3-D Property Rights and the Global Commons’, 10 *Duke Environmental L & Pol’y Forum* (1999) 13; Streck and Zhang, ‘Implementation of the Clean Development Mechanism in China: Sustainable Development, Benefit Sharing, and Ownership of Certified Emission Reductions’, 16 *Ybk Int’l Environmental L* (2005) 259, at 264.

³⁹ Through the Linking Dir. (Dir. 2004/101/EC, OJ (2004) L 338/18), CERs would be eligible for use in Phase One of the EU ETS (2005–2007), while both CDM and JI credits would be eligible for Phase Two (2008–2012).

such confidence. Consequently, the long-term robustness of the CDM goes along with the existence of a capable market regulator charged to promote market integrity through the administration, interpretation, and enforcement of rulings that apply to all regulated persons in the same manner.

B *The EB as Regulator*

As an instrument of international law, the Kyoto Protocol applies only to states that have ratified the treaty.⁴⁰ However, from the moment of its creation, the negotiators of the Kyoto Protocol foresaw private participation in the flexible mechanisms established under the Protocol. Article 12(9) of the Kyoto Protocol explicitly states that '[p]articipation under the CDM ... may involve private and/or public entities, and is subject to whatever guidance may be provided by the executive board of the clean development mechanism'.

The governance structure of the CDM is evidence of the increased delegation of authority under treaties to various subordinated panels and constituted bodies. Such delegation is not undisputed, as the increased distance between the legitimized law-makers (the national governments) and the executive bodies to which significant powers have been delegated poses the risk of deficits in control and accountability.⁴¹ Administrative effectiveness may increase through the delegation of executive tasks to specialized bodies such as the CDM EB. To the same extent, however, democratic accountability arguably diminishes through the increasing distance from legislative bodies and ratification procedures.⁴² Further, while delegated decision-making in the domestic context exists within a broader system of checks and balances, the accountability regime in the international realm is much thinner. For example, there is no judiciary to check the legality of executive decision-making.⁴³ The Executive Board's decision or its omissions to decide have important consequences for any project participant, regardless of whether it is a Party or a private legal entity participating in a particular CDM project.⁴⁴ If actions similar to those of the EB were performed by

⁴⁰ The general rule as stated in Art. 34 of the Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, is '[a] treaty does not create either obligations or rights for a third State without its consent'.

⁴¹ The delegation of 'legislative' or rule-making power from the COP/MOP to the EB poses the thorny question of abdication of responsibility on the part of the COP/MOP, which has been given such powers by the Convention and the Protocol. The delegation of decision-making power to constituted bodies and subordinated panels would raise questions with respect to general principles of good governance, such as accountability. While the EB has not delegated any decision-making powers further, it is the role and authority of the EB itself and its accountability towards the COP/MOP or any legitimized law-makers (i.e., the national governments) which is questionable.

⁴² When governments and legislators which bind sovereign states through the process of signing and ratifying a legal instrument are put in place through democratic elections and legitimized through transparent and democratic processes, treaty law also provides for democratic legitimacy on the international level.

⁴³ Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale LJ* (2006) 1490, at 1504.

⁴⁴ The conception that non-state actors are the regulated entities presents an evolution of international regulation away from a state-centric mode and towards a conception of global regulation of market actors, with states serving an intermediate position: Stewart, *supra* note 25, at 96, n. 11. Other examples can be found in the context of the WTO and the Montreal Protocol.

national agencies, there would be little doubt of their administrative and regulatory character. But the CDM does not provide entities affected by decisions of the EB with procedural rights comparable with those of domestic administrative law regimes.

The EB, under the guidance of the COP/MOP, acts as the market regulator for the CDM and is thus responsible for establishing and maintaining standards for the development of a fair, orderly, and efficient market. However, its role is not limited to pure market access regulation. The EB's responsibility includes the process of asset creation itself: The existence of any circulating CER depends on the EB's approval at various stages of the creation process.

The administrative rules that guide the operations of the EB provide a number of safeguards. Individuals serving on the EB are required to have defined expertise, obliged to preserve confidentiality, undertake to have no interest in any project or operational entity, and are required to take an oath of office.⁴⁵ However, there are no assessments or interviewing procedures to ensure that these requirements are met before an individual is appointed to the EB. Following UN tradition, the regional negotiations groups nominate representatives which so far have been approved by the COP/MOP without further questioning.⁴⁶

C *The EB in Operation: An Analysis*

Any evaluation of the performance of the CDM will have to strike a balance between the environmental integrity of CERs and the efficiency in their supply. It has not only been the CDM's environmental performance that has been the subject of debate and criticism, but its institutional performance as well.⁴⁷ The CDM can only be successful in creating CERs if participants in CDM projects trust that the procedure that leads to the eventual transfer of CERs to their registry accounts is administered in a transparent and fair manner. If project participants are not confident that their investments will eventually be rewarded with CERs, they will shy away from investing in CDM projects.

The continuous stream of project proposals that reaches the EB demonstrate that participants in CDM projects still evaluate the risks associated with the administrative procedures as bearable. The risks associated with the complicated and obscure CDM rules and the EB's performance are offset by the opportunities of generating cost-efficient CERs. However, such confidence will not necessarily be perpetuated and

⁴⁵ Decision 9/CMP.1 Guidelines for the implementation of Article 6 of the Kyoto Protocol (hereinafter 'Decision 9/CMP.1'), Annex, para. 10; Decision 3/CMP.1, *supra* note 22, Annex, para. 8(e). The EB has adopted rules of procedures that regulate their operations.

⁴⁶ The procedure is based on CDM Modalities and Procedures, *supra* note 22, Annex, paras 7 and 8. So far no objection to the candidates proposed by the regional groups has been recorded.

⁴⁷ Streck, 'The Governance of the Clean Development Mechanism – the Case for Strength and Stability', in D. Freestone and C. Streck (eds), 15(2) *Special Issue, Environmental Liability Journal: The Kyoto Protocol – Current Legal Status of Carbon Finance and the Flexible Mechanisms* (2007) 91. See also IETA, '2006 State of the CDM, IETA Position on the CDM for COP/MOP2', available at: www.ieta.org/ieta/www/pages/getfile.php?docID=1931 (accessed on 25 July 2007). For discussion of the environmental integrity of the CDM see Meijer and Werksman, 'CDM – Concepts, Requirements and Project Cycle', in Freestone and Streck (eds), above, at 81.

investors will continue to evaluate CDM risks each time they make an investment decision. Once project participants perceive that they may not be treated with fairness or enjoy certain minimal due process rights and that there is uncertainty in the decision-making processes, the risks will be considered too high to justify participation in the CDM. It is therefore crucial that the CDM applies commonly accepted principles of due process to guarantee fundamental fairness, justice, and respect for property rights.

A look behind the scenes reveals, however, significant unhappiness with a number of the EB's rulings and its way of conducting business. While market actors generally appreciate the hard work of the individuals serving on the Board, there are mounting complaints about the continued lack of transparency in the Board's decision-making and the lack of predictability.⁴⁸ The ingredients of a sound process are, at the same time, the conditions for fair and predictable decisions. In what follows, the EB's performance will be measured against the procedural requirement of independence, transparency, efficiency, predictability, as well as the right of project participants to be heard and to appeal EB decisions.⁴⁹

1 Independence

The EB and the DOEs are mandated to be neutral and independent. Any potential conflicts of interests are to be avoided, whether these interests are of a financial, political, or personal nature.

EB members act in their personal capacity and do not represent any country or constituency. They have to be properly qualified and are not supposed to have an interest in any project. To ensure that all decisions taken are unbiased, at the beginning of each meeting the members of the Board confirm that they do not have any interest in any project or operational entity.⁵⁰ Affected entities can raise objections regarding such confirmations.

In practice, the interpretation of what constitute 'conflicting interests' is *de facto* reduced to the question of whether a financial conflict of interest exists. However, while it can be assumed that no EB member has a pecuniary interest in the CDM projects he/she reviews, political conflicts of interest are common and uncontested. In some instances, those conflicts appear to dominate the Board's decision-making practices. It is not seldom that EB members play multiple roles at the same time, including those of being UNFCCC/Kyoto Protocol negotiators for their country, representing their country's DNA for the CDM, or as managers of large government CDM purchasing

⁴⁸ IETA, 'Strengthening the CDM, Position Paper for COP 11 and COP/MoP 1', Position paper to COP12 COP/MOP 2, available at: www.ieta.org/ieta/www/pages/getfile.php?docID=1132; IETA letter dated 6 Oct. 2006 to the Chair of the Executive Board regarding the communication with the Board and its panels; World Bank, Reforming the Clean Development Mechanism, Background Paper for the Steering Committee Meeting, World Bank Carbon Finance Host Country Committee, available at: <http://carbonfinance.org/Router.cfm?Page=DocLib&CatalogID=5668> (accessed on 10 Aug. 2007); Center for Clean Air Policy, Washington, DC, 'Summary of an Informal Workshop on Streamlining the CDM, COP/MOP1', available at: www.ccap.org/international/Summary%20of%20Day%201%20&%202%20Discussions.pdf (accessed on 10 Aug. 2007)

⁴⁹ The following list borrows heavily from Streck, *supra* note 47.

⁵⁰ Decision 3/CMP.1, *supra* note 22, Annex, para. 8(f).

programmes.⁵¹ Although there may be no financial conflict of interest, many EB members are entangled in a complicated web of different interests which is tolerated by the COP/MOP and the members of the Board.

2 *Transparency*

The EB is a body which exercises regulatory functions but is not directly subject to the control of national governments or national legal systems. Transparency and public participation should provide the necessary counterbalance to the missing legal controls and is supposed to play a central role in the decision-making processes of the CDM.⁵² The CDM project cycle provides the possibility of public participation at the project level and the CDM rules require that 19 separate types of CDM-related information be made ‘publicly available’.⁵³ While there is a clear recognition of the importance of participation and transparency in the CDM project cycle, it is questionable whether the same degree of transparency applies to the work of the EB. In order to ensure transparency regarding some ‘aspects’ of its work, the EB decided, at the tenth meeting of the CDM Executive Board in July 2003, to take the following measures:

enhancement of the UNFCCC CDM web site; provision of CD-ROMs, selected documents/forms in all UN languages; organization of meetings with Parties and accredited observers; and the review of modalities for attendance by observers to meetings of the Executive Board.⁵⁴

To enable interested parties to follow the deliberations of the EB, the Board’s meetings ‘shall be open to attendance, as observers, by all Parties and by all UNFCCC accredited observers and stakeholders, except where otherwise decided by the Executive Board’.⁵⁵ The objective of transparency is to be weighed against the need for efficiency and the need to keep certain information confidential. This is expressed in rule 14 of the EB rules and procedures,⁵⁶ which authorizes the Chair of the Board to decide on the opening and closing of EB meetings without giving reasons for his/her decision. In addition, the EB may decide ‘in the interest of economy and efficiency, to limit attendance at its meetings to members, alternate members and secretariat support staff’.⁵⁷

⁵¹ A comparison of the list of EB members and the representatives of country DNAs (both listed on the UNFCCC website at: <http://cdm.unfccc.int/index.html> (accessed on 10 Aug. 2007)) reveal the overlaps in responsibility. Reviewing the portfolios of the individuals within their national ministries, it also becomes clear that their responsibilities often cover all aspects of the CDM, including the purchase and sale of CERs on behalf of their respective countries.

⁵² Meijer and Werksman, *supra* note 48.

⁵³ Eddy, ‘Public Participation in CDM and JI Projects’, in D. Freestone and C. Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (2005), at 71, 79.

⁵⁴ EB10 Annex 6 to the Second Annual Report of the Executive Board to the Clean Development Mechanism to the Conference of the Parties (2002–2003)/section IV, number 54–65.

⁵⁵ Para. 16 of the Annex to Decision 3/CMP.1 on modalities and procedures for a CDM, document FCCC/KP/CMP/2005/8/Add.1.

⁵⁶ The Board has further complied with its mandate to develop Rules of Procedure and has proposed these Rules which were adopted by the 8th session of the COP (2002) and the 1st session of the COP/MOP (2005). Rule 26 of the Rules and Procedures emphasizes that the rule of transparency applies to all the work of the EB, see *Rules of Procedure of the Executive Board of the Clean Development Mechanism* available at: <http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf#page=31> (accessed on 20 June 2007).

⁵⁷ *Ibid.*, Rule 27.

In practice, there is a clear tendency to limit attendance to EB meetings and to conduct closed sessions. Recently, it has become more frequent that half of each EB meeting takes place behind closed doors. As a result, even those very entities that are directly affected by the decisions of the EB do not have access to the Board's meetings. In addition, there is little opportunity for direct interaction between stakeholders and the EB and its bodies, as appropriate, e.g., between the Methodologies Panel and project participants, that could improve the transparency of the process for those directly affected. The public is allowed to attend neither the meetings of the expert Panels nor the meetings of the Working Groups.⁵⁸ Participants in CDM projects are left on their own to try to understand the underlying rationale and the reasoning for a particular decision. Yet, one of the purposes of granting a fair hearing, apart from considerations of the efficient administration of law or policy, is to enable the affected party to play a role in the process of decision, thereby acknowledging his autonomy as a rational agent.⁵⁹ Further, closed door meetings do not promote adherence to the fundamental tenet that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.⁶⁰ The appearance of bias offends the rule of law as much as its actuality.

3 Efficiency

Consistent with the aim of ensuring environmental and social integrity, the CDM process should minimize: (1) the duration of the review; (2) the transaction costs for project developers; and (3) the administrative costs of the international process. The review procedures should be as streamlined as possible.

Reality does not live up to this aim. The CDM process is lengthy and cumbersome. The approval of new methodologies can take between six months and two years. Different interpretations by the Methodologies Panel and the EB lead to delays, and even the mandatory 90-day period for the registration of a submitted project is set back in practice.⁶¹

It is true that the EB is confronted with an increasing workload because of the scope of guidance sought by project participants and the sheer number of projects presented for registration. It is also true that the EB consist of extraordinary, committed, and hard working individuals. However, the individuals serve on the Board in addition to their full time jobs, and part-time volunteers find it almost impossible to keep up with the workload of the EB.

In addition, the EB is confronted with an increasing number of technical issues which lie beyond the expertise of its members. While the EB members would be qualified to exercise an oversight function, they are overwhelmed by technical details

⁵⁸ The newly created 'Review and Issuance Team' has been created without any clear legal basis and, although it is highly influential, there is no international process of selecting and appraising its members, nor are the meetings of the team open to the public.

⁵⁹ *Supra* note 6, at 29.

⁶⁰ Lord Hewart CJ in *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.

⁶¹ The UNFCCC secretariat has introduced the practice of counting the 90-day period not from the moment of submission of the documents but from the moment the secretariat and the RIT consider the documents to be complete. Misspellings or other minor issues can thus lead to significant delays in the registration process.

of various project classes. The requirements of daily micro-management of project- and methodology-related issues lead to delays in the approval of projects and the review of methodologies.

4 *Predictability and Certainty*

Decisions of the Executive Board (and DOEs) should be consistent and predictable.⁶² The various rules and decisions have to be applied in a consistent manner to ensure that all project participants are treated fairly. Given the importance of stability to encouraging the development and maturity of the emerging carbon market and the significant role played by the market regulator in creating and maintaining such stability, there is all the more need for the EB's decision-making to be consistent, fair, and predictable.

In reality, the decisions and interpretations of the EB are often unpredictable.⁶³ The lack of predictability may, to a certain extent, be the logical consequence of ambiguous COP/MOP decisions which lie outside the control of the EB. However, there are a number of issues that increase the risk of inconsistent decision-making practices: (1) the lack of institutional memory and the rotation of the EB members;⁶⁴ (2) a process driven by politics rather than technocratic application of rules, and (3) insufficient technical expertise. The issues presented to the EB are of increasing technical complexity, which goes beyond the training and expertise of its members. In addition, political interests and horse-trading may also exercise undue influence on the decisions of the EB.

5 *Review*

Where rights of private entities are affected by EB decisions, these entities should be granted the right to be heard and the right to have a decision that they wish to contest reviewed by an independent body.

It is a necessary condition of a fair administrative procedure that entities that are affected by the decisions of a regulatory body have access to a full and fair review of the decision in question. The COP/MOP decisions provide for a review procedure of some contested decisions when a decision improperly affects a Party's interest. The review is conducted by the enforcement branch of the Protocol's Compliance Committee.⁶⁵ These procedures, however, do not extend to non-Party participants in CDM projects. Under the existing Kyoto Protocol guidelines, procedures, and rules, the procedural rights of private parties are very limited. Under the current CDM regime, affected project participants are afforded no opportunity for the review of Board decisions. It is unacceptable that private entities that see themselves directly affected by administrative decisions of

⁶² IETA, *supra* note 48.

⁶³ See e.g., *ibid.*

⁶⁴ This point is partly being address by an increasing number of professional UNFCCC secretariat staff. However, currently the UNFCCC staff is still new and does not possess the required institutional memory.

⁶⁵ Decision 27/CMP.1, Annex, Procedures and mechanisms relating to compliance under the Kyoto Protocol, sects IX and X.

an administrative body have no access to a court or independent tribunal that reviews these decisions.⁶⁶

The described shortcomings of the CDM process increase the likelihood of disputes between private (and public) entities and international bodies such as the COP/MOP or the EB. In its daily operations, the Executive Board clarifies and interprets the application of the decision of the COP/MOP. The Executive Board serves as administrative body under the Kyoto Protocol and its decisions or its omissions to decide have important consequences for any project participant, regardless of whether it is a Party or a private legal entity participating in a particular CDM project. Potential areas of dispute could be based on the following claims:

- Determinations of the Executive Board are *ultra vires* the Board's delegated authority;
- Members of the Executive Board are not qualified and that the Board has taken decisions based on factually incorrect technical and scientific conclusions;
- Members of the Board are faced with a conflict of interests, which makes impartial decisions impossible;
- Breach of confidentiality;
- Non-conformity with the EB's operational procedures that result in a violation of procedural rights under the CDM. Such rights include the right to open EB meetings, access to information, and hearings according to the CDM procedures and modalities.⁶⁷

The CDM is dominated by private sector interests. Project participants take investment decisions based on the promise of receiving CERs that reward achieved emission reductions. Any decision that impedes or reduces the likelihood of receiving CERs will potentially cause project developers financial damage. Wherever the damage can be linked to a particular determination of the EB, the affected party may seek compensation from the Board and/or its individual members for the damage suffered.

International organizations must respect the rule of law. Accordingly, there must be processes which allow entities that claim to be harmed by such organizations to be heard. These processes may be through dedicated international bodies or, in the absence of such bodies, national courts. Without being granted procedural rights and access to appeal and review of EB decisions, private sector participants may turn to domestic courts as a forum of redress when their rights are perceived to have suffered infringement.⁶⁸ The EB and its Members are not granted any immunity under the Kyoto Protocol. And even if these treaties included provisions that extend immunity to constituted bodies of the Kyoto Protocol, immunity would not lead to impunity, and in the absence of an international dispute settlement mechanism national courts may hear the claims put forward by private entities. Whether such actions were eventually dismissed would depend on the substantive law of the State Party concerned.

⁶⁶ Meijer, *supra* note 25, at 925.

⁶⁷ E.g., Decision 3/CMP.1, *supra* note 22, Annex, paras 16 and 23.

⁶⁸ *Supra* note 3.

While some authors argue that national courts would be a suitable forum for addressing the lack of accountability at the international level, it is our view that a review of CDM procedures by national courts would seriously put at risk the coherence of the mechanism that is unlikely to survive as a global mechanism if it were subject to litigation in various Member states and, consequently, differing judicial interpretations of the rights and obligations under the Kyoto Protocol.⁶⁹

4 Comparative Analysis

The call for greater protection of individual rights in the interaction with international bodies is not limited to the carbon market. Relevant discussions conducted in other contexts may help us to draw some conclusions for a proposed reform of the CDM. In this section, we will examine two examples of international bodies affecting rights of individuals with the objective of drawing lessons for a reform of the CDM. We will analyse the extent to which targeted sanctions applied by the UN Security Council and their effect on individuals hold comparative lessons for the CDM. Another case study is provided by the global anti-doping regime.

A *The UN Security Council and its Targeted Sanctions*

Since the 1990s, the UN Security Council has applied ‘targeted sanctions’ towards individuals or entities which are considered by the Council to be a threat to global security and peace.⁷⁰ ‘Targeted sanctions’ are intended to have their impact focused on leaders, political elites, and segments of society believed responsible for objectionable behaviour, while reducing collateral damage to the general population and third countries.⁷¹ The concept of targeted sanctions as an alternative to comprehensive embargoes and sanctions is relatively new and has been driven by the intent to avoid the humanitarian impact of traditional sanctions on broader populations. However, shortcomings in the process of applying and reviewing target sanctions have triggered criticism and led to challenges in national courts. Problems with the failure to notify listed individuals and entities, as well as the lack of information regarding the basis for subjection to targeted sanctions, contribute to perceptions of unfairness.⁷² Criticisms persist about procedures related to the designation or listing of individuals, or

⁶⁹ Meijer, *supra* note 25. Meijer argues that the review of administrative CDM decisions by national courts should be possible. Assuming that the EB would be protected by judicial immunity, she proposes a lifting of such immunity for any decisions of administrative nature.

⁷⁰ The authors thank Prof. Michael Bothe for making the link between the CDM and the targeted sanctions of the UN.

⁷¹ Hufbauer and Oegg, ‘Targeted Sanctions: A Policy Alternative?’, Paper presented at symposium on ‘Sanctions Reform: Evaluating the Economic Weapon in Asia and the World’, 23 February 2000, available at: www.petersoninstitute.org/publications/papers/paper.cfm?ResearchID=371 (accessed on 27 July 2007).

⁷² T. Biersteker and S. Eckert (eds), *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 Mar. 2006, Executive Summary, at 3.

the process for the removal of individuals and entities from the list. Targeted sanctions clearly affect the fundamental rights of those affected; however, they are applied outside any administrative process and the entities 'targeted' are therefore without means of appeal or review. This means that while targeted sanctions have reduced impact on the broader public, the move towards targeted measures has created new issues, in particular, with regard to the rights of individuals and legal entities that have been listed wrongly. Concerns regarding the legality of such sanctions have been expressed by academics,⁷³ NGOs,⁷⁴ and courts.⁷⁵ The Council of the European Union has also addressed the issue.⁷⁶

Just as in the case of targeted sanctions, albeit with a less severe impact on an individual or legal entity, the decisions of the CDM EB affect the rights of parties that do not have access to any mechanism of review or remedy. Depending on the impact of a certain decision on participants in a CDM project or DOEs, courts may review such a decision, like UN sanctions, in the light of the requirements of the right to an effective remedy. Improving the procedures for the application of sanctions – or decisions that affect individual parties under the CDM – ensuring that they are fair and clear in their application, would therefore reduce the risk of judicial decisions.⁷⁷

The discussions on a review mechanism of UN Security Council decisions on targeted sanctions can therefore be of value when deciding on the design of a similar mechanism in the context of the CDM. The rights to a fair trial and an effective remedy lie at the heart of the debate. Article 8 of the Universal Declaration of Human Rights (UDHR) enshrines the right to an effective remedy. The right to review and appeal a decision is also enshrined in Articles 2(3) and 14 of the International Covenant on Civil and Political Rights (ICCPR),⁷⁸ as well as Article 6 of the European Convention on Human Rights. There is certainly room for discussion about whether any of these provisions applies directly to cases such as the targeted sanctions or CDM related

⁷³ Frank, 'UN-Sanktionen gegen Terrorismus und europäische Menschenrechtskonvention', in L. Calfisch et al. (eds), *Liber Amicorum Luzius Wildhaber. Human Rights – Strasbourg Views / Droits de l'homme – Regards de Strasbourg* (2007), at 237; Warbrick, 'The European Response to Terrorism in an Age of Human Rights', 15 *EJIL* (2004) 989; Cameron, 'UN Targeted Sanctions, Legal Safeguards and the ECHR', 72 *Nordic J Int'l L* (2003) 1; Fitzgerald, 'Managing Smart Sanctions Against Terrorism Wisely', 36 *New England LR* (2002) 957; Schmahl, 'Effektiver Rechtsschutz gegen targeted sanctions des UN-Sicherheitsrats?' [2006] *Europarecht* 566; Aust and Naske, 'Rechtsschutz gegen den UN-Sicherheitsrat durch europäische Gerichte?', 61 *Zeitschrift für Äusserliches Recht* (2006) 587.

⁷⁴ Human Rights Watch, 'Sanctions Rules Must Protect Due Process', Mar. 2002, available at: <http://hrw.org/english/docs/2002/03/04/global5839.htm>.

⁷⁵ Case T-306/01, *Ahmed Ali Yusuf & Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-03533, relating to S/RES/1267 (1999); Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* [2006] ECR II-04665, relating to S/RES/1373 (2001).

⁷⁶ Council of the European Union, 'Basic Principles on the Use of Restrictive Measures (Sanctions)', 7 June 2004, Doc. No. 10198/1/04 PESC 450 REV 1; cf. also Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy', 2 Dec. 2005, Doc. No. 15114/05 PESC 1084 Fin 475.

⁷⁷ For UN targeted sanctions see *supra* note 72.

⁷⁸ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) of 16 Dec. 1966; entry into force 23 Mar. 1976.

decisions.⁷⁹ The need for due process has however been acknowledged by the UN General Assembly which declared in its 2005 World Summit Outcome:⁸⁰

109. We also call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individual and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions...

This is reflected in a statement issued on 22 June 2006 by the President of the Security Council.⁸¹

The Council is committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions. The Council reiterates its request to the 1267 Committee to continue its work on the Committee's guidelines, including on listing and de-listing procedures.

In addition, the Security Council has adopted a number of resolutions providing for a review of listing decisions and for a de-listing procedure.⁸² Implementing these resolutions, the Sanctions Committees have elaborated guidelines for the review of listing decisions and for de-listing.⁸³ In addition to those guidelines, a number of procedural improvements as well as a revision and appeal mechanism have been proposed, such as the establishment of a focal point, ombudsman, expert teams, or an arbitration panel reviewing the delisting of entities.⁸⁴ Similar approaches could be envisaged in relation to the CDM.

B The Global Anti-doping Regime

Another area wherein individuals are directly affected by decisions of international bodies is that of international sports, in particular, the anti-doping regime. Unlike the case of the UN Security Council, international sports have been regulated for the longest time by private institutions.

In 1999, the International Olympic Committee (IOC) set up the World Anti-Doping Agency (WADA), legally a non-governmental body with a mixed representation of Olympic bodies and governments.⁸⁵ WADA developed the World Anti-Doping Code (WADC) which, in itself, is a private text. Over 100 national governments supported the Code through the adoption of the so-called Copenhagen Declaration.⁸⁶ The mix of private and public elements in the governance system of the anti-doping regime makes for a useful comparison with the CDM. Just as anti-doping measures affect

⁷⁹ For UN targeted sanctions see van den Herik and Schrijver, 'Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law', in Biersteker and Eckert, *supra* note 72, Executive Summary, at 8.

⁸⁰ A/RES/60/1/.

⁸¹ S/PRST/2006/28.

⁸² Res 1617 (2005); 1730 (2006); 1735 (2006).

⁸³ Guidelines of the Security Council Committee Established Pursuant to Res 1267 (1999) Concerning Al-Qaida and the Taliban, adopted on 7 Nov. 2002, as amended; Guidelines of the Committee Established Pursuant to Res 1636 (2005).

⁸⁴ Biersteker and Eckert, *supra* note 72, Executive Summary, at 38.

⁸⁵ Its official website is at: www.wada-ama.org (accessed 10 Aug. 2007).

⁸⁶ A. Van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime*, New York University School of Law, IILJ Working Paper 2005/11, Global Administrative Law Series, at 4.

an athlete's fundamental rights, the decisions of the EB can affect the rights of CDM project participants. In both professional sports and the CDM, the participation of the actors is voluntary. However, in choosing to participate in sports or the CDM, the athlete or the CDM project participant respectively is forced to subscribe to the rules and procedures of the game. Taking into account the impact that decisions of the anti-doping regime may have on an athlete's professional life, most national courts would not let the private nature of the relationship between the athlete and the governing sport institutions stand in the way of an administrative law review of the process.⁸⁷ Similarly, in the CDM regime, it is likely that some legal systems may enable recourse to the courts in certain circumstances, in particular, if the court is convinced that the international system is not giving affected legal entities sufficient protection.⁸⁸ In both cases, courts may respect self-regulation up to the point at which they consider that the fundamental rights of the claimant have been affected, warranting judicial intervention under the pretext of public policy.⁸⁹ While the international law character of the CDM may convince national courts not to interfere with the EB's jurisdiction, the fact that the CDM governance does not provide for any alternative appeal or dispute settlement mechanism may lead courts to the conclusion that due process rights need to be granted to allow the private entity to seek recourse when its rights have been violated. The calls for good governance in the private regime of anti-doping can therefore be compared to, and are as convincing as, those in the area of the CDM.

The Court of Arbitration for Sport (CAS) is the independent international arbitral body established by the International Olympic Committee to handle disputes touching the world of sports, including matters involving athlete eligibility and commercial disputes relating to sports. Parties need to submit themselves voluntarily to the process of the CAS. WADA has designed the CAS as the exclusive arbitral mechanism to resolve doping-related matters involving international athletes or occurring at international events. Like the CAS's specialized arbitration mechanism in sport disputes, the Permanent Court for Arbitration (PCA) has reacted to the emerging market in environmental commodities. The PCA has adopted the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment and has established a roster of experts with specific climate change law expertise. The objective of the optional rules is to create a 'unified forum' to which states, intergovernmental organizations, NGOs, multinational corporations, and private parties can have recourse when they have agreed to seek resolution of disputes relating to the environment and/or natural resources.⁹⁰ While the CAS and the PCA optional rules create a specialized forum to address disputes in their respective areas, they are unlikely to provide affected parties with the administrative remedy needed. They are designed to

⁸⁷ *Ibid.*, at 17.

⁸⁸ Note by the Secretariat, 'Privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol', FCCC/KP/COP/MOP/2005/6, paras 19 and 27.

⁸⁹ Van Vaerenbergh, *supra* note 86, at 18.

⁹⁰ Ratliff, 'The PCA Environmental Arbitration and Conciliation Rules', 1(1) *Transnat'l Dispute Management* (Feb. 2004), available at: www.transnational-dispute-management.com/samples/freearticles/tv1-1-1-roundup_12.htm.

create space for dispute resolution between private parties or parties to a treaty, but they do not establish a standing appeal mechanism open to those who feel that they have been treated unfairly by a sports body or the Executive Board of the CDM.

5 Models for International Review Mechanisms

The establishment of a review mechanism is a crucial aspect of meeting due process requirements. A note prepared by the UNFCCC Secretariat on ‘Privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol’ confirms this conclusion, for it considers that the absence of formal procedures for private or public legal entities to raise their concerns when affected by decisions of a constituted body of the Kyoto Protocol regime, such as the EB, increases the risk that such entities will seek redress through litigation in the domestic courts.⁹¹ An appeals mechanism is necessary to meet the frustrated expectations of participants in the carbon market, which makes this discussion of the institutional design of such a mechanism timely. Before we develop a proposal for a CDM review mechanism, we will look at potential models and precedents. We found such models in the World Bank’s Inspection Panel and the European Ombudsman and, in this section, will discuss the extent to which these institutions can serve as models for a CDM review mechanism.

A *World Bank Inspection Panel*

In 1993, the World Bank created the Inspection Panel in response to widespread criticism by civil society and some government agencies for its failure to abide by its own policies in the course of its involvement in certain highly controversial infrastructure projects. A key reason for the formation of the Panel was to check on the Bank’s adherence to its own policies and procedures as well as to make its decision-making processes more transparent and accountable. The mandate of the Panel is to allow qualifying non-state actors to hold the Bank accountable for actions that cause or threaten to cause serious harm to the complainants and are inconsistent with the Bank’s own operational policies and procedures.⁹²

The Panel consists of three members who are nominated by the President of the Bank after consultation with the Board of Executive Directors, and are appointed by the Board.⁹³ Panel members are ‘selected on the basis of their ability to deal thoroughly and fairly with the requests brought to them, their integrity and their independence from the Bank’s Management, and their exposure to developmental issues and to living conditions in developing countries’.⁹⁴ The Resolution establishing this

⁹¹ FCCC/SBI/2006/21, Privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol, *supra* note 88.

⁹² IBRD Res 93-10 and IDA Res 93-6. The World Bank Inspection Panel, was adopted by the Bank’s Board of Executive Directors on 22 Sept. 1993. Also see the ‘About Us’ section on the Inspection Panel website at: www.worldbank.org/inspectionpanel (accessed on 10 Aug. 2007).

⁹³ *Ibid.*, para. 2.

⁹⁴ *Ibid.*, para. 4.

Panel includes a number of requirements designed to ensure the independence of the members of the Panel. First, the Resolution stipulates that members cannot have worked in any capacity, including those of consultant and local consultant, for the Bank for the two years prior to their appointment.⁹⁵ Secondly, a panel member is disqualified from taking part in the hearing and investigation of any request related to a matter in which he/she has a personal interest or has had significant involvement in any capacity.⁹⁶ Thirdly, Panel members may be removed only by a decision of the Board and 'for cause'.⁹⁷ Finally, following the expiry of their term on the Panel, members are not eligible for employment by the Bank Group in any capacity.⁹⁸ The Panel is assisted by a Secretariat which is functionally independent of the World Bank Management and answers only to the Panel.⁹⁹

An investigation by the Panel can be launched in one of three ways. The most important trigger for an investigation is a complaint by local people who are or may be affected by a Bank-supported project.¹⁰⁰ In the request for inspection, the affected party must demonstrate that its rights have been affected by an action of the Bank as a result of a failure of the Bank to follow its operational policies, and that such failure has had, or threatens to have, a material adverse effect.¹⁰¹

The Panel is a fact-finding body and does not make recommendations for the correction or remediation of any failures which are uncovered during the investigation process. Instead, when the Bank management responds to the Panel's Investigation Report, it will usually propose a course of remedial action to the World Bank Board. The Board decides whether to approve the management's recommendations. The request for information, management's response to the request, investigation report, management's response to the investigation report, and its recommendations are all made available to the public on the Inspection Panel's website.

While the Panel has proved to be an important accountability mechanism, a significant shortcoming hampers its efficacy. The Panel does not play any role in monitoring the implementation of the Board's final decision regarding the remedial course of action proposed by management and the Panel's findings.¹⁰² This effectively means that there is no checking mechanism to ensure implementation of proposed remedial action and that grievances that gave rise to the request for inspection in the first place are effectively addressed. In order to close this gap in the accountability process, the Board should monitor the implementation of any remedial action and a feed-back loop to the Panel should be introduced.

⁹⁵ *Ibid.*, para. 5.

⁹⁶ *Ibid.*, para. 6.

⁹⁷ *Ibid.*, para. 8.

⁹⁸ *Ibid.*, para. 10.

⁹⁹ See 'Panel Secretariat' section on the Inspection Panel website, *supra* note 92.

¹⁰⁰ Defined in the Resolution as 'an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals)'.

¹⁰¹ *Ibid.*, para. 12.

¹⁰² Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions', 36 *Georgia J Int'l L* (2005) 403, at 419.

B *The European Ombudsman*

On 9 March 1994, the European Parliament adopted the European Ombudsman Statute, laying the legal foundations for the creation of an ombudsman office to ‘help ... uncover maladministration in the activities of the Community institutions and bodies, ... and make recommendations with a view to putting an end to it’.¹⁰³ Apart from the fact that there is no standardized definition of ‘maladministration’, the examples of ‘maladministration’ provided are potentially confusing as they fail to provide a clear delineation of the Ombudsman’s mandate. However, the definition may be intentionally broad so that the Ombudsman enjoys wide latitude to correct whatever administrative irregularities it sees fit.

The procedures of the European Ombudsman are relatively straightforward. A complaint must be made within two years of the date on which the complainant became aware of the facts on which its complaint is based.¹⁰⁴ A complainant need not be individually affected by the maladministration. However, the complainant must have contacted the institution or body concerned before it contacts the Ombudsman.¹⁰⁵ The Ombudsman registers the complaint and has to determine whether the complaint is within its mandate and, if so, whether it is admissible. It may request to be furnished with more information and documents before reaching a decision.¹⁰⁶ In addition, the Ombudsman decides if there are sufficient grounds to justify making an inquiry into an admissible complaint.¹⁰⁷ If an inquiry is warranted, the Ombudsman informs the complainant and the institution involved and invites the institution to submit an opinion within a stipulated period of time.¹⁰⁸ Upon receiving the institution’s opinion, the Ombudsman sends a copy to the complainant and invites it to make observations on the institution’s opinion, which should be submitted within a month.¹⁰⁹ The Ombudsman’s powers of investigation include the ability to require Community institutions and bodies and the authorities of Member States to supply information or documents for the purposes of an inquiry, and to inspect the file of the Community institution concerned in order to verify the accuracy and completeness of its replies.¹¹⁰

In accordance with Article 6 of the Implementing Provisions, in the event that the Ombudsman uncovers maladministration in the course of its investigation, it is obliged to co-operate as far as possible with the institution concerned in seeking a ‘friendly solution’ to eliminate it and to satisfy the complainant. In the event that the Ombudsman considers that a friendly solution is not possible or that the search for one has failed, it either closes the case with a reasoned decision that may include a

¹⁰³ Art. 2 of the European Ombudsman Statute, adopted by Parliament on 9 Mar. 1994, OJ (1994) L 113/15, and amended by its decision of 14 Mar. 2002 deleting Arts 12 and 16, OJ (2002) L 92/13. *The European Ombudsman Implementing Provisions* were adopted on 8 July 2002 and amended by decision of the Ombudsman of 5 April 2004.

¹⁰⁴ Art/ 2(4) of the European Ombudsman Statute, *supra* note 103.

¹⁰⁵ ‘How to Complain’, available at: www.ombudsman.europa.eu (accessed on 27 June 2007).

¹⁰⁶ Art. 3(1) of the European Ombudsman Statute, *supra* note 103.

¹⁰⁷ *Ibid.*, Art. 4(1).

¹⁰⁸ *Ibid.*, Art. 4(3).

¹⁰⁹ *Ibid.*, Art. 4(4).

¹¹⁰ *Ibid.*, Art. 5(1).

critical remark or makes a report with draft recommendations.¹¹¹ This detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendations. If the detailed opinion still does not satisfy the Ombudsman, it may draw up a special report to the European Parliament in relation to the instance of maladministration.¹¹² It should be noted that the Ombudsman may undertake inquiries on its own initiative and enjoys the same powers of investigation when doing so as when inquiries are instituted following a complaint.¹¹³

6 Lessons Learned for the CDM

The previous section demonstrates that there is a clear tendency to demand the application of due process requirements to the decisions of international bodies, whether they are established in the context of international organizations and law or as part of public-private regulatory regimes. Courts and law-makers are increasingly of the view that decisions by international bodies cannot go unchecked and are not averse to having such decisions reviewed by national courts in the absence of review processes in the relevant international regulatory regime. The need for reform of the CDM governance has recently been acknowledged by the third COP/MOP and will lead to a process of review in the context of the formulation of a post-Kyoto climate regime.¹¹⁴ We will put forward in this section some proposals for the reform of the CDM, which include the introduction of administrative law-like processes, professionalizing the EB and the panels, securing better and more consistent funding, the elimination of political interference, and the establishment of a review and appeal mechanism.

A Adoption of Due Process Rules

1 Administrative Rules and Procedures

We propose reforming the procedural rules of the CDM. Currently, there are only a few formalized provisions governing the interaction between project proponents, the EB, and its panels. Insecurities regarding communications, hearings, and time lines often make processes cumbersome and opaque. From the perspective of project participants, there is a perception of insufficient and circuitous communication. At the same time, communication becomes unsatisfying, redundant, and ineffective, when new queries are brought up in each round of review of a project and it is not clear how many of such review cycles may take place. As a result, there is an undefined period of legal and planning insecurity during which project participants (i) have to

¹¹¹ *Ibid.*, Art. 6(3).

¹¹² *Ibid.*, Art. 8(4). Further, a copy of this report will be sent to the complainant and the institution concerned.

¹¹³ *Ibid.*, Art. 9(1) and (2).

¹¹⁴ See the decisions of the 3rd session of the COP/MOP, among others, available at: http://unfccc.int/files/meetings/cop_13/application/pdf/cmp_guid_cdm.pdf (accessed on 29 Dec. 2007).

retain resources to answer an undefined and unlimited number of new questions, and (ii) have no indication on whether they can move ahead with developing the corresponding CDM project activities.

We therefore recommend the adoption of administrative due process rules governing communication amongst the various CDM actors. The adoption of due process requirements would apply to any activities related to (i) the accreditation and withdrawal of accreditation of DOEs, (ii) the approval and review of baseline and monitoring methodologies; (iii) the registration, or refusal to do so, of CDM projects; and (iv) the issue, or refusal to issue, of CERs. The objective of such rules would be that any person (DOE or project participant) with a direct and material interest in any of the abovementioned processes would have a right to participate by: (a) expressing an opinion and its reasons, (b) having that position considered, and (c) having the right to appeal (see below). The administrative requirements have to go beyond the existing guidelines governing the internal proceedings of the EB and establish rights for affected third parties, thereby promoting equity and fairness.

2 Establishment of a Focal Point

Communication would be made more efficient and reliable with the establishment of a focal point within the UNFCCC secretariat which would handle complaints from project participants and DOEs. Such a focal point would not have decision-making responsibilities, but serve an entirely administrative function of ensuring efficient and consistent interaction with the EB, its panels, and the review mechanism.

3 Compiling CDM Rules

In addition to the adoption of procedural rules, we recommend making available the complete set of CDM rules in a comprehensive and easy accessible format. As it stands today, anyone who does not spend a significant amount of time trying to understand how the CDM functions (including many project participants) will inevitably be lost in the thicket of decisions and interpretations that govern today's CDM. To facilitate fair and transparent application of all CDM relevant rules, the UNFCCC secretariat should make available a compilation of all rules governing the CDM. The three sources of these rules are: (i) the Kyoto Protocol, (ii) COP/MOP decisions, and (iii) EB decisions that are currently spread over uncountable documents and their annexes. The rules should be thematically organized, referenced, and indexed.¹¹⁵

Such an official compilation of CDM rules should be maintained and updated by the UNFCCC secretariat. The EB should review the rules periodically and present the updated compilation annually to the COP/MOP for endorsement. In the event that there is more than one version of a rule and a dispute arises, the latest effective version on file with the division should be deemed the authoritative or binding version.

¹¹⁵ The authors appreciate the attempts of the EB and the UNFCCC Secretariat to compile the relevant rules and decisions. This compilation has however led to a rather user-unfriendly search machine on the UNFCCC website which does not lead to significantly improved access to the relevant rules.

B Reform of the Executive Board and its Panels

1 Professionalizing the EB

The current EB has been established as a United Nations committee, rather than as a professional regulatory authority overseeing the carbon market. This is not unexpected, considering the roots of the CDM in international environmental treaty law. It is revealing that the EB's role and powers as set out in Part C of the Annex, 'Modalities and procedures for a clean development mechanism', do not include any regulatory objectives or principles.¹¹⁶

Nonetheless, whatever its role was originally intended to be, the CDM EB today is in the position of a *de facto* market regulator. In order for the Kyoto Protocol to succeed, the EB must rise to the occasion and fulfil the role of a market regulator. A first step in this direction is to professionalize it. Currently, the majority of its members have a background in international environmental negotiations, not in market regulatory work (for example, work experience in financial regulatory authorities). As a result, the considerations of the EB tend to be oriented towards agendas raised during international negotiations rather than towards the sort of issues related to the creation and maintenance of an efficient international market.

The professionalizing of the EB would require the recruitment of full-time salaried individuals whose collective experience spans the entire range of sectors (including project finance, law, business management, science) and is grounded in practical, project-level experience and knowledge of the CDM. Technical expertise should therefore be the governing criterion for the selection of EB members. The right of the various geographical constituencies to nominate EB members need not be affected, but nominations should be backed by the technical expertise and experience that the nominee can bring to the EB. The selection of a new member to the EB should require the approval of the existing EB members and, while the EB members are formally hired as employees of the UNFCCC, they should report to the COP/MOP directly in order to minimize the potential for political interference. Further, the creation of a direct reporting channel between the EB members and the COP/MOP will help to foster greater accountability.

Staffing the EB with professional staff will also help to avoid conflict of interests since individuals are no longer made to serve several agendas and interests in parallel. To avoid conflicting interests before and after the time an individual serves on the EB, eligibility for the EB should be limited to individuals who have not held a position that involved decision-making on CDM-related matters for a defined period before serving on the Board and should be excluded from such offices for a time after they cease to be active EB members.¹¹⁷

2 Funding and Hiring of Sufficient Support Staff

An overworked and understaffed EB can hardly be expected to deliver results. An adequate staff should be made available to support the EB in its work. At the first session

¹¹⁶ Decision 3/CMP.1, *supra* note 22, Annex C.

¹¹⁷ See below for similar rules applying to the members of the World Bank Inspection Panel.

of the COP/MOP, it was decided that the share of proceeds to cover the administrative expenses of the CDM (SOP-Admin) to be paid by project developers would be US\$ 0.10 per CER issued for the first 15,000 tonnes of CO₂ equivalent and US\$ 0.20 per CER issued for any amount in excess of the first 15,000 tonnes of CO₂ equivalent.¹¹⁸ Given the high number of CERs that the EB is expected to issue in the years up to 2012, the SOP-admin levy is an adequate and predictable source of funding.¹¹⁹

C Establishment of a Review Mechanism

1 Design Features of a CDM Review and Appeal Mechanism

(a) Mandate

The CDM appeal mechanism's mandate or jurisdiction should be clearly defined in its constitutive document (preferably, and likely to be, a COP/MOP decision). To avoid opening the floodgates to all and sundry, it is important that the terms of reference for the operation of the appeal mechanism be clearly set out in the constitutive document. The World Bank's Inspection Panel, for example, has a clear mandate which also serves as a filtering process against frivolous claims. The European Ombudsman, on the other hand, has too broadly defined a mandate, such that 70 per cent of the complaints it receives actually fall outside its mandate.¹²⁰ The availability of an accessible and effective remedial mechanism should be made known to all parties which may be adversely affected by a decision of any of the constituted bodies under the Kyoto Protocol, but the scope of its operation should also be emphasized to prevent creating unrealistic expectations about what the appeal mechanism can achieve.

(b) External Authorization

The European Ombudsman enjoys more independence than the Inspection Panel in the sense that the Ombudsman does not require any external authorization to proceed with any investigation and may in fact launch an investigation on its own initiative. The Inspection Panel, however, requires the authorization of the World Bank before an investigation may be launched and cannot trigger an investigation on its own. To the extent that 'own initiative investigations' can help to uncover potential or existing maladministration before it becomes the subject of a complaint, an accountability mechanism possessing such investigative powers can be pro-active in improving the institution's decision-making process. However, the authors are of the view that investigations by the CDM appeal mechanism should be triggered only upon the receipt of a complaint and after an initial review of the facts show that there is, *prima facie*, a case to answer. The right to submit a complaint should be governed by the administrative

¹¹⁸ Annex 35 to the Report of the 23rd Meeting of the Executive Board. *Additional Guidance Related to Registration Fee for Proposed Clean Development Mechanism Project Activities*, available at: http://cdm.unfccc.int/EB/023/eb23_repan35.pdf.

¹¹⁹ See CDM statistics, available at: <http://cdm.unfccc.int/Statistics/index.html> (accessed on 19 July 2007).

¹²⁰ However, the broad mandate may also be seen as a low threshold so that the Ombudsman is highly accessible to the public. An 'over-inclusive' mandate also prevents the accidental exclusion of otherwise valid allegations of maladministration.

requirements adopted by the COP/MOP and governing the process. This is in line with the dispute settlement function of the CDM appeal mechanism, which sets it apart from the European Ombudsman, which also has a preventive function of eliminating potential maladministration. The CDM appeal mechanism should also not be expected to require any external authorization, e.g., from the COP/MOP or the EB, before it can commence investigations as there is no apparent value to this additional administrative hurdle. On the contrary, such authorization would reduce the perception of independence and objectivity that the appeal mechanism should have. The UNFCCC secretariat should receive a mandate to support the appeal mechanism by conducting preliminary reviews of the eligibility of complaints received. Provided that the secretariat assigned staff to ensure an effective and consistent response to complaints, such initial review would help to increase the efficiency of the process.

(c) Power to Issue Binding Decisions

Unlike the European Ombudsman and the Inspection Panel, a potential CDM appeal mechanism should be empowered to issue binding decisions. Crucial elements of an effective appeal mechanism are: (i) an independent and impartial authority, (ii) decision-making authority, and (iii) accessibility.¹²¹ Aggrieved parties, such as private sector project developers whose investments are at stake, want an efficient, fair, and effective settlement of any disputes. The inability to render binding decisions will hamstring the appeal mechanism's ability conclusively to resolve disputes and make remedial orders. The CDM appeal mechanism must be a satisfactory alternative to litigation in the national courts. In this regard, it is important that decisions of the appeal mechanism be binding just like those of any other administrative tribunal or national court.

In the case of the Inspection Panel, there appear to have been cases wherein the World Bank Board's decisions were not implemented and the complainants have not seen any improvement in their situation. Problems have arisen because the Inspection Panel does not have the power to issue binding decisions and to monitor the implementation of the Board's decisions. These issues should not arise in relation to the CDM appeal mechanism if its decisions are made final and binding on all parties.

(d) Investigation and Administrative Process

The CDM accountability mechanism should be given powers of investigation, including the ability to call for hearings, view all relevant files and other documentation, interview staff members, and require them to give evidence, and the ability to conduct special inquiries if required. The investigation process should not be allowed to take too long, and therefore strict adherence to deadlines should be mandated. The EB should be consulted and the aggrieved parties given the opportunity to be heard or to make written submissions. The aggrieved party should be informed of all steps taken during the investigation process so that it does not feel that the process has been taken out of its hands and that, once again, it is the victim of opaque and exclusive decision-making.

¹²¹ Biersteker and Eckert, *supra* note 72, at 3.

(e) Budget

Both the Inspection Panel and the European Ombudsman are sufficiently funded to carry out their purposes. This should be the case for the CDM accountability mechanism. An inadequately funded office will lack true independence as it will not be able to perform its functions properly. The accountability mechanism should not be answerable to the EB for its budget, but to the COP/MOP which is the quasi-legislative body and is also very unlikely to be the subject of complaints by project participants (who have very little, if any, direct contact with the COP/MOP).

(f) Independence and Integrity

Independence and integrity of the members that comprise the accountability mechanism are essential for the credibility of the mechanism. An accountability mechanism is futile if it is perceived to be working in the interests of the institution(s) against which it is supposed to be exercising a checking function. The criteria for the European Ombudsman and the Inspection Panel members emphasize the need for independence and integrity. The European Ombudsman, for example, has to give a solemn undertaking before the European Court of Justice upon taking up his duties that he will perform them with complete independence and impartiality.¹²² In order to preserve the independence of the CDM accountability mechanism, it is recommended that persons who serve on it should be experts in the appropriate fields, with qualifications elaborated by the COP/MOP. As with EB members, they should not be former or existing staff of the CDM regulatory regime and should not be allowed to take up employment therein for a period of time after the end of their term on the accountability mechanism.

7 Conclusion

The wide participation of private and public entities from developing and developed countries alike makes the CDM one of the most widely supported elements of the Kyoto Protocol architecture. The mechanism has introduced the concept of market-based mechanisms to the realm of international law and creates a framework for private–public partnerships which support the objectives of the Kyoto Protocol. With the definition and creation of tradable emission rights, CERs, the mechanism has given rise to a growing carbon market.

The private sector's enthusiastic embrace of the CDM puts the mechanism to the test. Unlike other existing financial mechanisms under MEAs, the CDM has left the realm of intergovernmental cooperation and its operations and demands are driven by the rules and forces of international markets.

In our analysis, we have questioned whether the current CDM governance can meet the demands of the private, profit-driven market. We conclude that the CDM requires reform to ensure its effectiveness as well as efficiency as a robust element of a post-Kyoto climate regime. Leaving others to review concerns relating to design

¹²² Art. 9(2) of the European Ombudsman Statute, *supra* note 105.

features that endanger the environmental effectiveness of the mechanism (such as concerns regarding the lack of additionality of projects), our analysis has focused on the procedural aspects of the CDM.

The CDM's EB acts as supervisor and day-to-day regulator of the CDM and its decisions have direct impact on the property interests of private entities participating in the mechanism. The Board, modelled in the UN tradition as a committee of Party appointees, has however not been equipped with clear procedural rules that would guide its dealings with those participating in the CDM. Rules are sketchy and often improvised; one would search the CDM modalities in vain for any due process requirements such as the right to be heard or to have a decision reviewed.

An analysis of other areas of international cooperation and law has shown that national courts may decide to fill the legal gap when the fundamental rights of individuals and legal entities are affected by the decisions of international bodies and no recourse for the vindication of rights is available. Having local courts review decisions of the EB will threaten the international infrastructure of the Kyoto Protocol in general and the CDM in particular. The CDM is designed to operate in a uniform fashion world-wide and any disputes concerning the operation of or participation in these mechanisms should be resolved consistently and in accordance with CDM rules and procedures. Leaving the settlement of disputes to local courts which may supplement international rules and procedures with national law would result in diverging interpretations of the CDM and its rules. Such diverging interpretations would put into question the functioning of the mechanism as a whole. They may also alter the delicate web of rights and obligations that were carefully negotiated by the parties to the Kyoto Protocol.

The risk of dispute between participants in the CDM and the EB is real and imminent. At the time of writing this article, more than 1,000 CDM projects have been registered with the EB. Most of them are still in the construction phase and are yet to produce CERs. The big tests of the robustness of the CER transfer agreements are yet to come. Bearing in mind the monies at stake both in the delivery of CERs and in potential penalties, there is no doubt that project participants will not hesitate to enforce their rights rigorously. They will claim contractual rights and, where damage can be attributed to perceived or real failures of the EB, they will try all means to recover their losses, given what is at stake and the costs of inaction.

In the absence of an international review and dispute resolution mechanism, local courts may be the only fora in which claims have a chance to be heard. While it will be difficult to hold the Board itself responsible, Board members lack protection under the laws of international immunity, which makes them potentially vulnerable to claims of conflict of interest, fraud, or incompetence. At the very least, the possibility that some local courts may exercise their jurisdiction to hear cases against the EB cannot be entirely dismissed.

Preempting any conflicts and court rulings, rule of law principles demand an adaptation of the CDM to due process requirements. We therefore recommend the adoption of clear and transparent administrative procedures, professionalizing of the EB and its members, as well as the establishment of a review and appeal mechanism under the CDM.

The CDM is an ambitious project with the potential of laying the foundations for international cooperation beyond the climate regime and environmental law. The pricing of externalities allows developing country entities to benefit from financial transfers which help to promote sustainable development during a time when foreign direct investment increasingly benefits only a few countries. By expanding its scope and participation, the CDM also has the potential to become a cornerstone of the post-Kyoto regime. However, in order to realize its full potential, it is important that the negotiators take note of and deal with a number of teething problems. Only a procedurally and environmentally robust CDM can fulfill the promise and potential it holds: the creation of the first global environmental market mechanism.