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**Delegation to Private Actors of the Competences
in Validation and Verification in the Kyoto
Protocol Flexibility Mechanisms:**

Accountability Issues and the Role of the Public

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Delegation to Private Actors of the Competences in Validation and Verification in the Kyoto Protocol Flexibility Mechanisms:

Accountability Issues and the Role of the Public

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1. Introduction

The establishment of flexibility mechanisms is one of the most revolutionary features of the international climate change regime, as well as one of its most controversial elements. Providing one of the first academic analyses of the “Kyoto surprise”, Jacob Werksman rightly predicted that *[a]spects of the [Clean Development Mechanism (CDM)] are undeniably innovative, and have the potential to take the climate regime, and indeed, international law into uncharted territory.*¹

The flexibility mechanisms were established in the Kyoto Protocol as tools to promote the economic effectiveness of reduction of greenhouse gases emissions. The origin of emissions of greenhouse gases being irrelevant in the perspective of combating the physical effects of climate change, flexibility mechanisms would provide opportunities for developed states to reduce emissions while keeping the abatement costs of such actions to a minimum.

Notwithstanding major criticisms on the use of market-based instruments in global environmental policy, this paper focuses on the issue of the delegation to private entities of administrative functions exercised in the governance of the mechanism. The mechanisms constitute a textbook example of public-private partnership in international governance. States have delegated the oversight of these mechanisms to dedicated international institutions and to third-party certifiers. The role of for-profit companies in ensuring the integrity of the mechanism raises legitimacy and credibility issues, as these private actors do not operate under the same rules of accountability than intergovernmental institutions.

Considering the complexity of the flexibility mechanisms and the uniqueness of their governance structure among other international institutions, the first section of this paper will provide the reader with a detailed introduction to the functioning of the mechanisms and to the various entities and bodies involved. The nature and functions of each of the entities and bodies involved in the governance of the mechanisms will be introduced in the second section, with a particular emphasis on the

¹ Jacob D. Werksman, “The Clean Development Mechanism: Unwrapping the ‘Kyoto Surprise’” *Review of European Community & International Environmental Law* Vol 7 (2) (1998), at 147.

relations of delegation of authority prevailing among these actors.² Due to the much larger scale of the implementation of CDM projects compared to Joint Implementation (JI) projects, this paper focuses mainly on the role of private regulation and accountability as a feature of the CDM.³

The institutions overseeing the mechanisms have relied partly on the provision of procedural rights to stakeholders and NGOs in order to maintain the credibility and legitimacy of the mechanisms. Modalities guaranteeing of transparency and involvement of stakeholders have contributed to increasing the accountability of the private actors involved in the governance of these mechanisms. The paper will however argue that the current absence of a formal review process impairs the capacity for civil society to act as a watchdog and raise effectively the concerns of local communities potentially affected by the implementation of individual projects.

2. Introduction to the flexibility mechanisms

2.1. Conceptual origin

It is difficult to underestimate the role played by the flexibility mechanisms and in particular the CDM as prominent element of the current climate change regime. At the time of the adoption of the Kyoto Protocol, the current executive secretary of UN Framework Convention on Climate Change (UNFCCC) Christina Figueres – then one of the lead negotiators involved in the design of the mechanism – described the mechanism as providing *unprecedented opportunities* to developing countries to choose a low emissions path of development.⁴ The mechanism, so the argument goes, would promote technological leapfrogging of the developing world, enabling countries hosting projects to bypass the unsustainable growth patterns on the basis of which western countries reached their current level of economic wealth. The assumed objective of the mechanism is to

² Jessica Green published in 2009 a comprehensive study covering most issues covered under this section. Jessica F. Green, "Delegation and Accountability in the Clean Development Mechanism: The New Authority of Non-State Actors", *Journal of International Law and International Relations* Vol 4(2) (2008) 21-55

³ Based on the latest available reports, the number of projects submitted under the CDM is currently twenty times superior to JI projects submitted. In terms of reduction of emissions CDM projects, were they all approved and certified, would result in more than four times the amount of emissions reduction expected under the JI scheme. See the 2010 reports of the CDM EB and the JISC to the CMP6, respectively FCCC/KP/CMP/2010/10 and FCCC/KP/CMP/2010/9.

⁴ Christina Figueres, "The CDM: An Innovative Financial Mechanism which Promotes Sustainable Development", (1998), available at <http://figueresonline.com/publications/WD%20Article.pdf>.

create and regulate a market for a new commodity. The establishment of this market would enable private entities to make cost-effective reductions in greenhouse gases emissions while at the same time creating incentives for investment flows from the Global North to the Global South. The provisions of the Kyoto Protocol make an explicit reference to the reliance on the participation of private actors to the mechanism.⁵ This element was originally perceived as having the potential to become *the most revolutionary aspect of the CDM*.⁶ The scope of the implementation of these mechanisms in the climate policies of the western countries is however limited by the reference in the Marrakech accords to the requirement that the use of the CDM and of the two additional flexibility mechanisms could only be *supplemental* to actions taken domestically.⁷

While the market-based mechanisms established under the Kyoto Protocol have resulted in the emergence of the largest market for a regulatory commodity, prior attempts to establish such markets had already been implemented. In 1990, the amendments adopted by the US congress to the Clean Air Act established an early cap and trade scheme in relation to emissions of sulphur dioxide.⁸

2.2. Outline of the CDM project cycle

The present sub-section provides to the reader a summary of the CDM project cycle for the sake of understanding of the role and position of each of the actors involved in this cycle.⁹

⁵ FCCC, article 12.9

⁶ Werksman (1998), supra note 1, at 154. Article 12.9 of the Kyoto Protocol provides: [p]articipation under the clean development mechanism, including in activities mentioned in paragraph 3 (a) above and in the acquisition of certified emission reductions, may involve private and/or public entities [...].

⁷ Recital 7 of the preamble of decision 15/CP.5 on the Principles, Nature and Scope of the Mechanisms Pursuant to Articles 6, 12, and 17 of the Kyoto Protocol stated that the COP affirm[ed] that the use of the mechanisms shall be supplemental to domestic action and that domestic action shall thus constitute a significant element in the effort made by each Party included in Annex I to meet its quantified emission limitation and reduction commitments included under Article 3, paragraph 1, FCCC/CP/2001/13/Add.2

⁸ Clean Air Act, as amended by 1990 amendments (S.1630.ENR), see also for a critical historical context of the adoption of the flexibility mechanism, Tamra Gilbertson and Oscar Reyes, "Carbon Trading: how it works and why it fails", critical currents no. 7 (2009), at 19 ff.

⁹ For a more in-depth analysis, see Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: a guide to rules, institutions and procedures*, Cambridge: Cambridge University Press (2004), at 160 ff.

CDM project activity cycle

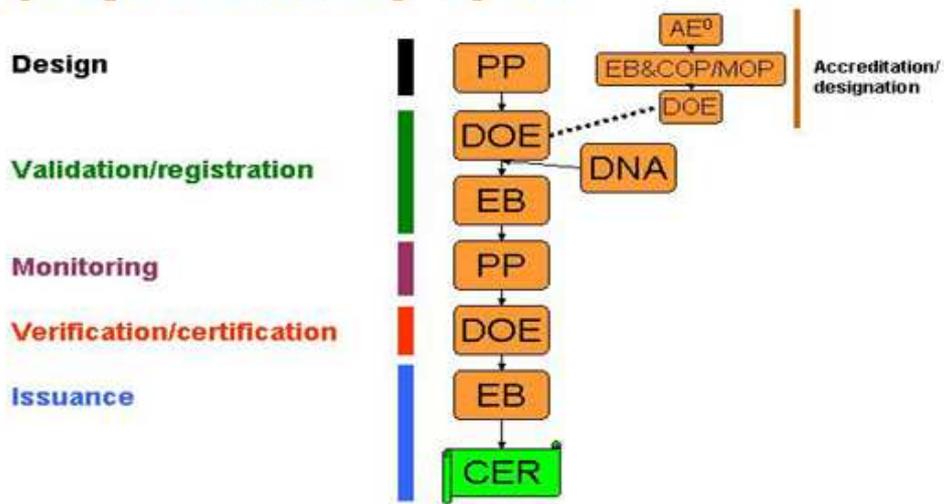


Fig. 1: Source UNFCCC secretariat webpage on the CDM

Independent of the nature of the different actors involved in the CDM transaction, each CDM project needs to go through each of the following seven steps.¹⁰ These procedures have been outlined in the Marrakech accords.¹¹ The journey through this complex procedure can only begin once initial eligibility conditions have been fulfilled, both in relation to the private entities taking part directly to the project and to designation at the national level of a Designated National Authority (DNA).

- Project Design – The CDM project cycle is initiated by the submission of a Project Design Document (PDD) by the Project Participants (PPs). The PDD form was developed by the Executive Board (EB) on the basis of the information contained in the original

¹⁰ Four distinguished categories of projects can be submitted with slight differentiation of the requirements necessary to the completion of the project cycle. The two aspects to be considered to categorize a project relate to the size and to whether or not the project activities include afforestation and reforestation activities.

¹¹ COP decision 17/CP.7, FCCC/2011/13/Add.2.

COP decision establishing the CDM.¹² A full section of the document is dedicated to the transcription of stakeholders' comments. The submission of the PDD is also accompanied by the choice of an approved baseline for the calculation of the reduction of emissions resulting from the project, or if applicable, by the submission of a new methodology.

- National Approval – According to the procedures and modalities of the CDM, projects submitted need to receive the approval of national authorities confirming that the project contributes to sustainable development.¹³ DNAs are responsible for issuing the statement confirming this element as well as the voluntary participation to the project.¹⁴
- Validation – The PDD is then validated through a third-party certifier, the Designated Operational Entity (DOE). The DOE, an accredited entity to the EB, has the responsibility to confirm whether the PDD fulfils all the requirements established by the Conference Of the Parties (COP) and by the EB.¹⁵ The validation process in the CDM follows slightly different requirements than for other assessment of the reduction of greenhouse gases emissions such as under the cap and trade scheme established domestically in the EU. The discrepancy between the requirements of the two procedures raises potential issues considering the convertibility of the two types of credits emitted.¹⁶ A private international regulator, the private International Standardization Organization (ISO), has responded to this diversity of requirements by designing its own international greenhouse gas accounting and verification standards.¹⁷

¹² Annex B, COP decision 17/CP.7, FCCC/2011/13/Add.2, and PDD (Version 03 - in effect as of: 28 July 2006) are available at http://cdm.unfccc.int/Reference/PDDs_Forms/PDDs/index.html.

¹³ Annex B, COP decision 17/CP.7, FCCC/2011/13/Add.2, para. 40(b).

¹⁴ See Report EB 16, Annex 6, paragraph 1.

¹⁵ Decision 17/CP.7, Modalities and procedures for a CDM as defined in Article 12 of the Kyoto Protocol, Annex (CDM-M&P), para. 35-52.

¹⁶ See Werner Betzenbichler, "The role of the verifier: Validation and verification in "cap & trade" and "baseline & credit" systems", *Intereconomics*, Vol. 39 (3) (2004), at 127.

¹⁷ ISO standards 14064. ISO is provided by Kingsbury, Krisch and Stewart as example of the fifth type of global administration. Benedict Kingsbury, Nico Kirsch, and Ricard B. Stewart, "The Emergence of Global Administrative Law", *Law and Contemporary Problems* Vol. 68 (2005), at 22, see also below for further reference to the five types of global administration identified by these authors.

- Registration – The EB becomes involved in relation to a particular project during the fourth step of the project cycle. Once validated, the DOE submits the project to the EB for registration. After being vetted by both the secretariat and the EB, the project might be finally registered if non-conformity with the procedures and modalities of the CDM is found. Registration constitutes the formal acceptance of the project by the EB, which opens the door to later certification and issuance of the Certified Emissions Reductions (CER) credits. In case of a doubt concerning the credentials of the project, a party or a third of the members of the EB can call for a review of the project before its registration.
- Monitoring – The monitoring phase consists in the continuous gathering of information on the project implementation by the PP, according to the requirements specific to the methodology selected to calculate the reduction of emissions resulting from the project.¹⁸ Since this information will be required for the fulfilment of the next stage of the project life cycle, the correct implementation of the monitoring plan is a formal requirement.
- Verification and Certification – Once the project has been completed, the verification phase will enable a DOE to verify whether emissions reductions have indeed occurred and to quantify this reduction.¹⁹ Once the project has been verified, the DOE might proceed to its certification.
- Issuance of CERs – The CDM project cycle is then completed with the issuance of CERs by the EB. After a completeness check by the secretariat and a vetting by the EB, the board instructs the CDM Registry Administrator to issue a given amount of CERs. A party involved in the project or a third of the members of the EB might however still call for a review of a project at this stage.

2.3. The Joint Implementation Mechanism

Article 6 of the Kyoto Protocol establishes another mechanism enabling industrialized countries having committed to emission reductions under the Protocol (Annex 1 parties) to take joint mitigation action and to share the credits resulting from these activities. In practice, this mechanism

¹⁸ CDM-M&P, supra note 15, para. 53-60.

¹⁹ See CDM Validation and Verification Manual, Version 01.2, Report EB 55, Annex 1.

constitutes an emissions trading scheme in which emissions resulting from specific projects are at the centre of the transaction rather than trading of units from the assigned amount allocated to each party. While the terms of the article 6 are particularly vague, parties to the Protocol adopted, as part of the Marrakech Accords, guidelines elaborating on the use of the mechanism.²⁰ The main feature of the guidelines consists in the establishment of two parallel “tracks” for the implementation of JI projects. The differentiation between the two tracks enables that parties participating in a JI project might benefit from a simplified procedure when all conditions guaranteeing adequate domestic review and reporting are fulfilled. In case the parties concerned do not meet the eligibility requirements for participation to the previous procedure, a second track enables them to take part to the JI mechanism while relying on an international oversight of the project. Considering that the establishment of the JI mechanism echoes many of the concerns raised by the development of the procedures for the CDM (environmental integrity, additionality, equity issues), the negotiations developing the guidelines for the implementation of JI have been based on the notion of “institutional parallelism” between the two mechanisms.²¹

The institutional framework created to manage JI projects submitted under the track 2 is thus comparable to the model developed for the governance of the CDM, with the same number of entities involved and similar function exercised at each level. The role of the COP is limited to the oversight of the whole mechanism, providing guidance to the subsidiary bodies established to manage concrete steps of the JI project cycle.²² Under its authority, the Article 6 Supervisory Committee (JISC) supervises the whole mechanism,²³ similarly to the role played by the EB in relation to the CDM. The task of verifying the reduction of emissions taking place before the issuance of Emissions Reduction Units (ERUs, which are equivalent to CERs generated under the CDM) is delegated to private regulators. Contrary to the case of the DOEs for which procedural requirements were clearly stipulated in the modalities of the CDM, the procedures of the JI do not contain any specific section regulating the Independent Entities (IE) but rather describe procedures application to

²⁰ Decision 16/CP.7 on Guidelines for the implementation of Article 6 of the Kyoto Protocol, the full guidelines being contained in the Annex to the decision 10/CMP.1, FCCC/2005/cmp1/eng/08a02.

²¹ For a further account of the context of the negotiation of the JI guidelines, see Farhana Yamin and Joanna Depledge (2004), *supra* note 9, at 188.

²² 16/CP.7, Guidelines for the implementation of Article 6 of the Kyoto Protocol, Annex, para. 2.

²³ *Ibid.*, Annex, section C.

the IE in the description of the stages of JI track 2 projects. Procedures for the accreditation of IEs have been developed by the JISC and contain most features of those applicable to the DOEs, including the intervention of a JI-Accreditation Panel and of a the constitution of an ad-hoc JI-Assessment Team, the conduct of both desk and on-site review, and procedures for the suspension of the Accredited Independent Entities (AIEs).²⁴ The similarities between track 2 JIs and CDMs are further demonstrated by the fact that DOEs have been authorized by the CMP to act provisionally as AIEs until the JISC has adopted accreditation rules for applicant entities.²⁵ This possibility highlights the similar function plays by the two types of entities with respect to each mechanism. The successive steps through which a project must proceed in the track 2 of the JI are similar to those of the CDM project cycle.

While the track 2 of the JI relies on international supervision through private regulators, the track 1 of the mechanism has little relevance for the scope of this paper. Indeed, the environmental integrity of the projects is guaranteed by the compliance of the host country, the eligibility criteria ensuring the credible accounting of reduction of emissions. Therefore host countries must demonstrate the establishment of effective national evaluation systems of their domestic emissions as well as proper reporting of these emissions, but are not subjected to international scrutiny.²⁶

3. Institutional Frameworks managing the mechanisms

3.1. The threefold set of actors active involved with CDM governance

The set of actors involved in the CDM and their specific roles defines the relevance and particularity of the CDM in the context of the emergence of global administrative space. The very unique intertwining of intergovernmental institutions and private entities prevents the classification of the CDM within one particular type of global administrative regulation as introduced by Kingsbury. The mechanism indeed contains elements of three out of the five categories proposed by this author. The role of the EB in relation to private actors constitutes a

²⁴ P-JI-ACCR-02, Procedure for Accrediting independent entities by the Joint Implementation Supervisory Committee (Version 06).

²⁵ Paragraph 3 of Decision 10/CMP.1, Implementation of Article 6 of the Kyoto Protocol.

²⁶ 16/CP.7, Guidelines for the implementation of Article 6 of the Kyoto Protocol, Annex, para. 23

clear example of *international administration*. The requirement of approvals of projects at the national level by the DNAs evokes aspects of governance through *transnational network*. Finally, and of most relevance to this paper, the regulatory role delegated to DOEs categorizes the CDM as a *hybrid intergovernmental-private administration*, which combines regulatory activities by both public and private regulators. While the role of each actor in the CDM project cycle has already been introduced in the previous subsection, their particular nature and the relation between each is further elaborated in this section, particularly from the point of view of the international delegations characterising the between some of these bodies. Aspects related to the legitimacy of each of entities are also introduced.

3.1.1. Intergovernmental bodies

- Conference of the Parties acting as the Meeting of the Parties to the Kyoto Protocol (CMP) – Similarly to regimes established under many Multilateral Environmental Agreements, the Conference of the Parties (COP) is the supreme organ established under the Convention,²⁷ with the CMP serving this function in relation to the Kyoto Protocol.²⁸ Despite being the highest decision-making body among the institutions established under the Convention,²⁹ the authority of the COPs (or in the present case of the CMP) remains based on the delegation of power from the parties and explicitly elaborated in the text of the founding treaty (here, the Kyoto Protocol). The COP draws its legitimacy from this delegation.³⁰ Due to the delayed entry into force of the protocol, it is the COP which has adopted the modalities and procedures for all three flexibility mechanisms, the CMP acting since 2005 as the body overseeing the mechanisms.³¹ The role defined for the CMP in governance of the CDM is mainly limited to the supervision of the role of the

²⁷ UNFCCC, Article 7.2.

²⁸ Kyoto Protocol, Article 13.1.

²⁹ Churchill and Ulfstein discussed in 2000 the hierarchal organization of treaty-based regimes as autonomous institutional arrangements, with COPs or MOPs as the highest organs of decision-making. Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", *The American Journal of International Law*, Vol. 94 (4) (2000), 631 ff.

³⁰ Annecoos Wiersema, "The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements", *Michigan Journal of International Law*, Vol. 31 (2009), at 252.

³¹ Decisions 15/CP.7-18/CP.7.

Executive Board, through the provision of guidance and the review of its annual reports.³² The Kyoto Protocol also identifies the CMP as the competent body for the designation of the operational entities.³³

- Executive Board (EB) – While the Kyoto Protocol only assigns to the EB the role of supervising the mechanism and providing guidance to private and public entities on their participation under the CDM,³⁴ the EB is in practice the main governing body of the CDM. The modalities and procedures of the mechanisms elaborated on the functions and the composition of this body.³⁵ The EB is composed of ten individuals – accompanied by 10 alternate members – chosen for their professional competence and on the basis of geographic criteria.³⁶ Considering the importance of their functions and their access to economic information, the members of the board are required to take an oath of office, to declare any conflict of interest in case they possess a financial stake interest in any project submitted, and are prohibited from disclosing any confidential information after the end of their term. The definition of conflict of interest applied to the proceedings of the EB however has been denounced as too restrictive as it does not consider, for instance, the issue of a board member taking part to a decision affecting a project originating from his/her home country.³⁷ The establishment of the EB constitutes one of the breakthroughs of the Marrakech Accords as it is the first body established under the Convention with a limited membership that has a decision-making authority.³⁸ Other bodies previously established under the Convention with limited membership only had an advisory or recommendatory function, the COP and its subsidiary bodies retaining until then all decision-making authority. In the context of the increasing workload for the EB, the question of the nature of the commitment expected by members of the board has been raised repeatedly in the past years. The EB has addressed this growing

³² CDM-M&P, supra note 15, para. 2-4.

³³ Article 12.5 of the Kyoto Protocol.

³⁴ Articles 12.4 and 12.9.

³⁵ CDM-M&P, supra note 15, para. 5-19.

³⁶ Ibid., para. 7-8..

³⁷ Charlotte Streck and Jolene Lin, “Making Markets Work: A Review of CDM Performance and the Need for Reform”, *European Journal of International Law* Vol. 19 no. 2 (2008), at 423.

³⁸ Farhana Yamin and Joanna Depledge (2004), supra note 9, at 165.

workload and the need for more specialized expertise in establishing several committees, panels and working groups.³⁹ Three of these actors interact with the third party regulators independently of the methodology chosen for a particular project: the CDM Accreditation Panel (CDM-AP) and the CDM Accreditation Team (CDM-AT) intervene during the process leading to the designation of an operational entity (see next subsection), while the Registration and Issuance Team support the EB in assessing the validity of the certification reports transmitted by DOEs, prior to the issuance of credits.

The procedures and modalities of the CDM specify conditions of transparency to stakeholders, providing that the board meetings might be open to observers as a default condition.⁴⁰ Streck however noted that the possibility of the EB to close part of its proceedings is been used extensively, with about a half of each meeting now closed to observers.⁴¹ Finally, the EB is assisted in its activities by the UNFCCC secretariat. The role of the UNFCCC secretariat is however only limited to servicing and providing a technical and logistical assistance to other bodies established under the convention. It does not play any leading role at any particular stage of the CDM life cycle.

3.1.2. Entities involved in the Validation and Verification of projects

- Designated National Authorities (DNAs) – The role of the DNAs in the whole process is relatively limited. As mentioned in the previous section, the approval of the relevant DNA is a prerequisite for the completion of the CDM project cycle. The main *raison d'être* of the DNAs lies in the insistence of developing country that national administration would systematically be involved in the management of the CDM projects so as to better coordinate and monitor the projects implemented.⁴²
- Designated Operational Entities (DOEs) – The primary responsibility for ensuring that the projects take place in conformity

³⁹ CDM-M&P, para. 18. This proliferation of committees and panels has led meetings of the CDM institutions to represent now about half of all meetings convened under the frame of the UNFCCC. See http://unfccc.int/meetings/unfccc_calendar/items/2655.php.

⁴⁰ M&P, para. 16.

⁴¹ Charlotte Streck and Jolene Lin (2008), *supra* note 37.

⁴² Farhana Yamin and Joanna Depledge (2004), *supra* note 9, at 171

with the CDM guidelines lies in the DOEs, acting as third party regulator. The CDM project cycle requires twice the intervention of the DOEs, once at the validation stage, and a second time at the verification stage. In order to avoid conflicts of interest, the DOE involved in the verification of a project usually cannot perform the tasks related to its validation.⁴³ This prohibition can nevertheless be lifted in special cases and after a request has been approved by the EB.⁴⁴

Considering the important role that the DOEs plays in the CDM project cycle, their competence and the quality of their processes are keys in maintaining the credibility and the integrity of the mechanism.⁴⁵ Thus the modalities and procedures elaborate a detailed and complex procedure for their designation.⁴⁶ The procedure for the designation of applicant entities (AEs) as operational entities is based on the intervention of the CDM-AP to which the EB delegates the evaluation of the applications.⁴⁷ The composition of the CDM-AP includes members of the EB as well as private expert selected from the CDM roster of expert on the basis of a public call.⁴⁸ Once the application of an AE has been submitted (and the 15000 \$ application fee paid to the Secretariat), the secretariat will proceed with a completeness of the application. The chair of the CDM-AP establishes then a CDM-AT composed of members of the CDM-AP. The CDM-AT will conduct a full review of the application, starting from a desk review of the document submitted and followed by at least one on-site visit to the AE. Based on the reports submitted by the CDM-AT, the CDM-AP might recommend to the EB any of the three following decisions: acceptance of the application of the AE, partial acceptance of the application for only one or several of the sectoral scopes proposed

⁴³ CD-M&P, para. 27(e).

⁴⁴ This exception would for instance be applied in cases in which few DOEs have the required expertise in a given sectoral scope.

⁴⁵ Farhana Yamin and Joanna Depledge (2004), *supra* note 9, at 171.

⁴⁶ CDM-M&P, *supra* note 15, Appendix A, at 41. See also Procedure for Accrediting Operational Entities by the Executive Board of the CDM, (Version 10.1), EB 56 Report, Annex 2.

⁴⁷ The EB adopted “general guidelines for panels/working groups” applicable to the establishment of such bodies. EB 37 Report Annex 1 page 1 Annex 1, (Version 03). The members of such panels sit on an individual basis, their selection being based on expertise and geographical repartition.

⁴⁸ EB 23 Report, Annex 1, Terms of Reference for the Establishment of the CDM Accreditation Panel (version 02), para 9 ff.

by the AE, or the rejection of the application. On this basis, the EB shall take a decision considering the status of the entity. If the EB decides to accredit the applicant, it will also recommend its formal designation by the CMP.

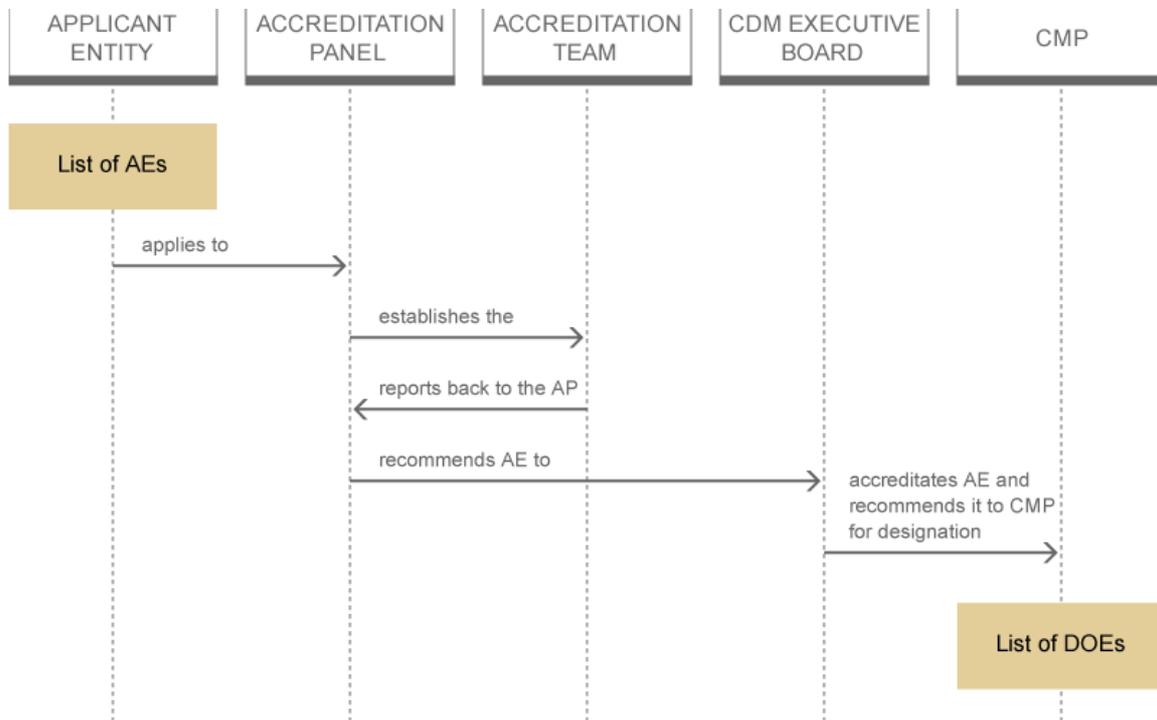


Fig. 2: Source UNFCCC secretariat webpage on the CDM

Once designated as DOEs, the entities might be suspended by the EB either on the basis of a recommendation by the CDM-AP or as a result of a review process engaged by the EB.⁴⁹ A suspended DOE is provided usually the opportunity to take corrective actions to address the issues identified by the EB. The assessment of these actions might lead to the revoking of the suspension if the DOE is considered as in conformity with the DOE standards. If such actions are not taken or at not considered satisfactory by the EB, it might withdraw the accreditation of the entity, based on the recommendation of the CDM-AP.⁵⁰

⁴⁹ EB 56 Report, Annex 2: Procedure for accrediting Operational Entities by the EB of the CDM - Version 10.1, para 153 ff.

⁵⁰ Such a withdrawal is made definitive only once it has been endorsed by the CMP as it only has the competence to grant and withdraw formally DOE status. Ibid, para. 163.

3.1.3. Private (and Public) Entities taking part to Projects

- Project Participants (PPs) – Project Participants consist of the investor(s) involved in a particular project. More than one PP might be involved in any particular project, in which case the role of each PP must be clearly stated in the PDD. In practice, the legal nature of PPs covers a broad range of entities. The participation as PPs of international institutions (such as investment banks) emphasizes further the relevance of a new understanding of international relations. Indeed those institutions become the addressees of the CDM regulations through their participation to the mechanism, thus creating a rather unusual type of relations between intergovernmental bodies. The Westphalian understanding of international relations based on the international-domestic dichotomy is here fully inadequate. Participation of international institutions to the projects further emphasizes the need to consider the *subjects* of global administrative law as proposed by Kingsbury.⁵¹

3.2. A twofold set of delegation of regulatory authority

Considering delegation of competences by elected national representatives to intergovernmental bodies, Esty noted that *distance matters* in terms of the legitimacy of decision-making, delegation thus reducing the accountability of the agent.⁵² The addition of a second layer of delegation of authority will increase the distance between the regulatory authorities and democratically elected representatives from who they draw their agency. Criticisms about the legitimacy of decision-making in the flexibility mechanisms have increased consistently since the creation of the mechanism. One of the contributing factors of this increasing concerns consists in the steady growth of the number of projects registered. The mechanisms have become a core element of the climate regime. Bodansky emphasized that legitimacy concerns raised about international institutions increase when those gain more authority.⁵³ The following subsections addresses the vertical relation between the various bodies involved in the governance of the CDM. In order to understand this governance model, this paper draws from the definition of

⁵¹ Benedict Kingsbury, Nico Kirsch, and Ricard B. Stewart (2005), at 23.

⁵² Daniel Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", Yale Law Journal, 115 (2006), 1502.

⁵³ Daniel M. Bodansky., "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?", Scholarly Works Paper 443 (1999), at 93

the concept of *international delegation* proposed by Bradley and Kelley.⁵⁴ These authors defined international delegation as *a grant of authority by two or more states to an international body to make decisions or take actions.*⁵⁵

3.2.1. Primary delegation of competences to the EB

In their own clarification of the concept, Bradley and Kelley's specified that the notion of international body referred to in the definition is to be understood broadly, encompassing from the larger collective bodies such as the CMP to more specialized agents and bureaucratic institutions. Using the UN Security Council as an example, they clarified that only those member states without veto power can be considered as having delegated authority to the Council. In the case of the climate regime, the rules of procedures allowing for a majority-based decision-making could never be adopted.⁵⁶ The requirement of a consensus among parties for the adoption of decisions by the COP and the CMP thus excludes the relation between states parties to the convention and the Conference of the Parties from the scope of international delegation.⁵⁷ Consequently, the CMP delegates to the EB, and on behalf of the states parties to the Kyoto Protocol, the authority of supervising the mechanism. Bradley and Kelley categorized delegation of authority into eight different types according to the competences which are being delegated.⁵⁸ Governance of the CDM relies on the delegation of half of these types of delegation. Considering the functions entailed by this supervision, this grant of authority constitutes both regulatory delegation, and monitoring and enforcement delegation.⁵⁹ The adoption of standards and guidelines by the EB falls under the first category, while monitoring and enforcement

⁵⁴ Curtis Bradley and Judith Kelley, "The concept of International Delegation", *Law & Contemp. Problems*. 71 (2008).

⁵⁵ *Ibid*, at 3.

⁵⁶ While all other rules are applied in the practice to the proceedings of the COP and other bodies established under the FCCC, agreement related to the rule of procedure 42 enabling the COP to adopt decisions with a majority voting could never be accepted by consensus (the adoption of the rules of procedures necessitating in itself a consensus among the parties, article 7 of the Convention).

⁵⁷ The recent shift in the interpretation of the requirement of a consensus among parties might however challenge this understanding of the relation between parties and the COP. At the COP16, the president of the conference announced the adoption of the Cancun Agreements despite the persistent objection of one of the parties, thus marking a shift with prior interpretation.

⁵⁸ See the eight types of delegation proposed by Curtis Bradley and Judith Kelley (2008), at 9 ff.

⁵⁹ Charlotte Streck and Jolene Lin (2008), *supra* note 37, at 421.

functions are performed through the conduct of on-site visit and the vetting of reports. Considering the experience of the EB with the implementation of the mechanism, the CMP has also relied on the EB to make proposals for the improvement of the governance of the CDM, thus delegating also advisory functions to the board. In the context of the drafting of terms of reference for an appeal mechanism for EB decisions, the CMP has for instance requested the board to propose draft rules of procedures for such an appeal mechanism.⁶⁰

3.2.2. Re-delegation to international and private actors

The delegation of authority by the COP and the CMP to the EB also includes a grant of authority to re-delegate authority. This function has been implemented in relation to both international bodies and private actors. The previous sections mentioned the creation, by the EB, of subsidiary panels and bodies supporting it in its tasks and the membership of which consists partly of external experts.⁶¹ These international bodies are bestowed with advisory authority, conducting evaluation and assessment, and recommending actions to the EB. In a second form of re-delegation, the EB relies on cooperation with private for-profit entities for the performance of most of its monitoring and enforcement authority. This second form of secondary delegation of authority – from the parties (deciding collectively as CMP), via the EB and to private certifiers – lead to the inclusion of elements of public-private regulation into the international climate regime. Abbott and others highlighted that relations between a principal and its agent are increasingly constrained so as to leave less margin of interpretation to the agent further down the chain of delegations.⁶² Indeed, acts establishing the delegation of authority to DOEs are characterized by the inclusion of secondary norms as conceptualized by Hart. Proposals, such a submitted by Figueres and Streck, for a stronger integration of the entities in the work of the EB in order to increase the effectiveness of the regime would entail the delegation of additional authority such as advisory functions.⁶³

⁶⁰ Draft decision -/CMP.5, Further guidance relating to the clean development mechanism, para 42.

⁶¹ See the general guidelines for panels/working groups adopted by the EB and framing its exercise of re-delegation to international bodies, EB 37 Report Annex 1 page 1 Annex 1, (Version 03).

⁶² Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization”, *International Organization* Vol. 54 (3) (2000), at 31.

⁶³ Christina Figueres and Charlotte Streck, “The Evolution of the CDM in a Post-2012 Climate Agreement”, *The Journal of Environment Development* 18 (2009), at 235.

3.3. Critical upraising of the quality of the DOEs functions

The nature and performance of the DOEs has been under criticisms which contributes to undermine the credibility of the whole CDM regime.⁶⁴ Besides questions arising on the legitimacy of the DOEs due to their for-profit nature, the work of the DOEs is also undermined by several other elements. Firstly, the DOEs are contracted on an economic basis by the Project Participants. Their independence towards PPs and their capacity to sanction projects failing to meet the CDM standards appear undermined by the financial dependency of the DOEs on the PPs – their main customers. DOEs have also failed to demonstrate their reliability, the three largest of them having been temporarily suspended in the past few years. Furthermore, a ranking by a German research institute of the performance of the five largest DOEs highlighted the lack of performance of the entities considering the high number of reviews and rejections that the EB decided in discrepancy with DOEs recommendations.⁶⁵

The DOEs are nevertheless not the only actors of the flexibility mechanisms under criticisms. More generally such a questioning can be expected in relation to innovative designs for global governance, in particular when those propose a challenge to the historical separation between the international and the domestic sphere.⁶⁶ Proposals for reforms of the CDM also include suggestions that the role of the DOEs be strengthened as to really become the central actor in charge of the reviewing of project applications. In this context, the EB would mainly focus on overseeing the whole process.⁶⁷

3.4. Parallelism of issues in the governance of Article 6 mechanisms

⁶⁴ See for instance for a short account of the criticism addressed to the DOEs, Lambert Schneider, Lennart Mohr, “A rating of Designated Operational Entities (DOEs) Accredited under the Clean Development Mechanism (CDM): Scope, methodology and results”, Report for WWF, Institute for Applied Ecology, Berlin (2009), at 137.

⁶⁵ Lambert Schneider, Lennart Mohr, “A rating of Designated Operational Entities (DOEs) Accredited under the Clean Development Mechanism (CDM): Scope, methodology and results”, Report for WWF, Institute for Applied Ecology, Berlin (2009).

⁶⁶ Nico Kirsch and Benedict Kingsbury. “Introduction: Global Governance and Global Administrative Law in the International Legal Order”, *European Journal of International Law*, Vol.17 (1) (2006), at 11.

⁶⁷ Nhan T. Nguyen, Minh Ha-Duong, Sandra Greiner and Michael Mehling, “Improving the Clean Development Mechanism Post-2012: A Developing Country Perspective”, *Carbon and Climate Law Review* Vol. 4 (1) (2010), at 84.

In addition to the “institutional parallelism” existing between track 2 JI and the CDM mechanism, it is notable that the same private regulators are active in both mechanisms. Only three IEs have been successfully through the accreditation stage up to date, all of these AIEs being also major actors of the CDM verification and certification business. All but one applicant IEs have the DOE status under the CDM.⁶⁸ As the limited amount of private regulators accredited in the CDM is already considered an issue, the risk resulting from this situation is further increased in relation to AIEs, active in the JI, thus posing a further threat to the credibility of this second mechanism.

One of the differences existing between the JI and CDM procedures consists in the lack of referral to the CMP for the final accreditation of AIEs, the AIEs thus drawing their competence solely from the delegation of the competence by the JISC.⁶⁹ This absence of systematic oversight of the accreditation of the private regulators involved reinforces the framework of the re-delegation of authority described in the previous subsections. Another difference between the two schemes with relevance in the context of global administrative law consists in that some of the competences delegated by the parties to the EB in the CDM context are retained by host countries in the JI context, such as the issuance of credits. Thus conflicts related to these tasks would involve in the case of the JI a dispute between a private entity and a state, and would therefore not create issues of global administrative nature that might arise in the CDM context.⁷⁰ The JI procedures retain however much potential for conflicts between private actors and international institutions.⁷¹

4. Procedural rights of stakeholders in the flexibility mechanisms

In his early analysis of the emergence of legitimacy issues in international environmental law, Bodansky identified three sources of legitimacy which could provide alternatives to the absence of state consent.⁷² With regards to the CDM governance bodies, it is unlikely that legitimacy stemming from the source of their authority might contribute much to raising the overall credibility of the mechanism, as this authority results from one or

⁶⁸ Source: <http://cdm.unfccc.int/DOE/list/index.html> and <http://ji.unfccc.int/AIEs/listIL.html>

⁶⁹ JI procedures for accreditation of AIEs (Version 6) P-JI-ACCR-02, para. 103.

⁷⁰ See Sander Simonetti, “Legal Protection and (the Lack of) Private Party Remedies in International Carbon Emission Reduction Projects”, *Journal of Energy & Natural Resources Law* Vol 28 No 2 (2010), at 193.

⁷¹ *Ibid*, at 195.

⁷² Daniel M. Bodansky (1999), *supra* note 53, at 611.

even two layers of international delegation. Secondly, the environmental integrity of CDM projects has been under much criticism so that there is little room at present for an increase of the legitimacy of the CDM bodies on the basis of the outcomes of their work. Thus authority of the EB and DOEs remains to a large extent dependant on the third source of legitimacy identified by Bodansky: legitimacy through the implementation of fair procedures. Alkoby further argued that the legitimacy of international environmental law was challenged by the lack of recognition of non-state actors as *subjects* of this legal order, which was in discrepancy with the increasing roles played by these actors in international relations.⁷³ This author poses public participation as the *cure* to the democratic deficit of environmental governance resulting to the absence of systematic state consent to every decision adopted under multilateral environmental agreements.⁷⁴ This position is supported by Buchanan and Keohane's analysis of global legitimacy.⁷⁵ Noting that democracy is considered as the main factor legitimizing the exercise of powers, the authors concluded that global democracy could provide a legitimization of global governance. However and given the unfeasibility of achieving global democracy, the authors propose a Complex Standards of Legitimacy aiming at raising the legitimacy of global governance.⁷⁶ This Complex Standards relies, among other elements, on the implementation of key democratic values – of which transparency and public participation are key components – and the establishment of a transnational network of accountability.

The regulatory activities of the flexibility mechanisms are susceptible to affect the rights of two separate categories of stakeholders, as in many administrative legal orders.⁷⁷ Firstly, EB and DOEs decisions might have consequences for their addressees, for instance the PPs in the case of the rejection of a certification by the EB. Fundamental legal principles and the requirement of due process will command the granting of some procedural rights to these actors. Third parties and affected stakeholders constitute a second category of stakeholders whose rights might be indirectly affected by regulatory decisions taken by the CDM bodies. Decisions of the EB and DOEs might for instance create positive

⁷³ Asher Alkoby, "Non-State Actors and the legitimacy of international environmental law", *Non-State Actors and International Law* 3 (2003), at 25.

⁷⁴ *Ibid.*, at 44.

⁷⁵ Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions", *Ethics and International Affairs*, 20 (4) (2006), at 416.

⁷⁶ *Ibid.*, at 435.

⁷⁷ Kingsbury emphasized this distinction. Benedict Kingsbury, Nico Kirsch, and Ricard B. Stewart (2004), *supra* note 17, at 45.

incentives for economic actors to engage in activities potentially resulting in the infringement of the rights of the members of a local community.

Disregarding to the administrative nature of the decisions adopted during the project cycle of CDMs, the participatory rights of stakeholders in environmental decision-making has been consistently reiterated by the international community since the Earth Summit and the adoption of the Rio Declaration.⁷⁸ The UNECE Almaty Guidelines on the promotion of the implementation of these principles to international decision making emphasized that *[a]ccess to information, public participation and access to justice in environmental matters are fundamental elements of good governance at all levels and essential for sustainability.*⁷⁹ Based on the categorization adopted in these instruments, the following sections considers to which extent procedural rights are implemented in relation to the functions of the DOEs in the CDM project cycle.

4.1. Access to information

Transparency and access to information are two key features of the whole regime created under the UNFCCC. In her assessment of the legitimacy of the COPs, Brunée noted the importance of transparency in the proceedings of this body, acknowledging the role played in this context by online streaming of the meetings, as well as the publication of semi-official reports by the non-governmental organization IISD.⁸⁰ Besides raising the legitimacy and public support for the climate convention, release of public information also plays a strong role in promoting compliance with the obligations of parties. Prior to the adoption of the Kyoto Protocol and of its enforcement mechanism, the assessment of domestic emissions of greenhouse gases and their reporting to the COP constituted the main instrument providing incentives to developed countries to take actions to reduce their emissions. Developed parties are indeed required to submit annual reports of national greenhouse gases emissions, as well as regular comprehensive reports of their climate

⁷⁸ “Environmental issues are best handled with participation of all concerned citizens, at the relevant level.”, Principle 10 of the Rio Declaration on Environment and Development 1992, 31 ILM 874; see also in Agenda 21, Sections 27.3 – 27.4, and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998, 38 ILM (1999), in force 30 October 2001..

⁷⁹ Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, ECE/MP.PP/2005/2/Add.5, Annex, para. 11.

⁸⁰ Jutta Brunnée, “COPing with Consent: Law-Making Under Multilateral Environmental Agreements”, *Leiden Journal of International Law* Vol. 15 (2002), at 45.

policies.⁸¹ This information is then reviewed by a group of experts and published, together with the review report, on the webpage of the convention.⁸² While under the Kyoto Protocol transparency does no longer constitute the main mean for the promotion of compliance with the climate regime, it remains a key to ensuring both integrity and legitimacy, in particular as the instruments established under the protocol become more sophisticated, requiring very specialized expertise for their assessment.

Before an AE can begin its work and validate or verify projects, it is required to communicate information in relation to its internal governance, functioning and expertise. The CDM procedures require AEs applying to designation as operational entities to make available to the EB detailed information concerning its internal structure and policies.⁸³ The list and status of all DOE is to be maintained publicly available by the EB, each DOE responsible for the communication of an updated list of all project for which it has been contracted to carry either validation and/or verification and certification tasks.⁸⁴

The communication of additional project-specific information is also required from the DOEs in relation to every project for which they have been contracted. Access to information in the context of the flexibility mechanisms is conditioned by the respect of confidentiality of economic information. The guarantee of the respect of confidentiality is a key element to promote the participation of private investors in the mechanism. All actors taking part to the governance of the CDM are therefore required to respect the confidentiality of the particular economic information, both during their terms working in the governance of the CDM and afterwards.⁸⁵

The procedures of the CDM generally state that the DOE should make publicly available all information provided by the PPs to the exception of information marked as confidential.⁸⁶ The procedures further define the

⁸¹ See Wang and Wiser for a brief analysis of the various forms of compliance used in the climate regime. Xueman Wang and Glenn Wiser, "The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol", *Review of European Community & International Environmental Law*, Vol.11 (2) (2002), at 186.

⁸² UNFCCC, Article 4, para 1, and article 12.

⁸³ CDM-M&P, *supra* note 15, Appendix A, para 1(g).

⁸⁴ *Ibid.*, para 27 (f).

⁸⁵ See *Ibid.*, para 6 and Annex A, para 2. (b).

⁸⁶ *Ibid.*, para 27 (h).

content of this general obligation with regards to both stages at which the DOE might intervene. In relation to validation functions, the DOE is responsible to make available to the public the PDD (subject to the exception detailed in the previous paragraph). Its validation report should also be communicated to the public upon its transmission to the EB.⁸⁷ During the verification stage, the DOE is only required to make publicly available its verification report.⁸⁸

4.2. Public Participation

Stakeholder participation in the CDM can take place in relation to each entity or body involved in the governance of the mechanism. The input of stakeholders to the overall governance of the mechanism and to its environmental integrity is channelled through interaction with the EB. Observers accredited to the UNFCCC have the possibility to attend part of the meetings of the EB.⁸⁹ The board also organizes on a regular basis briefings and workshops with stakeholders in order to facilitate the sharing of information and collection of feedback. In relation to the participation of third-party certifiers to the mechanism, stakeholders are provided an opportunity to submit input on specific AEs prior to their designation by the board. This procedure has however not resulted in the submission of many genuine comments.⁹⁰ Once a DOE has been accredited, it will need to engage with stakeholders during the validation stage of projects for which it has been contracted.

Stakeholders' consultations in relation to specific projects are organized in two different processes with a different geographic scope. The main channel of participation by local stakeholders to the project cycle consists in their involvement in local consultations which the PPs are requested to organize during the design of the project. The report of this consultation should be included in the information transmitted by the PPs to the DOEs during the validation of the project.⁹¹ The PDD should include the description of the steps taken by the PP to invite public comments, as well as a summary of the comments received and a report on the consideration given to the issues raised in the comments received. On a global level, stakeholders and UNFCCC-accredited organizations are

⁸⁷ Ibid., para 40.

⁸⁸ Ibid., para. 62 (h).

⁸⁹ Ibid., para. 16.

⁹⁰ Comments are available for each DOE on the CDM webpage: <http://cdm.unfccc.int/DOE/CallForInputs/index.html>

⁹¹ CDM-M&P, supra note 15, para. 37 (b).

invited to provide comments through the “global stakeholders consultations” managed by the DOE. Global stakeholders consultations are initiated by the publication by the DOE of all non-confidential elements of the PDD. Stakeholders are then invited to submit comments during a period of 30 days following this publication.⁹² Comments submitted should then be taken under consideration by the DOE, which need to include in its validation report to the EB information about how it took due account of these inputs.⁹³

There is no formal and automatic opportunity for stakeholders to play a role in the relation to the verification by the DOEs of the emissions reduction resulting from a project. The DOEs is required to conduct an on-site visit to the project during which it might arrange interviews with local stakeholders.⁹⁴ The choice of this particular method of review is however let to the discretion of the DOE. Also, once the DOE has published its verification report, the CDM procedures do not provide any specific opportunity for the public to comment on and react to this report. In case of strong concerns by stakeholders with the content of the report, those would need to address parties to the project or members of the EB in order for the later actors to trigger the review of the request for issuance of CERs, this review being limited to cases of fraud, malfeasance and incompetence of the DOE.⁹⁵ This absence of a proper opportunity for stakeholders to react to verification reports further highlights the importance played by the guarantee of access to a review mechanism.

4.3. Access to a Review Process, *ubi remedium, ibi ius*

The right to an adequate access to judicial remedies constitutes the third pillar of procedural rights. Public international law traditionally does not provide for procedures enabling individuals and private entities to challenge directly decisions reached by intergovernmental institutions. The multiplication of instances in which decisions taken at the international level target directly individuals has however led to the creation of some forms of appeal procedures to which individuals have a limited standing. The UN Security Council itself have been under much pressure to establish such an effective process providing the possibility of

⁹² Ibid., para. 40 (c).

⁹³ See EB 50 Report, Annex 48, Procedures for processing and reporting on validation of CDM project activities (Version 03), para. 12 ff.

⁹⁴ CDM-M&P, supra note 15, para. 62(b)

⁹⁵ Ibid., para. 65.

an appeal for individuals directly affected by individual sanctions. The Court of Arbitration for Sport also provides to some extent a form of appeal of decisions adopted by the World Anti-Doping Agency, an international non-governmental organization assuming some forms of administrative authority.⁹⁶

Streck noted that the importance paid to negotiations in the SBI over the immunities of the officers serving in the institutions established under the Kyoto Protocol further demonstrates relevance of the provision of a review mechanism.⁹⁷ Figueres and Streck noted that review mechanisms existed under the Kyoto Protocol for the decisions of the CMP itself, but were lacking for those of its subsidiary bodies.⁹⁸ Indeed the compliance procedures established by the CMP at its first sessions provide that a party affected by a decision of the CMP might appeal to this decision to the enforcement branch of the compliance committee.⁹⁹ This current absence of appeal mechanism for EB decisions thus lead to the paradoxical nature of the situation in which decisions of a principal might be subject to a review process when the decision of its agent cannot be contested.

The following subsections describe the existing review processes existing internally to the DOEs as well as the appeal mechanisms, which are currently under consideration by the SBI and the CMP.

4.3.1. DOEs internal review procedures and Complaint Mechanism against the DOEs

The presence of review procedures internal to the DOEs is a requirement established in the CDM M&P. Describing the management structure required from applicants operational entities, the standards for the

⁹⁶ The two examples are cited in Charlotte Streck and Jolene Lin (2008), *supra* note 37, at 428. For further analogies with other administrative review processes established in relation to decisions adopted by international institutions, see also the elements drawn from six other international mechanisms by the UNFCCC in its technical paper on the issue, FCCC/TP/2011/3, the processes concerned are mentioned in para. 11.

⁹⁷ Charlotte Streck and Jolene Lin (2008), *supra* note 37, at 432. For an updated version of the document under consideration, see the report of the contact group working on this issue at the SBI 32 in FCCC/SBI/2010/10, annex IX.

⁹⁸ Christina Figueres and Charlotte Streck, "A Post-2012 Vision for the Clean Development Mechanism", in David Freestone, Charlotte Streck (eds) *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and beyond*, Oxford: Oxford University Press (2009), at 575.

⁹⁹ Decision 27/CMP.1, Annex, Procedures and mechanisms relating to compliance under the Kyoto Protocol, section VII., FCCC/KP/CMP/2005/8/Add.3.

accreditation of DOEs refers to the necessity for entities to make publicly available their *procedures for handling complaints, appeals and disputes*.¹⁰⁰ The CDM accreditation standards for DOEs further develop on the content of these requirements, elaborating on each of these three types of contention processes.¹⁰¹

In relation to the role of stakeholders and civil society, the establishment of procedures for the handling of complaints is the most promising. DOEs must welcome the submission of complaints addressing PPs and submitted in relation to any of the stages of the CDM project cycle for which it has the responsibility.¹⁰² DOEs need to guarantee the transparent and objective management of the complaints which it receives, through the publication of the procedures applied to address those. The confidentiality of complainants is to be guaranteed. Based on the results of the consideration of the merits of the complaints, the DOE need to ensure that, if necessary, corrective action is taking place.

In addition to these internal procedures, the EB also established an external process for the handling of complaints against the DOEs.¹⁰³ This process is open to any individual which provided input to the global stakeholder consultation and is unsatisfied with the treatment by the DOE of the information provided. The complaint procedure is handled by the CDM-AP with the help of the UNFCCC secretariat. The CDM-AP establish a contradictory procedure, which might lead to the recommendation to the EB of the suspension or to further investigation in case it finds that the DOE has acted against the CDM procedures or against its own processes.

4.3.2. Options for an appeal mechanism of the decisions of the EB

Legal standing of various actors in review procedures was already identified by academics as a potential issue before the adoption of the

¹⁰⁰ CDM-M&P, supra note 15, Appendix A, para 1(g)vi. The standards for the accreditation of DOEs also contains a second reference to such processes, requesting from applicant entities to communicate their procedures to allocate responsibility in relation to the handling of complaints, CDM M&P, para. 1(e).

¹⁰¹ EB 56, Report, Annex 1, Annex 1, CDM Accreditation Standard for Operational Entities (Version 02), para. 133 ff.

¹⁰² Ibid., para. 134.

¹⁰³ EB 56 Report, Annex 2, Procedure for accrediting Operational Entities by the EB of the CDM, (Version 10.1), Appendix 3.

Marrakech Accords.¹⁰⁴ In the current regime, NGOs and stakeholders have access to review neither in relation to the decisions made by the DOEs nor on the status of DOEs itself. While the following paragraphs discuss the opportunity for an appeal mechanism created under the frame of the UNFCCC, other proposals ensuring the accountability of the governing entities of the CDM have also been put forward. Prior to the resurgence of the debate over the consideration of appeal processes by the CMP, Meijer proposed to rely on domestic courts for the review of some of the decisions taken at the international level in the management of CDM projects cycles.¹⁰⁵ This approach would require the preliminary lifting of the immunity potentially enjoyed by the entities managing the CDM. Meijer's approach to the issue of jurisdictional immunity of international actors relies on the distinction between *acta jure gestionis* adopted by the institutions in the performance of its administrative functions – to which no immunity applies – and *acta jure imperii* for which immunity would remain.¹⁰⁶ This doctrine offers interesting implication in the context of the emergence of global administrative law. While Meijer's approach appears limited to a narrow legal standing, it could also be implemented in a context of a broader legal standing enabling a larger group of stakeholders to appeal to decisions taken by the EB or the DOEs. One risk inherent to the adoption of such an approach consists in the fragmentation of the rules and standards applicable to various participants to the mechanisms.

At the COP15, the CMP requested the EB to propose, in consultation with stakeholders, procedures for "*appeals that are brought by stakeholders directly involved, defined in a conservative manner*".¹⁰⁷ While this request does not define specifically the scope of the legal standing in this process, the wording use indicates that the CMP expects that the procedures for a review process would strike a balance between the openness of the process and the safeguard of the effectiveness of the mechanism. On the one hand, the CMP refers to stakeholders rather than to specify "Project Participants", potentially indicating that the appeal process should not be limited only to the economic entities directly involved in the projects rejected or reviewed by the EB. On the other

¹⁰⁴ Peggy Rodgers Kalas and Alexia Herwig, "Dispute resolution under the Kyoto Protocol", *Ecology Law Quarterly* 27 (2000), at 121.

¹⁰⁵ Ernestine E. Meijer, "The international institutions of the Clean Development Mechanism brought before national courts: limiting jurisdictional immunity to achieve access to justice", *International Law and Politics* Vol. 39 (2007).

¹⁰⁶ *Ibid*, at 900.

¹⁰⁷ Decision 2/CMP.5 on Further guidance relating to the clean development mechanism, FCCC/KP/CMP/2009/21/Add.1, para 42

hand, the definition of the stakeholders, to which such a process would be opened, is qualified by the requirement of direct involvement.

Private economic actors taking part to projects under the CDM (both PPs and DOEs) and environmental NGOs submitted views on the scope and procedures that could frame such an appeal procedure. Thus two diverging views have emerged on the purpose of the mechanism. Economic actors involved in the CDM emphasized the importance of providing procedural rights to entities directly concerned by EB decisions, thus providing a guarantee of due process to these entities. According to this restrictive approach, the mechanism would allow DOEs and PPs to negative decisions reached by the EB. The DOE/AIE Forum responded to the call for input, emphasizing that all DOEs had already in place appeal processes which are evaluated by the Accreditation Panel as part of the accreditation procedure (see above). The Forum thus called for the procedure for an appeal mechanism to take this processes into consideration and requires for appeals against DOEs decisions that the appellants have exhausted such remedies before submitting a request for appeal to the appeal mechanism.¹⁰⁸ Despite the fact that this suggestion is not considered in the current draft procedures tabled by the Executive Board, it does constitute an interesting proposal from the point of view of the status of the DOEs. If such a proposal would be inserted in the procedure, this reference would have constituted a unique acknowledgement of the legitimacy of the DOEs internal processes. An intermediary proposal presented during a side event at a session of the UNFCCC consisted in enlarging the scope of the legal standing to private competitors of project participants who would be entitled to appeal to a positive decision of the EB, while still preventing other stakeholders to appeal such decisions.¹⁰⁹ Competitors, so the argument goes, have a direct interest in positive decisions granted to other private entities. Those, if taken in breach of the CDM procedures, might indeed provide their beneficiary with an unfair economic advantage. While such a legal standing could contribute to increase the accountability of the CDM institutions, its adoption would result in an explicit acknowledgement of the primary economic function of the mechanism. The contribution of the mechanism to the environmental integrity of the climate regime would therefore be undermined.

¹⁰⁸ Views on appeals against CDM Executive Board decisions, submitted by the DOE/AIE Forum, 23rd April 2010 (available at <http://unfccc.int/resource/docs/2011/smsn/ngo/288.pdf>), at 2.

¹⁰⁹ See the presentation of Dr. Ludger Giesberts LL.M., available online at http://regserver.unfccc.int/seors/attachments/get_attachment?code=GY0RY1TUSWXY2MIOT1QH2EP41O9QJID3.

On the other hand, environmental NGOs highlighted the opportunity that the creation of such a mechanism offered to ensure the provision of procedural rights to stakeholders influenced by EB decisions. This second approach would require a more inclusive definition of the legal standing in this process as well as the possibility to appeal also to positive decisions reached by the board. Given that one of the objectives attributed to CDM is to stimulate investments in projects taking place in developing countries, an element considered in the assessment of different procedures for an appeal mechanism consists in ensuring that such procedures do not deter investors from taking part to the CDM. In order to strengthen the environmental purpose of the mechanism, academics have proposed that legal standing be granted not only to individuals claiming that their rights have been directly infringed by a project, but also more broadly to environmental NGOs.¹¹⁰ The granting of a legal standing to the later organizations would enable those to contribute as watchdogs of the mechanism with their expertise. The appeal process of the decisions adopted by the CDM governance bodies would in this case strengthen the environmental integrity of the whole mechanism.

In its 2010 annual report to the COP, the EB developed a recommendation for an appeal procedure of its decisions.¹¹¹ The recommendation of the EB interpreted the reference to *stakeholders directly involved, defined in a conservative manner* as encompassing only PPs and the DNA(s) involved. The procedures proposed do not foresee any role for stakeholders in the appeal process. The option for stakeholders to act as *amicus curia* in the appeal process is indeed also discarded in these draft procedures as they restrict the type of information sources which can be considered by the appellate body.¹¹² The draft procedures also propose to prevent the appellate body from considering motions and unsolicited submissions.¹¹³

The CMP considered the issue once again in Cancun and requested the SBI 34 to make a recommendation to the CMP with a view to the adoption of a decision in Durban.¹¹⁴ This decision also invited parties and observers organizations to submit comments on the procedure drafted by the EB. Among the few submissions received from parties and

¹¹⁰ Michael Bothe, Thilo Marauhn, Eckard Rehbinder, Ayse Martina Böhringer, Johan Horst, "Clean Development Mechanism: Proposal for an Appeals Process", *Environmental Policy and Law*, Vol. 41 (1) (2011), at 16.

¹¹¹ 2010 Annual Report of the EB to the CMP, FCCC/KP/CMP/2010/10, Annex II.

¹¹² *Ibid.*, para. 45.

¹¹³ *Ibid.*, para. 80-81.

¹¹⁴ Decision 3/CMP.6, FCCC/KP/CMP/2010/L.8, para. 18.

intergovernmental organizations, only the UNDP and the European Union called for consideration of a broader legal standing than as proposed currently in the EB draft procedures.¹¹⁵

The UNFCCC secretariat produced a technical paper in May 2011 at the request of the COP to support the work of the SBI34 on this issue.¹¹⁶ The paper draws from a comparative study of other existing appeal processes reviewing administrative decisions taken by international institutions. The technical paper addresses the issue of the legal standing in the process by inviting negotiators to consider whether the process should be open to all parties or restricted to project participants. The paper also notes that decision over this matter will have implications *for issues such as environmental integrity, legitimacy and confidence as well as for caseload, the efficiency of the appeal mechanism and the possibility of vexatious or frivolous claims.*¹¹⁷ Contrary to the draft procedures proposed by the EB, the paper also refers to the role that stakeholders could play in the process, suggesting that the appeal mechanism might have the possibility to solicit, at its own discretion, views from stakeholders previously engaged in the project cycle.¹¹⁸ Decision on this issue is thus expected to take place in June 2011, subject to the CMP rubber-stamping the recommendation in December 2011.

5. Conclusion

The establishment of the CDM and JI mechanisms provides two textbook examples of the emergence of global administration law. Administrative functions are delegated in these mechanisms from state parties to institutional bodies taking decisions which affect directly the rights of individuals and private actors. Moreover, regulatory authority is the further delegated to private actors, which are thus granted a vital role for the integrity of the whole mechanism and for its credibility.

¹¹⁵ Views on appeals against CDM Executive Board decisions, submitted by the UN Development Programme (available at <http://unfccc.int/resource/docs/2011/smsn/igo/123.pdf>) and by Hungary and the European Commission on behalf of the European Union and its member States (available at, http://unfccc.int/files/documentation/submissions_from_parties_in_2011/application/pdf/eu_submission.pdf).

¹¹⁶ Procedures, mechanisms and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism. Technical paper. FCCC/TP/2011/3

¹¹⁷ *Ibid*, para. 131.

¹¹⁸ *Ibid*, para. 132.

Alvarez noted that relations between NGOs and intergovernmental institutions could be described in many cases as symbiotic. On the one hand, the establishment of intergovernmental organizations creates a space for the participation of NGOs. On the other hand, the participation of civil society to the proceedings of intergovernmental bodies contributes to increasing the legitimacy of these bodies. This contribution is particularly welcomed as the legitimacy of these intergovernmental institutions is challenged by their lack of democratic representativeness.¹¹⁹ Considering the additional risks for the integrity of the climate regime resulting from the participation of for-profit entities in the governance of the flexibility mechanism, the CMP and the EB have placed a particular emphasis on transparency and on the capacity of stakeholders to provide feedback at several stages of the CDM project cycle. The role of transparency and of the guarantee of a right to access information is however limited by the complexity of the issues involved, making it extremely difficult for local actors to comprehend fully this information. In relation to the participation of stakeholders in the processes established under the CDM, criticisms have been raised on the way in which DOEs follow up on the feedback which they receive on specific projects. In this context, the guarantee of access to an appeal process for stakeholders and NGOs could greatly increase the accountability of non-state actors involved in the CDM project cycle. The formal ongoing negotiations on the establishment of such an appeal provide an opportunity to establish such a process and to increase the credibility of the mechanism. Should the SBI and the CMP adopt a narrow definition of the legal standing of stakeholders in this appeal process, the credibility of market-based mechanisms in the climate regime would be further undermined. The provision of procedural rights to project participants would emphasize the priority given in the mechanism to the contributing to the establishment of a new commodity market, and the secondary importance paid to the environmental integrity of the mechanism. Considering the groundbreaking nature and structure of the CDM, the (in)ability of parties to the UNFCCC to further develop these mechanisms in such a way as to maintain a high level of credibility is likely to have consequences beyond the UNFCCC regime. The development of other institutional arrangements relying on the delegation of administrative authority to private companies would certainly be affected by the capacity of flexibility mechanisms to retain credibility and legitimacy.

¹¹⁹ José E. Alvarez, "Governing the World: International Organizations as Lawmakers", *Suffolk Transnational Law Review*, 31:3 (2007), at 597.

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