
Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives

Damilola S. Olawuyi*

Abstract

The Clean Development Mechanism (CDM) of the Kyoto Protocol has come under increased criticisms for spearheading human rights violations in host countries. These human rights concerns include mass displacement of citizens from their homes to allow for projects, lack of participation by citizens in project planning and implementation, siting and concentration of projects in poor and vulnerable communities, lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of the above-mentioned problems.

As negotiators continue to map out the details of post 2012 climate change regimes, it is imperative to take stock and examine how these transparency and accountability concerns facing the current CDM framework could be pragmatically addressed. This paper discusses the need for a more transparent and accountable CDM. It explores the idea of accountability under international law and examines how these notions could be mainstreamed into a post-2012 CDM framework. This paper discusses the need for a comprehensive complaint mechanism under the CDM as a starting point for a more transparent and accountable CDM.

1. Introduction

The Kyoto Protocol's market mechanisms have been lauded as its most innovative features. These mechanisms are considered significant for providing alternative opportunities for in-

dustrialized countries to achieve their emission reduction objectives through investments in other countries.¹ However, as innovative as these mechanisms are, their implementations across national and international levels have been fraught with challenges.² Specifically, the Clean

* LL.M (Harvard), Clarendon Scholar and Doctoral Candidate, Faculty of Law, University of Oxford, United Kingdom. Email: damilola.olawuyi@law.ox.ac.uk

¹ The three flexible mechanisms: Joint Implementation (JI), Emission Trading (ET) and the Clean Development Mechanism (CDM) allow industrialized countries to meet their emission reduction targets by investing in projects abroad rather than through domestic actions alone. They give industrialized countries the opportunity to earn emission reduction credits *anywhere* in the world, at the *lowest cost* possible by investing in projects that lead to emission reduction and sustainable development. Studies confirm that it requires US \$50 to mitigate one ton of CO₂ eq. in developed countries, while in developing countries the same reduction can be accomplished at US \$15 per ton of CO₂ eq. For a detailed and excellent discussion of these mechanisms, see F Yamin and J Depledge, *The International Climate Change Regime* (CUP, 2005) 25.

² See generally D Driesen, 'Sustainable Development and Market Liberalism's Shotgun Wedding: Emissions Trading Under the Kyoto Protocol' (2008) 83(1) *Indiana Law Journal* 21; D Hunter, C Wold, and M Powers, *Climate Change and the Law* (LexisNexis Publishing, 2009); UN Development Programme, *Fighting Climate Change: Human Solidarity in a Divided World* (New York: 2007) 1; A McMichael et al., eds., *Climate Change and Human Health – Risks and Responses* (World Health Organization, 2003); M Sandel, 'Its Immoral to Buy the Right to Pollute' *N.Y. TIMES*, 15 Dec., 1997; T Jackson, 'The Language of Flexibility and the Flexibility of Language' (1998) 10 *International Journal of Environment and Pollution* 3; I Rowlands, 'The Kyoto Protocol's Clean Development Mechanism: A Sustainability Assessment' (2001) 22 *Third World Quarterly* 795; K Umamaheswaran & A Michaelowa, 'Additionalty and Sustainable Development Issues Regarding CDM Projects in Energy Efficient'

Development Mechanism (CDM) has arguably come under more intense and scurrilous attacks than the other mechanisms.³ One main criticism is the low level of accountability in the project approval and implementation procedures under the CDM Rules.⁴ A number of CDM projects approved by the CDM Executive Board have also been criticised for resulting in the violation of existing human rights.⁵ There have also been issues related to pollution caused by the transfer of outdated and inefficient technologies for emission

cy Sector' (2006) HWWA Discussion Paper 346; M Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Carswell, 2005) 29.

³ The CDM has in fact been labeled as a 'Cheap and Corrupt Development Mechanism'. See Down to Earth Group, 'Issues: Flexibility Mechanisms' *Down to Earth Magazine* (November 15, 2005).

⁴ See L Schneider, 'Is the CDM Fulfilling its Environmental and Sustainable Development Objectives? An Evaluation of the CDM and Options for Improvement' (Öko-Institut, November 2007); C Sutter, 'Does the Current Clean Development Mechanisms Deliver its Sustainable Development Claims' (2005) *HWWA Report 1*; R Saner and A Neiderberger, 'Hype or Reality: Can the CDM trigger FDI?' (2005) 2 E.C.P 12; B Haya, *Damming the CDM: Why Big Hydro is Ruining the Clean Development Mechanism* (International Rivers Network, Berkeley: 2002) 1; H Kolshus, 'Can the Clean Development Mechanism attain both Cost effectiveness and Sustainable Development Objectives?' (2001) 8 CICERO Working Paper at 1.

⁵ See T Griffiths and F Martone, 'Seeing 'REDD'? Forests, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities' Forest Peoples Programme, May 2009, available at <http://www.rightsandresources.org/documents/files/doc_923.pdf> (accessed 12 January, 2011); See generally E Meijer, 'The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice' (2007) *New York University Journal of International Law and Politics* 873. See also J Barbara, *The False Promise of Biofuels* (San Francisco and Washington, DC: International Forum on Globalization and Institute for Policy Studies, September 2007); E Holt-Giménez and I Kenfield, *When Renewable Isn't Sustainable: Agrofuels and the Inconvenient Truths Behind the 2007 U.S. Energy Independence and Security Act*, Food First Policy Brief No. 13: Agrofuels (Institute for Food and Development Policy, March 2008).

credits.⁶ Other human rights concerns include the lack of participation by citizens in project planning and implementing,⁷ siting of projects in poor and vulnerable communities, lack of governmental accountability on projects and the absence of judicial and quasi-judicial remedies for victims of the above mentioned problems.⁸

⁶ See generally P Lucas and T Patzek, 'The Disastrous Local and Global Impacts of Tropical Biofuel Production' (March 2007) *Energy Tribune* 19. See also 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' available at <http://www.carbonradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> (accessed 12 October, 2010). Another example is the Chan 75 Hydro dam project in Panama, which has been criticised as violating several human rights of the Ngöbe indigenous people. See Petition, 'Human Rights violations by the Government of Panama against the Ngöbe indigenous communities and individuals in the Changuinola River Valley, Bocas del Toro, Panama' p.32–33 (28 Mar. 2008). See also the case of *Saramaka People v. Suriname* (2007) Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007). where the Inter American Court on Human Rights held that large scale development projects that would have a major impact within an indigenous people's territory can only proceed with the free, prior, and informed consent of the people, according to their customs and traditions.

⁷ See F Seymour, 'Forests, Climate Change, and Human Rights: Managing Risks and Trade-offs' in S Humphreys, ed., *Human Rights and Climate Change* (CUP 2010) 207; S Jodoin, 'From Copenhagen to Cancun: A Changing Climate for Human Rights in the UNFCCC?' CISDL & IDLO Sustainable Development Law on Climate Change Working Paper Series (January 2011) available at <http://www.idlo.int/Download.aspx?Id=282&LinkUrl=Publications/3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf&FileName=3_JodoinSébastien%20_ChangingClimateforHumanRights.pdf>. (Accessed 03 August, 2011).

⁸ See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming caused by Acts and Omissions of the United States, by the Inuit people of the Arctic Regions of the United States and Canada, 7 December 2005. The IACHR informed the petitioners that it would not consider the petition because the information it provided was not sufficient for making a determination and that no legally enforceable right has been violated. Available at <<http://inuitcircumpolar.com/files/uploads/iccfiles/FINALPetitionICC.pdf>> (accessed 12 July, 2011).

The most recent example that has dominated international discussions is the case of the Aguan biogas CDM project in Honduras, which was approved on the 18th of July, 2011 by the CDM Executive Board.⁹ This project sponsored by the U.K Government, has been heavily criticized internationally for its gross human rights violations.¹⁰ According to a report of the international human rights mission submitted on 25 March 2011 to the Inter-American Commission on Human Rights, the local project developer Grupo Dinant is alleged to have been at the center of violent conflicts with local people, who were deprived of their land by the project; about 23 peasants have also been killed.¹¹ A coalition of over seventy international human rights groups called on the UK to withdraw sponsorship for the project and for the CDM Executive Board not

to approve or register the project.¹² The U.K Secretary of State for Energy, in response, promised to follow the findings of the CDM Board on the project.¹³ Despite the protests, the CDM board approved this project. The Board argued as in most cases that it has no mandate to investigate human rights abuses and that any matter related to the sustainable development of a project or human rights is determined by the government that hosts the project.¹⁴ According to the spokesman for the CDM Executive Board:

The allegations are deplorable. If human life has been taken, or human rights violated in any other way, it is a flagrant violation of the most fundamental principles of the United Nations ... However the CDM board has no mandate to investigate human rights abuses. Any matters related to the sustainable development of the project are determined by

⁹ See UNFCCC, Lists of Registered CDM projects (2011), available at <<http://cdm.unfccc.int/Projects/DB/TUEV-SUED1260202521.42/view>> (accessed 02 August, 2011).

¹⁰ The project is located in the Bajo Aguan region in Honduras and it intends to reduce emissions by collecting biogas from methane emissions and replacing fossil fuels utilized for heat generation in a mill of a palm oil plantation of Grupo Dinant's subsidiary Exportadora del Atlantico. Estimates suggest that it would reduce annually about 23000 tonnes carbon dioxide, generating about US\$ 2.8 million between February 2010 to January 2017. See BIOMASS Hub, 'Human Rights Violations Linked to CDM Biogas Project in Honduras' (2011) available at <<http://biomasshub.com/human-rights-violations-linked-cdm-biogas-honduras/>> (accessed 12 July, 2011). See also CDM Watch, 'Press Release: United Nations under Pressure to denounce Human Rights Abuses in Carbon Offsetting Scheme' (2011) available at <<http://www.cdm-watch.org/?p=1872>> (accessed 02 August, 2011).

¹¹ For comprehensive details of human rights violations by this project, see CDM Watch, Petition to the CDM Executive Board on Aguan Gas project (2011) available at <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/unsolicited_letter_cdmproject_application_3197_honduras.pdf>; See also FIAN, Human Rights Violation in Bajo Arguan (2011), available at <http://www.fian.org/resources/documents/others/honduras-human-rights-violations-in-bajo-aguan/pdf>. (Accessed 02 August, 2011).

¹² CDM Watch, 'Open Letter: UK Government must withdraw authorisation for Aguan and Lean CDM projects linked to assassinations and other human rights abuses in Honduras' available at <<http://www.cdm-watch.org/?p=1648>> (accessed 02 August, 2011). As a response to protests by several international human rights groups German public development bank DEG (Deutsche Entwicklungsgesellschaft) declared that it will not pay out an already approved loan of \$20 million USD for the project. Similarly, EDF Trading, a wholly-owned subsidiary of Electricité de France SA's and one of the biggest CDM investors, pulled out from a contract to buy carbon credits from the project. See CDM Watch, 'German Bank Won't Lend to Honduran CO₂ Project' (April, 2011), available at <<http://www.bloomberg.com/news/2011-04-18/german-bank-won-t-lend-to-honduran-co2-project-cdm-watch-says.html>> (accessed 01 August 2011).

¹³ See Letter by Rt. Hon Chris Huhne M.P, (April 2011) available at <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/UK_Gov_reponse_on_aguan_130411.pdf> (accessed 31 July, 2011).

¹⁴ See The Response of the CDM Executive Board to the Petition, available at <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/EB59-14_CDM-Watch_Concerns-on-CDM-project-in-Honduras-Ref.-3197_Response.pdf> (accessed 02 August, 2011).

the government that hosts the project, in this case the de-facto government of Honduras ...¹⁵

The Kyoto Protocol is silent on the above mentioned human rights impacts of climate change, neither does it give the CDM Board any authority to consider such issues.¹⁶ It instead places the decision to host a project in the hands of national governments.¹⁷ Placing such a crucial decision in the hands of a country that is interested in such projects has led to the approval of all sorts of projects, even the ones that lead to loss of lives and the violation of human rights. States have been more concerned with hosting climate

¹⁵ See Climate Connections, 'Carbon Trade Group Backs Call to check Credits on Human Rights' available at <<http://climate-connections.org/2011/04/18/carbon-trade-group-backs-call-to-check-credits-on-human-rights/>> (accessed 02 August, 2011).

¹⁶ See S Jodoin, 'Lost in Translation: Human Rights in the Climate Change Negotiations' (January 2010) CISDL Legal Working Paper, available at <http://www.cisd.org/pdf/working_papers_climate/Jodoin.pdf> (accessed 02 June, 2011).

¹⁷ See Para. 27(h), CDM Modalities & Procedures, 3/CMP.1 (2005) <<http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf>> accessed 12 July, 2012.

According to the CDM Watch Group:

... Current CDM Rules rely on the CDM host country government to assess whether a project contributes to sustainable development. This places the assessment of sustainable development in the hands of governments that would like to see more investment in their respective countries. As a consequence it is quite logical that essential criteria to assess sustainable development, which are chosen by host country governments themselves, are already deemed to be fulfilled with the mere requirement that the projects 'increase GDP per capita'. As a consequence, no CDM project has ever been rejected on the basis that it did not contribute to sustainable development. Allegations of serious human rights abuses related to CDM project applications in Honduras and Panama have caused an outcry amongst civil society organizations and widespread dismay that human rights are not being taken seriously under the CDM.

See CDM Watch Group News Letter (February 2011) <http://www.cdm-watch.org/wordpress/wp-content/uploads/2011/02/cdm_watch_newsletter_15_february_2011.pdf> (accessed 23 July, 2011).

change projects at all costs, irrespective of the human rights consequences of such projects. Due to the scramble by developing countries to host CDM projects, there have been increased tendencies to lower sustainability standards and to encourage foreign CDM projects despite their potential short and long term effects on human rights enjoyment.¹⁸ These concerns are more serious in developing countries with abysmal human rights records.¹⁹

¹⁸ M Jung, 'Host Country Attractiveness for CDM non-sink projects', *Energy Policy* (2006): 2174; A. Silayan, 'Equitable Distribution of CDM Projects Among Developing Countries' *HWWAReport* 255 at 1; K. Olsen, 'The Clean Development Mechanism's Contribution to Sustainable Development: A Review of the Literature', available at <http://cd4cdm.org/Publication/> (accessed 21 January 2011).

¹⁹ In Nigeria for example, six different emission reduction projects have been subjects of intense petition and court actions over their human rights violations. These projects include: the Kwale Project, Ovade Ogharefe project, the Lafarge Cement Project, The West African Gas Project (WAGP), the Asuokpu/Umutu Gas Recovery and Marketing Facility, and the Reducing Emissions from Deforestation and Degradation (REDD) currently being executed in Nigeria by Shell. The violations range from land grabs without compensation, assault on indigenes, killings, lack of participation in decision making process and the displacements of residents of affected areas. For these projects it is reported that the environmental impact assessment was only put together as a smokescreen and forwarded to the CDM Board after the project had already been approved by the Nigerian authorities. These projects were consequently approved and registered by the CDM Board despite the protests. See K Adeyemo, 'Nigerians Oppose Climate Development Projects' *The Tribune* (Ibadan, 12 September, 2010) 3; REDD Under Fire in Nigeria, <http://uk.oneworld.net/article/view/165950/1/246>, Dont Sell Forests: Group Urge Nigerian Government <<http://www.scoop.co.nz/stories/WO1008/S00467/dont-sell-forests-groups-urge-nigerian-govts.htm>>; See Carbon Trade Watch, 'Groups Slam Nigeria's Submission of Gas Flare Reductions for Carbon Credits' (2006) <http://www.carbontradewatch.org/index.php?option=com_content&task=view&id=171&Itemid=36> accessed 12 October, 2010; Bank Information Center, 'Local Groups say project will not end gas flaring, could exacerbate conflicts in the Niger Delta' <<http://www.bicusa.org/en/Project.39.aspx>> (accessed 14 January, 2011).

Another critical concern under the current CDM rules as embodied in the Kyoto Protocol, and the Marrakesh Accords is that they fail to establish complaint mechanisms and procedures for stakeholders or private individuals whose consultative rights or human rights in general have been infringed to seek redress, to block the approval of such projects or to seek the review of already approved projects. Currently, only governments or three CDM Executive Board members can request a review of projects under the CDM rules.²⁰ As expected, States that have approved projects would most unlikely instigate such review processes. Stakeholders whose rights are violated do not currently have any way to request a review of a CDM project prior to registration. The Kyoto Protocol does not also confer the CDM Board with the authority to refuse a project based on human rights complaints or with the discretion to hear appeals from members of the public whose rights might be affected by a project even in cases such as the Aguan gas project where several petitions were received that indicated significant infringements of human rights.

This creates a one-way mechanism in which the decision of the State is final and most often rubber stamped by the international supervisory body. It freezes out the common citizen whose fundamental human rights may be repressed by the home state and the repression endorsed by the UNFCCC. This is a loophole that has significantly contributed to the high level of human rights petitions and criticisms against CDM projects. As Filzmoser notes:

Reported human rights abuses related to CDM project activities have caused widespread dismay that human rights are not

being taken seriously under the CDM ... The CDM Executive Board must take this issue seriously. If there are no rules in place that allow for the rejection of projects based on human rights abuses, it is time to change this now ... Excluding carbon offset projects that fund human rights abuses from the CDM would only be a logical move given that responsible investors should not be interested in buying carbon credits from projects that violate UN conventions.²¹

These concerns have led to calls for a more transparent and accountable market system in emerging climate change regimes.²² It has been argued that:

those with human rights expertise therefore have good reasons to think through the human rights consequences of different mitigation strategies-at national and local but perhaps especially at international level-given that the effects will be profound, of long duration and probably irreversible ...²³

Shue also notes that responses to these human rights concerns have to be coordinated internationally:

²¹ A Filzmoser, CDM Projects Affect Human Rights, (February 2011) available at <<http://www.cdm-watch.org/wordpress/wp-content/>> (accessed 2 August, 2011).

²² See E Meijer and J Werksman, 'Keeping It Clean: Safeguarding the Environmental Integrity of the Clean Development Mechanism' in D Freestone and C Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol* (OUP 2005) 191, 201; The World Bank, *Development and Climate Change: World Development Report 2010* (The World Bank, 2010); Oxfam International, *Climate Wrongs and Human Rights: Putting People at the Heart of Climate-Change Policy*, Oxfam Briefing Paper 117 (Oxfam International, 2008).

P Baer, T Athanasiou, and S Kartha, *The Right to Development in a Climate Constrained World: The Greenhouse Development Rights Framework* (Heinrich Böll Foundation, 2007); E Page, *Climate Change, Justice and Future Generations* (Edward Elgar, 2006), 132-60.

²³ *Ibid.*

²⁰ CDM Modalities & Procedures, 3/CMP.1 (2005)<<http://cdm.unfccc.int/Reference/COPMOP/08a01.pdf>> accessed 12 July, 2011.

any institutions to protect the rights threatened by climate change must be international ... When a national government fails to carry out its primary responsibility to protect rights, responsibility defaults to the second level consisting of the remainder of humanity, organized under the other national governments and constituting the remainder of the international community. This is essentially the model or picture underlying, for instance, what has come to be called the —responsibility to protect (or R2P) ... The futility of uncoordinated national efforts at protection against effects of climate change is certain. The only conceivable protection of any rights threatened by climate change is protection through concerted action by the international community as a whole.²⁴

This paper examines some of the transparency and accountability concerns in the current CDM framework. This paper discusses how the absence of transparent procedural guidelines on project approval and implementation have cast shadows on the overall importance and desirability of carbon market and the importance of retaining the CDM in emerging climate change regimes. This paper argues that the absence of complaint mechanisms and accountability procedures in the extant CDM Rules and institutions are direct violations of the robust human rights safeguards on accountability under international law. As negotiators continue to map out the details of post 2012 climate change regimes, it is arguably a good time to mainstream principles of accountability and a comprehensive complaint mechanism into the Kyoto Protocol and the CDM Rules, in line with well-established notions of accountability under international law.

²⁴ H Shue, 'Human Rights, Climate Change, and the Trillionth Ton' in D Arnold (ed.), *The Ethics of Global Climate Change* (CUP 2011) 292.

This paper sets out in part two with an examination of the concept of accountability under international law and a discussion on its essential normative requirements. Part three tests the current CDM framework against these notions of accountability with the aim of identifying areas that call for improvement. Part four offers recommendations on how these notions of accountability could be mainstreamed into post-2012 climate change regimes.

2. Notions of Accountability under International Law

Accountability has been defined as the requirement that officials explain their reasons and accept responsibility for carrying out an assigned mandate in light of agreed upon expectations.²⁵ It is the obligation to (demonstrate that work has been conducted in accordance with agreed rules and standards and to report fairly and accurately on performance results vis-à-vis mandated roles and/or plans.²⁶ An individual, group or organization entrusted with some financial, human or other resources ought subsequently to give an account of the use (or non-use) of the resources.²⁷ It has also been defined as 'being obliged to give satisfactory reasons for one's actions'.²⁸ It includes the burden on states to show compliance with human rights standards in project planning and execution and the need to demonstrate transparency in decision-making.

²⁵ Government of Canada, *Restoring Accountability: Recommendations* (Public Services Canada 2006) 8-9, see also S Kuyama and M Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-First Century* (United Nations University Press 2009).

²⁶ OECD, "Public Sector Transparency and Accountability: Making it Happen" OECD (2002) 7.

²⁷ See R Keohane 'Global Governance and Democratic Accountability' in D Held and M Koenig-Archibugi (eds) *Global Governance and Public Accountability* (Blackwell 2002) 130-159.

²⁸ Webster English Dictionary, Definition of Accountable.

The UNDP describes it as when actors *accept* responsibility for the impact of their action and inaction on human rights; *cooperate* by providing information and entering into dialogue and *responding* adequately to claims made.²⁹ The Global Accountability Project (GAP) defines accountability as the processes through which an organization makes a commitment to respond to and balance the needs of stakeholders in its decision-making processes and activities, and delivers against this commitment.³⁰

Behn explains the dimensions of accountability to include accountability for fairness, under which government organizations are held accountable to the norms of democratic governance through a fairness procedure by applying rules with fairness and equity; and accountability for performance, which involves fulfilling expectations of the citizens in a satisfactory manner and being accountable to the entire citizenry.³¹

Paragraph 29 of the UN Norms and Responsibilities of Transnational Corporations and other Businesses with Regard to Human Rights provides that:

²⁹ According to the UNDP, indicators for human rights need to be explored for four interlocking objectives: *asking whether states respect, protect and fulfill rights*—the overriding framework of accountability for the role of the state; *ensuring that key principles of rights are met*—asking whether rights are being realized without discrimination, and with adequate progress, people’s participation and effective remedies; *ensuring secure access*—through the norms and institutions, laws and enabling economic environment that turn outcomes from needs met into rights realized; *identifying critical non-state actors*—highlighting which other actors have an impact on realizing rights and revealing what that impact is. Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users’ Guide (March 2006), <<http://www.undp.org/oslocentre/docs06/HRBA%20indicators%20guide.pdf>> accessed 23 November, 2010. 1

³⁰ One World Trust, 2011 Pathways to Accountability II, The Revised Global Accountability Framework, <http://oneworldtrust.org/publications/doc_download/470-pathways-to-accountability-ii> accessed 12 March 2012.

³¹ R Behn, *Rethinking Democratic Accountability* (Brookings Institution Press 2001) 317.

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.³²

Grievance mechanisms support the identification of any adverse human rights impact as part of the human rights due diligence on a project; they also make it possible for grievances, once identified, to be addressed and for any adverse impact to be remediated early and directly by project proponents, thereby preventing harm from being compounded and grievances from escalating.³³ As new project information emerges, new human rights issues could also emerge. As such, it is not enough to only provide updated information on projects, there must also be a project review dispute resolution platform for stakeholders to seek a review of projects and to address any human rights concerns that might arise. A review mechanism complements wider stakeholder engagement as it provides opportunities for stakeholders to raise emerging issues that were not discussed or during the pre-approval consultations.

A) Accountability in international human rights law

Accountability in human rights terms is measured by a set of indicators which include identifying the unintended impact of laws, policies and practices on human rights; identifying which actors are having an impact on the realization of

³² UN Doc/E/CN.4/Sub 2/2003/38/Rev. 2. These norms have been further elaborated and endorsed by the United Nations in the recently released report: J Ruggie, “United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (2011) UN Document A/HRC/17/31 (21 March 2011).

³³ *ibid.*

rights; revealing whether the obligations of these actors are being met; giving early warning of potential violations, prompting preventive action; enhancing social consensus on difficult trade-offs to be made in the face of resource constraints; exposing issues that had been neglected or silenced.³⁴

Virtually every human right instrument creates mechanisms for monitoring compliance and for reporting violations. Many human rights treaty bodies monitor implementation through the creation of additional reporting requirements for states and the adoption of general comments and recommendations interpreting treaty obligation.³⁵ The Commission on Human Rights also establishes special rapporteurs, or expert committees and working groups to gather human rights compliance information and to recommend actions for non-compliance. The United Nations has in different resolutions identified accountability as part of the founding principles of public administration.³⁶ The UN General Assembly, for instance, has adopted Resolution 60/260 on Accountability.³⁷ This resolution emphasized the importance of strengthened accountability within the United Nations and the need for all UN agencies to ensure greater accountability within their spheres of operation for the effective and efficient implementation of legislative

mandates and the best use of human and financial resources.

In 2008, the UN Secretary General released an additional report Accountability Framework, Enterprise Risk Management and Internal Control Framework, and Results-based Management which reiterated the importance of accountability, that the UN can become stronger and more effective only if it is better managed and more clearly accountable.³⁸ In this report the Secretary-General proposes a comprehensive accountability architecture, comprising three pillars: performance, integrity, and compliance and oversight. The new architecture would build on the existing accountability framework, under which the Secretary-General delegates authority to his senior managers to implement the mandates and achieve expected results within a given resource level. The Secretary-General reports these results to Member States, which can then hold him accountable for the achievement of results.³⁹ This report was proposed as a model for all UN agencies to ensure greater accountability in their areas of operation.

Despite these however, the reality is that violations of human rights are still prevalent all over the world especially with regards to the respect of citizens in developmental projects that can affect their lives.⁴⁰ The lack of accountability within the UN systems and within international development agencies has received scholarly

³⁴ S Lankford and H Sano, *Human Rights Indicators in Development: An Introduction* (World Bank 2010); see also UNDP, *Using Indicators for Human Rights Accountability* <http://hdr.undp.org/en/media/hdr_2000_ch5.pdf> accessed 12 March 2012.

³⁵ See United Nations, 'Delegation of Authority and Accountability' (2004) Report of the UN Joint Inspection Unit, JIU/REP/2004/7, 13.

³⁶ See A/RES/49/136 of 1994, A/RES/50/225 of 1996, A/RES/53/201 of 1999, A/RES/56/213 of 2002, A/RES/57/277 of 2002 and A/RES/58/231 of 2004.

³⁷ United Nations, *Investing in the United Nations: For a Stronger Organization Worldwide*, Resolution of the United Nations General Assembly, 16 May 2006, A/RES/60/260.

³⁸ United Nations (2006) Press Release SG/2119, GA/10558.

³⁹ United Nations (2008) 'Accountability Framework, Enterprise Risk Management and Internal Control Framework, and Results-based Management' A/62/701, see also United Nations, 'Delegation of Authority and Accountability' (2004) Report of the UN Joint Inspection Unit, JIU/REP/2004/7, at 13.

⁴⁰ See E Brown Weiss, 'Accountability and International Law: Reflections from Water Projects' A lecture delivered at the University of Oxford on 23 February, 2012; see also O Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 11(8) Yale Law Journal.

attention within the last decade.⁴¹ Accountability concerns include the prevalent development paradigm that fails to hold development agencies and corporations liable for human rights violations in project constructions.⁴² There is also the failure by development banks and international agencies to establish clear and compulsory human rights benchmarks that must be met before projects are approved or funded.⁴³ This has led to increased calls for an approach that hinges development on the respect for a human rights threshold on accountability.⁴⁴

Rights based notions on accountability focuses on the need for human rights based benchmarks or indicators by which progress in human rights is measured in developmental projects, and

⁴¹ See S Kuyama and M Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century*, (United Nations University Press 2009) 5-8.

⁴² See E Brown Weiss, 'On Being Accountable in a Kaleidoscopic World' (2011) 1 *Asian J. Int'l L.* 21-32; see also E Brown Weiss, P Lallas and A Herken, 'The World Bank Inspection Panel: Participation and Accountability' in S Kuyama and M Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century*, (United Nations University Press 2009) 271.

⁴³ See R Keohane, 'Global Governance and Democratic Accountability', in D Held and M Koenig-Archibugi (eds) *Global Governance and Public Accountability* (Blackwell 2005), see also S Nanwani, 'Improving Accountability at the Asian Development Bank' in S Kuyama and M Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the Twenty-first Century* (United Nations University Press 2009) 271

⁴⁴ See E Brown Weiss, 'Accountability and International Law: Reflections from Water Projects' A lecture delivered at the University of Oxford on 23 February, 2012, see also O Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 11(8) *Yale Law Journal*. Other accountability issues identified include the public access to all relevant documentation related to operations and activities including budget information and procurement activities; the need for: whistle-blower protection policies; financial disclosure policies; availability of internal audits and other reports to Member States; independence of the respective internal oversight bodies; See United Nations, *Public Sector Transparency and Accountability in Selected Arab Countries: Policies and Practices* (United Nations 2010).

the provision of reward and sanction for success and failure in achieving a positive human rights effect.⁴⁵ It has been noted that an accountability procedure depends on, but goes beyond, monitoring.⁴⁶ It is a mechanism or device by which duty-bearers are answerable for their acts or omissions in relation to their duties. An accountability procedure provides right-holders with an opportunity to understand how duty-bearers have discharged, or failed to discharge, their obligations, and it also provides duty-bearers with an opportunity to explain their conduct.⁴⁷

B) Elements/Indicators of accountability

One suggested approach for measuring accountability is through the use of human rights indicators.⁴⁸ Human rights indicators aim to measure human rights realization, both qualitatively and quantitatively, and also to measure human rights outcomes, i.e. naming and shaming who is responsible for what. Human rights measurements help to name and shame project proponents or officials responsible for problems such as lack of participation, discrimination or inhuman treatments. The use of indicators thus provides clear and precise measurements of areas of progress and areas where progress is lacking. Indicators

⁴⁵ B Andreassen and H Otto Sano, *Human Rights Based Approaches Indicators* (Norwegian Centre for Human Rights, 2004) 1.

⁴⁶ *ibid.*

⁴⁷ See A Kuper (ed.), *Global Responsibilities: Who Must Deliver on Human Rights?* (Routledge 2005).

⁴⁸ S Lankford and H Sano, *Human Rights Indicators in Development: An Introduction* (World Bank 2010); Department for International Development, 'How to Note: A Practical Guide to Assessing and Monitoring Human Rights in Country Programmes' (DFID 2009); M Malhotra, and N Fasel, 'Quantitative Human Rights Indicators: A Survey of Major Initiatives' (2005) Background paper for the UN Expert Meeting on Human Rights Indicators, Turku; Norwegian Agency for Development Cooperation (NORAD), *Handbook in Human Rights Assessment: State Obligations, Awareness and Empowerment* (NORAD 2001).

help citizens to decide which areas human rights responsibilities are being met and areas in which action is lacking. As such, human rights indicators help us gauge the degree at which human rights are violated by a project and to what extent people have access to redress for violations.

While scholars agree on the importance of measuring accountability using a set of clearly identified indicators, creating such human rights-based indicators has remained a major theoretical and practical challenge.⁴⁹ The UN Special Rapporteur on the right to health, Paul Hunt, has however provided a framework which provides clear guidance on how human rights accountability can be measured. He argues that human rights accountability should be measured in terms of structural conditions, processes, and outcomes.⁵⁰ I will examine and analyse Hunt's framework.

⁴⁹ Limited progress has been made towards developing commonly accepted systems of measuring human rights promotion. For example there is an ongoing debate on whether the same set of indicators could be used to assess both civil and political and the economic and social rights. This paper will not assess the nature and extent of these debates because it is not directly relevant our scope. For more readings see J Ackerman, 'Social Accountability for the Public Sector: A Conceptual Discussion' (Paper No 82, The World Bank 2005); M Besançon, 'Good Governance Rankings: The Art of Measurement' (2003) 36(2) World Peace Foundation Report; P Ball, 'Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis' (2001) 18(3) Statistical Journal of the United Nations Economic Commission for Europe 163-174; T Landman, 'Measuring Human Rights: Principle, Practice, and Policy' in (2004) 26 Human Rights Quarterly 906; UNDP, *The Concept and Measurement of Human Development: UNDP, Human Development Report 2002* (OUP 2002).

⁵⁰ P Hunt, Interim report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, United Nations General Assembly, Fifty-eighth session, Agenda item 117 (c), 10 October 2003, United Nations General Assembly, paras. 14-29.

i) Structural conditions

This measures the availability of relevant regulatory and institutional structures that make it possible for citizens to enjoy human rights. It includes the availability of laws and regulations, which forbid human rights violations, and the establishment of relevant institutions that monitor and enforce these laws. At the international level, many international environmental agreements establish compliance committees that would be responsible for monitoring compliance. Even though the Kyoto protocol contains a very comprehensive compliance mechanism, it does not include a public complaint procedure.

Similarly, the Kyoto Protocol establishes the CDM Executive board as the body responsible for granting approvals and monitoring CDM projects.⁵¹ This body however does not have any mandate to consider projects from a human rights angle. Rather, the body examines the technical requirements of projects and whether such projects have met national requirements of the host country. Similarly, the CDM Executive Board is mainly accountable to member states in the discharge of its duties and not to the public. As such, it does have the mandate to take public complaints from citizens. This makes it impossible for individuals to approach the executive board for any projects that affect their human rights, leaving states as the only option for redress. When states, due to economic reasons fail to provide redress, individuals would only be left frustrated. This lacuna is a major factor responsible for human rights violations by climate projects under the CDM.

ii) Process

Apart from providing laws and institutions on human rights issues in development, such laws

⁵¹ See The CDM Executive Board, <<http://cdm.unfccc.int/EB/index.html>> accessed 12 February, 2011.

and institutions must be effective. Process measures how the laws and institutions are functioning in practice, whether they merely exist on paper or they actually possess the tools and skills needed to ensure the enforcement of human rights. International treaties might condemn lack of participation or gender discrimination and even appoint a committee to monitor the situation, but unless the courts are accessible and the committee is functional, such a treaty would mean nothing. As such, it is not enough to have huge volumes of laws and different institutions on human rights enforcements; 'process' measures how effective the existing laws and institutions are in the enforcement of human rights. For example it would include whether the public were consulted in the decision-making process for developmental projects; how decisions on projects locations are taken; if the marginalized groups are carried along; the availability of administrative or judicial remedies in case of perceived human rights violations and the degree of independence of the judicial system in dealing with such cases. When, for example, a government decides to go ahead with a project for economic or political reasons despite protests, claims and agitations by citizens and even despite the availability of scientific advice against such a project, the process indicator helps us to conclude that human rights accountability is low.

The Kyoto Protocol does not include any provision on the need to consider the human rights aspects of climate change projects. Similarly, the CDM Executive Board has not provided any human right threshold for CDM projects. In the absence of such a threshold, it is impossible to talk about effectiveness.

iii) Outcomes

This measures the progress made in human rights enforcement, it asks whether and to what extent human rights are realized. It tests whether indi-

viduals experience or enjoy their human rights enshrined in legal instruments; and whether structural conditions and processes are actually bringing about results in preserving people's human rights. While the outcome may tell us whether human rights are enforced, structural conditions and processes tell us how they are enforced. Outcome indicators assess, for example, whether and to what extent people actually feel they have a say in developmental projects that affect them. The outcome may suggest whether actors should be applauded and encouraged or whether they should be named and shamed.

C) The World Bank Inspection Panel: a case study on accountability

The World Bank Inspection Panel has gained increased recognition as a good example of how international institutions could mainstream accountability into their areas of activities.

The International Bank for Reconstruction and Development (The World Bank) was established in 1944 to promote the recovery and development of countries heavily affected by the impact of the Second World War.⁵² However during the 1980s, concerns began to emerge on how development projects sponsored by the World Bank were producing negative environmental and social impacts ranging from environmental pollution, unsafe dams and projects, mass displacement of citizens from their homes to allow for projects, concentration of projects in poor and vulnerable communities, and the lack of participation by citizens in project planning and implementation.⁵³ For example the Bank came under

⁵² See World Bank, About us, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:34542~piPK:36600,00.html>> accessed 21 March 2012.

⁵³ See for example Witness for Peace, A People Dammed: The Impact of the World Bank Chixoy Hydroelectric Project in Guatemala <<http://www.witnessforpeace.org/apd.html>> accessed 23 March 2012. See also D Clark, 'Re-

heavy criticism for financing the Sardar Sarovar Dam in India despite heavy opposition by villagers and community leaders.⁵⁴ The concerns raised by this project were publicized by locally affected communities, non-governmental organizations and interest groups to highlight the need for accountability in the operations and activities of the World Bank and that international funds should not be used for projects that harm the environment or externalize development costs to the poorest members of society.⁵⁵

Consequently, the Board of Executive Directors of the World Bank in September 1993 adopted a resolution to create an independent World Bank Inspection Panel to serve as an independent forum through which individuals or communities who believe that they are or are likely to be harmed by a World Bank funded project to bring their concerns directly before the Board of Executive Directors of the World Bank.⁵⁶ The Panel serves as an independent fact finding body with the power to review Bank funded projects to determine whether the World Bank management is following its own operational policies

settlement: The World Bank's Assault on the Poor' (CIEL Brief May 2000); F Seymour, 'The World Bank and Environmental Sustainability' in P Bosshard, *Lending Credibility: New Mandates and Partnerships for the World Bank* 43, 43–44 (World Bank 1996); K Horta, 'Rhetoric and Reality: Human Rights and the World Bank' (2002) 15 *Harv. Hum. Rts. J.* 227.

⁵⁴ See K Ramachandra, 'Sardar Sarovar: An Experience Retained' (2006) 19 *Harvard Human Rights Journal* 275–281; see also P Mehta, 'Internally-Displaced Persons and the Sardar Sarovar Project: A Case for Rehabilitative Reform in Rural Media' (2005) 20(3) *American University International Law Review* 613–647; D Clark, *The Impact of the 2002 Submergence on Housing and Land Rights in the Narmada Valley* (Habitat International Coalition 2003).

⁵⁵ See D Clark, 'The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 *Harvard Human Rights Journal* 205–226; D Bradlow, 'The World Bank, the IMF and Human Rights' (1996) 6 *Transnat'l L. & Contemp. Probs.* 47, 59.

⁵⁶ World Bank, IBRD Resolution No. 93-10/ IDA Resolution No. 93-6 (1993), available at <<http://www.worldbank.org/inspectionpanel>> accessed 23 February 2012.

and procedures in the design, appraisal and implementation of projects.⁵⁷ According to the Panel Operating Procedures:

The Panel has been established for the purpose of providing people directly and adversely affected by a Bank financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures.⁵⁸

The Panel is to ensure that the Bank funded projects are not leading to social and environmental consequences to the people in countries or communities where the projects are situated. The goal of the Inspection Panel is to provide individuals with a chance for their voices to be heard before an international body. It opens the window of opportunity for individuals to identify loopholes in the compliance system of an international organization. Weiss the Former Chair of the Panel describes the panel as part of the broadening of the range of actors in international law and policymaking – a stage once restricted to national governments and the bureaucracies of international organizations.⁵⁹ According to Weiss, the Panel offers people affected a formal means to challenge whether an international institution (The World Bank) is complying with international norms (its operational policies and procedures). This exemplifies the move in international law to recognize individuals and non-state actors in policy and decision-making processes and to create a 'public space' where

⁵⁷ *ibid.*

⁵⁸ IBRD Inspection Panel, 'Panel Operating Procedures' August 19, 1994 <<http://www.worldbank.org/inspection-panel>> accessed 23 February 2012.

⁵⁹ E Brown Weiss, *The World Bank Inspection Panel: Participation and Accountability* in S Kuyama & M Fowler (eds) *Envisioning Reform: Enhancing UN Accountability in the Twenty-First Century* (United Nations University Press 2009) 271.

people, states and large institutions can better interact.⁶⁰

The creation of the World Bank Panel as a structurally independent of World Bank management and Staff has gone a long way in restoring accountability to the process of approving development projects at the World Bank. Hunt's typology can be adopted to examine the structural conditions, processes, and outcomes of the World Bank Inspection Panel and to test how this panel has been able to restore some measure of accountability and transparency within the World Bank.

i) Structural conditions of the World Bank Inspection Panel

The enabling resolution of the Panel provides some measure of structural independence, fairness and impartiality in its operations. For example, the Panel comprises three members of different nationalities who are nominated by the President after consultation with the Board of Executive Directors. No panel member may serve for more than one term; as such vacancies in the Panel are filled every five years.⁶¹

⁶⁰ See L Boisson De Chazournes, 'The World Bank Inspection Panel: About Participation and Dispute Settlement' in T Treves et Al (eds) *Civil Society, International Courts and Compliance Bodies* (Asser Press 2005) 187-203; see also K Kingsbury and Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary*.

Problems 15, at 17; A Bradlow 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2005) 36 *Georgia J Int'l L* 403, at 419. See also E Brown Weiss, 'New Directions in International Environmental Law' Address Before the United Nations Congress on Public International Law (15 March 2001); L Sohn 'The New International Law: Protection of the Rights of Individual Rather than States (1982) 32(1) *American University Law Review* 1-64.

⁶¹ Para.4, World Bank, IBRD Resolution No. 93-10/ IDA Resolution No. 93-6 (1993), <<http://www.worldbank.org/inspectionpanel>> accessed 23 February 2012.

Structurally, the enabling resolution of this panel provides for independence in the appointment of members of the Panel. The 1993 Resolution provides that:

Members of the Panel shall be selected on the basis of their ability to deal thoroughly and fairly with the requests brought to them, their integrity and independence from the Bank's management and their exposure to developmental issues and to living conditions in developing countries. Knowledge and experience of the Bank's operations will also be desirable.⁶²

ii) Processes of the World Bank Panel

The World Bank Panel adopts a procedure that allows any group of individuals or community affected by a project including NGOs can approach it for investigations. The process of investigation is triggered by the submission of a request for inspection. According to the Resolution, such a request may be submitted by a community of two or more affected people; a local organization or other duly appointed representative on behalf of the affected people; a foreign organization in exceptional circumstances if no local representative is available; or an executive director of the World Bank. A request may be submitted in any language and in any format, including by a mere letter, except that they must be in writing, dated and signed by the requesters.⁶³ The Panel also respects the confidentiality of requesters who ask that their names should not be published.

iii) Outcomes of the World Bank Panel

Due to the simplicity of the process involved in accessing the Inspection panel, requests for review have been sent in from individuals and communities across the world. Since 1994, it has

⁶² *ibid.*

⁶³ *ibid* Para.6-15.

received over 52 requests from 31 countries on a wide variety of projects.⁶⁴

The Panel has been pragmatic in dealing with project requests and has recommended the suspension of projects that fail to comply with the World Bank's policies and procedures especially projects that involve inadequate levels of local involvement, community consultations and social and environmental impact assessments. The World Bank Executive Board has also followed the reports for the Panel by suspending funding for projects found to be in non-compliance by the Panel.⁶⁵ This aspect of following the findings of the Panel demonstrates outcomes. It is not enough for the Panel to make its findings, people must be satisfied that the report has been followed and has led to outcomes such as the

⁶⁴ Communities from Albania, Argentina, Bangladesh, Brazil, Burundi, Cambodia, Cameroun, Chad, Chile, China, Columbia, Congo Democratic Republic, Ecuador, Ethiopia, Ghana, Honduras, India, Kenya, Lesotho, Mexico, Nepal, Nigeria, Pakistan, Papua New Guinea, Paraguay, The Philippines, Romania, South Africa, Tanzania and Uganda have submitted project requests to the Panel. See World Bank Inspection Panel, *Cases and Reports*, *ibid*.

⁶⁵ A good example is the Mumbai Urban Transport Project (MUTP), which was reviewed by the Inspection Panel. The Panel received four successive requests for inspection of this project that would displace over 120,000 people from their homes. The requests noted that the Bank's policies concerning resettlement, income restoration and rehabilitation were violated by the project and that they would suffer adverse effects from the project. In 2005, the Panel released its investigation report which concluded that several policies of the World Bank had been violated particularly on involuntary resettlement and environmental assessment. Consequently on 1 March 2006, the World Bank Executive board suspended disbursements of funds for the road and resettlement components of the project. The Bank asked the government of Maharashtra to demonstrate compliance in terms for environmental impact assessments and resettlements before funding could be resumed. On 29 June 2006, The Bank lifted the suspension of funding after it was satisfied that the State of Maharashtra had substantially met all the requirements. The Panel later issued a follow up report on 01 March 2007 on progress made under this project after visiting India and after meeting with the people affected.

suspension of funding for the project or the resolution of outstanding issues relating to the project.

Due to the concrete contributions of the Panel towards ensuring accountability within the World Bank, it has been recognized with the highest accountability rating by *the 2006 Global Accountability Report*. The Report identified four key dimensions of accountability: transparency, participation, evaluation and complaint and response mechanisms. The Report studies 30 international institutions in terms of accountability and recommended the Panel as the 'best practice' for accountability especially for keeping its commitments of responding to all complaints brought before it.⁶⁶ It has been said that:

The Inspection Panel offers a significant example of an internationally agreed mechanism to promote the involvement of civil society and local communities in the decision-making process of international law, cooperation and development. In this way it has made-and is still making- an important contribution to the continuing evolution towards greater rights of participation by non-state actors in the international law and policymaking process.⁶⁷

The World Bank Inspection Panel could be a fitting template for restoring accountability within the systems of approving CDM projects. By creating an independent panel that would enable individuals, communities and NGOs to have a voice in the processes of approving climate change projects, the current pervasive culture of approving projects which could lead to emis-

⁶⁶ One World Trust, *2006 Global Accountability Report: Holding Power to Account* (One World Trust 2005) 25-46.

⁶⁷ E Brown Weiss, 'The World Bank Inspection Panel: Participation and Accountability' in S Kuyama and M Fowler (eds) *Envisioning Reform: Enhancing UN Accountability in the Twenty-First Century* (United Nations University Press 2009) 292.

sion reductions without adequate attention to their potential human rights and environmental impact could be addressed in a balanced and transparent way before an independently structured international panel. The aim is to provide a balanced measurement system which includes structure, process and outcome indicators, which allow individuals to expose the side effects of projects and to demand amendments before their registration.

Accountability thus encompasses the conditions, the processes and the outcomes with respect to who gains or loses in human rights terms from a particular project or activity. It is relevant to incorporate these three considerations in designing policies that would ensure that actors in a mitigation/adaptation project are accountable for human rights violations that result from them. A good accountability framework would also de-emphasize state-centric notions of accountability for projects; it would take into consideration the fact that a project life cycle involves several actors including project proponents, funding agencies, host governments and supervisory bodies of climate change regimes who all have obligations to ensure that human rights are not violated by a project.

3. Reforming the CDM: The Need for a Project Review Mechanism

It is crystal clear from the foregoing that there is a need for an equally detailed project review mechanism to be mainstreamed into the CDM project approval process. A project review mechanism is necessary to provide a chance for stakeholders who have legitimate concerns or whose rights might be affected by a project to raise their concerns and have them addressed. A review mechanism would enable project proponents to address any claims that affected persons may have early in the project planning stages. This would provide an opportunity for a rem-

edy before disputes become inflamed. Grievance mechanisms support the identification of an adverse human rights impact as part of the due diligence on a project; they also make it possible for grievances, once identified, to be addressed and for an adverse impact to be remedied early and directly by project proponents, thus preventing any escalation.

Currently, the CDM Rules contain no requirements that provide stakeholders the opportunity to request a review of projects before or after registration. As such, many projects have been registered by the CDM Executive Board despite intense petitions and protests by stakeholders. Generally, as new project information emerge; new human rights issues could too. As such, it is not enough to only provide updated information on projects, it is pertinent for project proponents to provide a project complaint and review platform for stakeholders to establish complaints that have arisen especially after the initial consultations.

A practical approach would be to establish project review panels that would get feedback from stakeholders on projects and to consider if and how these projects could affect them. This can be through household perceptions, opinion surveys or a simple questionnaire, for example 'do you think the construction of hydro power projects in Aguan violates or could violate human rights?'; 'what specific human rights are in danger and in what way?'. Such feedback would allow stakeholders the chance to demand human rights enforcements and would make it easier for the project proponents to prevent human rights violations.

A starting point therefore would be for the COP to expand the mandate of the CDM Executive Board by vesting the Board with powers to refuse registration for projects that violate human rights and by establishing a review process through which already registered projects could

be discontinued if they violate human rights. As noted, the current CDM rules fail to establish complaint mechanisms and procedures for stakeholders or private individuals whose consultative rights or human rights in general have been infringed to seek redress, to block the approval of such projects or to seek the review of already approved projects. Currently, only governments or three CDM Executive Board members can request a review of projects under the CDM rules.⁶⁸ As expected, States that have approved projects would be unlikely to instigate such review processes.

A) Process

The criteria for approaching the public complaint mechanism would also have to be simplified for ease of access. Firstly, the review panel must adopt a simple procedure that ensures any group of individuals or community affected by a project (including NGOs) can approach it for investigation by the submission of a request or complaint. A simplified procedure would be able to admit a petition whenever the following three requirements are met. An individual or NGO allege that:

(a) A project or action would cause actual or threatened injury or human rights violations to the public. This would make it possible for any interested member of the public or NGO to be able to file a petition even if they suffer no direct or actual injury. This expansive approach

is endorsed by the Aarhus convention in Article 9(3) which provides that environmental non-governmental organizations 'shall be deemed' to have sufficient standing to seek redress for lack of access to environmental information for this purpose. Similarly, the procedure of the World Bank Inspection Panel is such that a request may be submitted by a community of two or more affected people; a local organization or other duly appointed representative on their behalf; a foreign organization in exceptional circumstances if no local representative is available; or an executive director of the World Bank.⁶⁹ Similarly, a request may be submitted in any language and in any format, including by letter, except that they must be in writing, dated and signed by the requesters.⁷⁰ This simplified process of the World Bank Inspection Panel should be adopted by the CDM project review panel so that any member of the public including NGOs would be able to trigger a review of a project by a petition or complaint.

(b) The injury or violation is traceable to the project or action. This condition would be satisfied by linking the policy measure to a public harm or human rights violations. For example, emission reduction projects that displace citizens or lead to loss of life, arable land or loss of income. Once complainants can establish that violations can be traced to an emission reduction project, it should create sufficient grounds for the public complaint branch to investigate and penalise the parties involved.

⁶⁸ Para 41 of the CDM Modalities and Procedures provides that:

The registration by the Executive Board shall be deemed final eight weeks after the date of receipt by the Executive Board of the request for registration, unless a Party involved in the project activity or at least three members of the Executive Board request a review of the proposed CDM project activity.

See CDM Modalities & Procedures, FCCC/KP/CMP/2005/8/Add1.

⁶⁹ IBRD Inspection Panel, 'Panel Operating Procedures' August 19, 1994 <<http://www.worldbank.org/inspection-panel>> accessed 23 February 2012.

⁷⁰ Para.6-15, World Bank, IBRD Resolution No. 93-10/IDA Resolution No. 93-6 (1993), <<http://www.worldbank.org/inspectionpanel>> accessed 23 February 2012.

(c) The injury is avoidable or redressable by the intervention of the project review panel. This condition would establish the importance of a complaint. It must be shown that the intervention of the public complaint branch would assist in preventing or redressing the violations. This would require the complainants to demonstrate that the project is one that is carried out under the climate change regimes and how the complaint branch can assist either by redress or avoidance. Redress would be the best remedy if the project had already been completed. In such cases, the public complaint branch could apply consequences that can redress or mitigate the harm suffered by the public, for example by requesting the party to pay compensation or to ensure resettlement where necessary or face the risk of losing emission reduction credits obtained as a result of such a project. For an on-going project, complainants can request that the project be stopped by the complaint branch to prevent any likely impact on human rights or environmental issues. The panel can then compel the parties to stop the project pending a comprehensive investigation on the scale and magnitude of human rights violations involved and how the violations can be prevented.

B) Investigation

Most of these tasks would be to deal with petitions and complaints regarding any impact. To establish these claims, there is a need for proper investigation, this would include visiting countries where projects are initiated to investigate the claims. The review panel could occasionally mandate an inspection committee made up of its own members to investigate claims brought before it and to produce a comprehensive report on which the panel could base its decisions. The committee would serve as an ad-hoc investigative organ of the review panel and would be charged with producing a comprehensive report

on its findings. The purpose of the investigation is to establish the facts and determine whether the complaint has merit.

For the inspection committee to function effectively, part of its terms of reference would be to hold consultations, public hearings and meetings with directly affected people and general members of the affected community. There would also be the need to visit project sites and to speak with as many interested NGOs on the field who have vital information. The report of the inspection committee should indicate the relevant facts and of steps taken to conduct the investigation; a conclusion showing the committee's findings on whether the Bank has complied with relevant policies and procedures; and the recommendations of the committee to the project review panel.

The team's report would form the basis for a decision by the project review panel on whether or not to proceed with the registration of a project. This comprehensive process would make it easier to exclude projects that violate human rights, environmental and social standards prior to their registration. It represents a preventive approach that makes use of human rights safeguards to avoid the source of some of the problems facing current CDM projects. This approach is in tandem with the precautionary principle of international environmental law, which requires States to anticipate and avoid environmental damage before it occurs, especially where failure to do so would result not only in environmental degradation, but in human rights violations.⁷¹ According to the principle, where there are threats of serious or irreversible damage, governments should take all effective measures to prevent environ-

⁷¹ Principle 15 of the Rio Declaration which states that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation'

mental degradation, to anticipate and respond to credible environmental threats.⁷²

This dispute resolution mechanism could also help to avoid litigation arising from environmental projects as it provides an opportunity for concerns to be addressed at an early stage before they escalate. This could prevent violations and litigation.

C) Constitution and Membership

There is also the need to provide elaborate rules on the constitution and membership of the EB to safeguard and ensure impartiality, transparency and accountability. The current rules have led to a situation whereby certain EB members also hold positions as UNFCCC and Kyoto Protocol negotiators for their countries.⁷³ This creates conflicts of interests and reduces the transparency of the EB. To ensure transparency, individuals who serve as negotiators for their countries should be disqualified from serving in the CDM EB while holding such 'negotiator' appointments. It is also important for CDM EB members to be appointed and remunerated as officials of the UNFCCC during the term of their membership of the board.⁷⁴ Similarly, an EM member should be disqualified from participation in the hearing and investigation of any project in which they have a personal interest or a significant involvement in any capacity with the project proponents or state.

⁷² According to Kiss, the principle involves the use of special techniques such as risk analysis and assessment of the potential effects of planned activities. See A Kiss, *Introduction to International Environmental Law* (2nd Edition, UNITAR 2005) 70.

⁷³ See C Streck and J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) (19 (2) Eur J Int Law 409-442.

⁷⁴ See for example, the World Bank Inspection Panel, para. 10 of the Operating Resolution. See Resolution No. IBRD 93-10, Resolution No. IDA 93-6 "The World Bank Inspection Panel"

There is also the need to create a balanced mix in environmental and human rights expertise in the membership of the EB. The current CDM Rules simply provides that members of the B shall possess 'appropriate technical and/or policy expertise'.⁷⁵ For the EB to effectively mainstream human rights principles into its project registration and eligibility requirements, there is a need for it to be properly constituted to include human rights experts not only technical or policy experts. It would be helpful to clarify what the exact constitution of the panel would be in terms of expertise, how many human rights experts, how many policy and technical experts. This would ensure that at every sitting of the Board, all the areas of expertise would be represented.

D) Post Registration Issues: The need for a public complaint branch

A question that would flow from the foregoing is: what of projects that satisfy all the requirements and were registered but subsequently turned out to violate some of the minimum legal threshold, i.e. what remedy would be available for victims in the case of projects that violate the legal threshold post-registration or on the long term. To provide for such events, the compliance committee of the Kyoto Protocol (which is vested with powers under the current regime to facilitate and enforce compliance with the Protocol and its rules) should be reformed to take up such post-registration compliance issues.⁷⁶ This would enable the EB to receive and facilitate the resolution of the affected stakeholders or communities' concerns and grievances about the human rights,

⁷⁵ Para. 8 (c) of the CDM Modalities & Procedures.

⁷⁶ The Kyoto Protocol established a compliance mechanism to facilitate, promote and enforce compliance with the commitments under The Protocol and under its subsequent accords and rules. UNFCCC, 'An Introduction to the Kyoto Protocol Compliance Committee', <http://unfccc.int/kyoto_protocol/compliance/items/3024.php> accessed 21 April 2012.

environmental and social impacts of post registration

This could be done by establishing a third branch for the compliance committee: a 'public complaints branch'.⁷⁷ A public complaints

⁷⁷ The Compliance Committee is currently made up of two branches: a facilitative branch and an enforcement branch. The facilitative branch provides advice and assistance to parties to promote their compliance and implementation of The Protocol. It provides parties with guidelines, information on new technologies and procedures on how to attain emission reduction targets. The enforcement branch is responsible for determining the consequences for parties not meeting their commitments. The enforcement branch is responsible for determining whether a party included in Annex I (Annex I Party) is not in compliance with its emissions targets, the methodological and reporting requirements for greenhouse gas inventories, and the eligibility requirements under the mechanism. As comprehensive as the Kyoto Protocol's compliance mechanism is-in fact one of the most comprehensive and rigorous systems of compliance for a multilateral environmental agreement – the mandate of the enforcement branch does not extend to addressing human rights issues arising from the Kyoto Protocol. It is only vested with powers to detect non-compliance with emission reduction targets and to determine consequences for such non-compliance. As such issues relating to how policy measures aimed at achieving emission reductions affect human rights fall outside the mandate and expertise of the enforcement or facilitative branches of the compliance committee. This is not surprising considering the fact that the Kyoto agreement itself does not mention human rights, neither does it place any obligation on parties to minimize an adverse human rights impact resulting from the implementation of measures taken to mitigate or adapt to the climate change impact (response measures). Also, the enforcement branch only considers non-compliance issues amongst parties. As such private parties or individuals cannot approach the enforcement branch for issues related to pollution or displacements and resettlements. The Kyoto Protocol as a whole does not recognise private individuals or entities. Most of its dispute resolution mechanisms are only accessible by parties and are designed to resolve disputes between parties. Unlike the Aarhus Convention the Kyoto Protocol does not provide any formal complaint mechanism for private individuals and NGOs whose interests or rights are violated This void closes the door to private individuals accessing the COP, the enforcement branch or the UNFCCC secretariat. For a detailed understanding of the Kyoto Compliance mechanisms, see UNFCCC, 'An Introduction to the Kyoto Protocol Compliance Com-

branch could serve as a sort of an 'appellate body' where post-registration issues arising from projects could be raised by stakeholders. The PCB could be established as a specialized branch responsible for receiving and reviewing claims by individuals, private entities and NGOs against policy measures adopted by states for meeting their obligations if such measures produce a negative impact on human rights or social and environmental concerns. Human rights issues arising from projects that have already been registered by the EB, could be brought under the jurisdiction of the PCB in line with the CDM rules. These rules vest the compliance committee with overseeing functions for ensuring that parties comply with the methodological requirements and procedures of the CDM.⁷⁸ A public complaint branch would create a public space or forum through which individuals can access climate change regimes and provide opinion, comments or complaints about policy measures and on-going projects that violate international law standards. This would offer individuals the opportunity to hold their governments directly accountable for adverse policy measures before an international supervisory body. The PCB would also determine the appropriate remedies and consequences for non-compliance with approved project procedures or methodologies.

To function effectively, the PCB like the two already existing braches of the compliance committee would have to be appropriately staffed and provided the space, resources and structures to function as a stand-alone branch of the compliance committee. Since the PCB would be considering human rights issues and petitions it is pertinent for its members to include international

mittee', <http://unfccc.int/kyoto_protocol/compliance/items/3024.php> accessed 21 April 2012.

⁷⁸ See Para 5 of CDM Rules.

human rights experts and individuals who have experience and training in human rights compliance and enforcements

4. Conclusion

The growing recognition that policy responses to climate change must address complex and fundamental causes of human rights violations and lack of a public complaint process have led to a meteoric rise in calls for a more transparent and accountable CDM. There could be no better time, to think of such reforms. As negotiators prepare for the expansion and modification of the expiring Kyoto Protocol, it is important that the human rights and accountability issues facing the current regimes are brought to the fore and addressed to restore the integrity of climate change regimes.⁷⁹ Failure to address these concerns in the build up to a new climate change treaty would only preserve the human rights problems and challenges that have trailed current regimes and could even cast more doubts on the future of international cooperation on global climate change mitigation and adaptation.

This paper has examined how the well-tested notions of accountability under international law could be mainstreamed into current and emerging CDM framework. Creating a project review process through which stakeholders could

seek and obtain redress will arguably go a long way. The reforms proposed here could assist in achieving a rights-based climate change regime where the rights of stakeholders are considered in the design and execution of CDM projects. The World Bank Inspection Panel model could be a fitting template for restoring accountability within the systems of approving climate change projects under the CDM. By creating an independent panel that would enable individuals, communities and NGOs to have a voice in the processes of approving climate change projects, the current pervasive culture of approving projects which could lead to emission reductions without adequate attention to their potential human rights and environmental impact could be addressed in a balanced and transparent way before an independently structured international panel.

⁷⁹ The recommendations here would also be helpful to shape thoughts on the implementation of the recently concluded CDM Policy Dialogue on how to address human rights concerns facing the CDM and how to ensure the recognition of human rights principles in the design and implementation of post 2012 market mechanisms. According to the UNFCCC, the CDM policy dialogue was established in November 2011 is to address prevalent criticisms against the CDM including allegations that some projects lack environmental integrity or, in extreme cases, have been the scene of environmental and human rights abuses. See UNFCCC, Input to the high-level panel for the CDM Policy Dialogue: Background Paper by the Secretariat (22 December 2011) 1<http://www.cdmpolicydialogue.org/background/CDM_policy_background.pdf> accessed 10 May 2012