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Strengthening the complaint mechanisms of multilateral climate funds and carbon markets: A critical step towards a human rights-based green transition

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Abstract
Notwithstanding their indisputable benefits, climate change mitigation and adaptation activities can negatively impact the environment and human rights. Accordingly, multilateral funds and programmes financing these activities have increasingly adopted environmental and social safeguards. However, enforcing these safeguards has been difficult because of the lack of or shortcomings affecting complaint procedures provided by multilateral climate finance institutions to individuals and groups negatively impacted by the activities that the institutions support. This article assesses the effectiveness of the complaint procedures of the main multilateral climate funds and carbon market mechanisms; it highlights the limitations of alternative complaint options, including project- and implementing entity-level grievance mechanisms and judicial avenues; and it reflects on the need for effective complaint procedures at the international level to further a human rights-based green transition.

1 INTRODUCTION

The last few decades have witnessed the multiplication of multilateral funds and programmes financing climate-related activities all over the globe.[1] Some of these financial mechanisms promote both mitigation and adaptation action (e.g. the Global Environment Facility (GEF)[2] and the Green Climate Fund (GCF)[3]); others focus on one such area only (e.g. the Adaptation Fund[4]); and yet others

[1] Bilateral climate finance has been flourishing as well: see A Atteridge et al, 'Bilateral Finance Institutions and Climate Change: A Mapping of Climate Portfolios' (Stockholm Environment Institute 2009). This article focuses on (selected) multilateral climate funds and programmes because of the specific issues that they raise in terms of redress for the violations of human rights and environmental integrity caused by the activities that they support.
[2] The GEF was created in 1990 as a pilot programme and now acts as the financial mechanism for five major international environmental agreements (including the United Nations Framework Convention on Climate Change (UNFCCC)), supporting developing countries in the implementation of the relevant conventions by financing projects and programmes.
[3] The GCF was established by the 2010 Cancún Agreements with a view to scaling up and simplifying the provision of funds to developing countries for both mitigation and adaptation activities. On the efforts towards complementarity between the GCF and the GEF, see GEF, 'Long-Term Vision on Complementarity, Coherence, and Collaboration between the Green Climate Fund and the Global Environment Facility' GEF/C.60/08 (17 May 2021).
[4] Created in 2001, the Adaptation Fund was intended to remedy the imbalance between mitigation and adaptation by financing adaptation projects and programmes in developing countries parties to the Kyoto Protocol.

are sectoral in nature (e.g. the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD)[5]). Additionally, multilateral climate finance institutions vary considerably in many other respects. These include: their legal capacity; financing instruments used; sources of funds (mostly from contributor countries, but also, in the case of the Adaptation Fund, a share of proceeds from the activities registered under the Kyoto Protocol's Clean Development Mechanism); requirements for the registration of activities and the accreditation of partner agencies/implementing entities; relationship with the private sector (e.g. while the GEF and UN-REDD support government projects and programmes, other funds more directly interact with private project proponents); and staff numbers (from the 15 staff members of the Adaptation Fund to approximately 220 staff members at the GCF).[6]

To these institutions must be added the increasing financing of climate-related activities by the World Bank Group and regional development banks; as well as carbon market mechanisms, including the Clean Development Mechanism (CDM) under the Kyoto Protocol and the so-called Sustainable Development Mechanism (SDM) under the Paris Agreement, which allow for the financing of cost-effective mitigation projects in developing countries and for the trading of the related emission reductions by both States and private actors.[7]

In fact, the abovementioned financial mechanisms display such notable differences that they are hardly considered together. Nonetheless, in this author's view, they share three significant features that warrant their joint consideration as well as further investigation. First, they are all aimed primarily (although not all exclusively) at financing concrete mitigation and adaptation activities—from the construction of hydroelectric dams[8] to reforestation activities, from the building of infrastructures to enhance coastal resilience to the production of biofuels—whose implementation can have negative impacts on the local environment and on the rights and well-being of local communities, including indigenous ones, and their members. Second, even though most multilateral climate finance institutions have by now adopted environmental and social safeguards to prevent, minimize and mitigate such adverse impacts, the enforcement of those safeguards—particularly through complaint procedures in the context of the same institutions—is deficient. Third, traditional judicial avenues, which could alternatively be used to address the adverse impacts, face considerable hurdles in these instances—especially in light of the plurality of actors involved in the activities' design and implementation, their different nationalities, and immunity from jurisdiction of at least some of them. Such outcomes are highly problematic from the point of view of the respect for and fulfilment of the right to a remedy for victims of human rights violations, as laid down in numerous international and regional human rights treaties.[9] To these must be added the specific recognition of

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[5] Since 2008, UN-REDD promotes partner countries' adoption of REDD+ policies and strategies, the implementation of REDD+ activities and the mobilization of funds.

[6] For a comparative overview of the main features of multilateral climate funds, see <https://climatefundsupdate.org/the-funds/>.

[7] On the structure and functioning of the CDM, see, among many, M Netto and KU Barani Schmidt, 'The CDM Project Cycle and the Role of the UNFCCC Secretariat' in D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (Oxford University Press 2009) 213; on the nascent SDM, see A Marcu, 'Carbon Market Provisions in the Paris Agreement (Article 6)' (Centre for European Policy Studies 2016) 13ff; and CE Di Leva and S Vaughan, 'The Paris Agreement's New Article 6 Rules' (International Institute for Sustainable Development, 13 December 2021) <https://www.iisd.org/articles/paris-agreement-article-6-rules>.

[8] While the mitigation benefits of dams are increasingly put into question (W Cornwall, 'Hundreds of New Dams Could Mean Trouble for Our Climate' (Science, 28 September 2016)) and the environmental and social risks of large dams are by now well-known, the construction of dams is still being financed by multilateral climate funds and development banks (although, for instance, the GEF, 'Policy on Environmental and Social Safeguards' (20 December 2018, updated 13 June 2019) 29 expressly excludes funding the construction or rehabilitation of large or complex dams).

[9] For a list of the relevant provisions in the main international and regional human rights conventions, see UNGA 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UN Doc A/RES/60/147 (16 December 2005) preamble.

the right to access to justice in environmental matters, enshrined in the Aarhus Convention and, more recently, in the Escazú Agreement.[10]

Accordingly, this article examines more in-depth the three aspects mentioned above, with a particular focus on the shortcomings of the current landscape of complaint and dispute settlement procedures of multilateral climate finance institutions, which have hardly been at the centre of the debate concerning these funds and programmes. The article then draws some conclusions on the importance of effective grievance mechanisms against the adverse effects of climate change mitigation and adaptation activities, with a view to promoting a low-carbon transition that does not infringe on human rights and is respectful of the surrounding environment.

2 THE ADVERSE HUMAN RIGHTS AND ENVIRONMENTAL IMPACTS OF CLIMATE ACTION AND THE NEED FOR ENVIRONMENTAL AND SOCIAL SAFEGUARDS

Despite the benefits that climate change mitigation and adaptation activities bring towards a future of net-zero emissions and climate resilience, they can have adverse impacts on the livelihoods of the affected local populations as well as on the surrounding environment—as has been amply documented in the press, nongovernmental organizations' reports and the relevant literature.[11] By way of example, the building of dams for the production of hydroelectric power can result in the displacement of local communities, with repercussions in terms of job losses, livelihood changes and school dropouts.[12] The growing of land-based crops for biofuels can lead to land degradation and intensive use of (scarce) water in certain areas and have effects on food availability and affordability from the local to global levels.[13] Reforestation plans and the creation of protected areas, when approved without the effective involvement of local indigenous peoples, might infringe on their economic, social and cultural rights as well as their rights to property and self-determination.[14]

Awareness of these risks and impacts has grown over time, with the result that most multilateral climate funds and programmes have by now equipped themselves with environmental and social safeguards, which the activities that they support are expected to comply with.[15] Accordingly, in 2012 UN-REDD adopted its Social and Environmental Principles and Criteria,[16] which were followed by Guidelines on Free, Prior and Informed Consent a year later.[17] The Adaptation Fund and the GCF respectively agreed on Environmental and Social Policies in 2013 (amended 2016)[18] and 2018,[19]

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[10] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf>.

[11] United Nations Environment Programme (UNEP), 'Climate Change and Human Rights' (UNEP 2015); MISEREOR, CISDE and Carbon Market Watch, 'Human Rights Implications of Climate Mitigation Actions – Second Edition' (March 2016).

[12] UN Special Procedures, 'Joint Statement on the Human Rights of People Affected by Dams and Other Water Infrastructure' (1 November 2021).

[13] PB Matondi, K Havnevik and A Beyene (eds), *Biofuels, Land Grabbing and Food Security in Africa* (Zed Books 2011).

[14] JP Sarmiento Barletti and AM Larson, 'Rights Abuse Allegations in the Context of REDD+ Readiness and Implementation: A Preliminary Review and Proposal for Moving Forward' (CIFOR 2017); and UNGA 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay. Protected Areas and Indigenous Peoples' Rights: The Obligations of States and International Organizations' UN Doc A/77/238 (19 July 2022).

[15] Especially for the most recent multilateral climate finance institutions, the adoption of environmental and social safeguards was already provided for in the decisions establishing the institutions: see, among others, UNFCCC 'Decision 3/CP.17, Launching the Green Climate Fund' UN Doc FCCC/CP/2011/9/Add.1 (11 December 2011) Annex, para 18.

[16] UN-REDD, 'UN-REDD Programme Social and Environmental Principles and Criteria: Report of the Eighth Policy Board Meeting' (26 March 2012).

[17] UN-REDD, 'Guidelines on Free, Prior and Informed Consent' (January 2013).

[18] Adaptation Fund, 'Environmental and Social Policy' (November 2013, revised March 2016).

[19] GCF, 'Environmental and Social Policy' (1 March 2018).

accompanied by Gender Policies[20] and, in the case of the GCF, by an Indigenous Peoples Policy as well.[21] The GEF Policy on Environmental and Social Safeguards became effective in 2019 and complemented sectoral policies already in place on indigenous peoples, stakeholder engagement and gender equality.[22] On their part, the World Bank Group and regional development banks mostly adopted environmental and social standards to guide their action and that of their borrowers between the 1990s and 2000s and subsequently updated them.[23]

On the other hand, carbon market mechanisms have been less responsive to reports of environmental degradation and human rights violations connected to the projects registered with them. An early decision by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on the 'modalities and procedures' for the CDM only includes among the requirements to be satisfied by project participants the conduct of an 'analysis of the environmental impacts of the project activity' and the invitation, collection and consideration of comments by local stakeholders.[24] In addition to their narrow scope and to the fact that various studies have pointed to limited stakeholder engagement in practice,[25] these provisions only refer to the stage preceding the submission of the project proposal—not the stage of project implementation.

Notwithstanding the evident gaps affecting the CDM's prevention of and response to the environmental and social impacts of the projects it approves, also highlighted by multiple reports alleging human rights violations,[26] discussions about its successor—i.e. the SDM under Article 6(4) of the Paris Agreement—have not focused on this aspect. Nonetheless, thanks to the pressure and proposals by experts and nongovernmental organizations,[27] the decision adopted in Glasgow by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement regarding 'rules, modalities and procedures' for the SDM requires the SDM Supervisory Body to establish 'the application of robust, social and environmental safeguards'.[28] References to the preambular paragraph of the Paris Agreement that mentions States' human rights obligations in their fight against climate change as well as to the need for projects to be subject to local stakeholder consultation were also included.[29]

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[20] Adaptation Fund, 'Gender Policy and Gender Action Plan' (March 2016, updated March 2021); and GCF, 'Gender Policy' (14 November 2019).

[21] GCF, 'Indigenous Peoples Policy' (1 March 2018).

[22] GEF (n 8). For the other GEF policies, see <https://www.thegef.org/projects-operations/policies-guidelines>.

[23] H Himberg, 'Comparative Review of Multilateral Development Bank Safeguard Systems: Main Report and Annexes' (World Bank 2015).

[24] UNFCCC 'Decision 3/CMP.1, Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol' UN Doc FCCC/KP/CMP/2005/8/Add.1 (30 March 2006) Annex, para 37(b)-(c).

[25] Y Dong and K Holm Olsen, 'Stakeholder Participation in CDM and New Climate Mitigation Mechanisms: China CDM Case Study' (2017) 17 Climate Policy 171; and LL Benites-Lazaro and NA Mello-Théry, 'Empowering Communities? Local Stakeholders' Participation in the Clean Development Mechanism in Latin America' (2019) 114 World Development 254.

[26] W Obergassel et al, 'Human Rights and the Clean Development Mechanism: Lessons Learned from Three Case Studies' (Wuppertal Institute 2017).

[27] See the contribution submitted by the former Special Rapporteur on Human Rights and the Environment, JH Knox, to the UNFCCC Subsidiary Body on Scientific and Technological Advice: 'Human Rights and Safeguards in the New Climate Mechanism Established in Article 6, paragraph 4 of the Paris Agreement' (3 May 2016) <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/Letter_to_SBSTA_UNFCCC_May2016.pdf >. See also the proposals put forward by various nongovernmental organizations, among others, Center for International Environmental Law (CIEL), 'Rights, Carbon, Caution: Upholding Human Rights under Article 6 of the Paris Agreement' (CIEL 2021). In the literature, see S Duyck et al, 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach' (2018) 12 Carbon and Climate Law Review 191; and R Webb and J Wentz, 'Human Rights and Article 6 of The Paris Agreement: Ensuring Adequate Protection of Human Rights in the SDM and ITMO Frameworks' (Sabin Center for Climate Change Law 2018).

[28] UNFCCC 'Decision 3/CMA.3: Rules, Modalities and Procedures for the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement' UN Doc FCCC/PA/CMA/2021/10/Add.1 (13 November 2021) Annex, para 24(a)(x).

[29] ibid paras 24(a)(ix) and 31(e).

Overall, the abovementioned environmental and social safeguards set important (albeit generally succinct) standards in relation to biodiversity conservation, protection of ecosystem services, sustainable development, public access to information and participation, benefit-sharing and respect for fundamental rights. Nevertheless, their bindingness and stringency differ. For instance, whereas the report of the UN-REDD Policy Board endorsing the Social and Environmental Principles and Criteria clarifies the instrument's voluntary nature,[30] the GEF Policy on Environmental and Social Safeguards refers to the standards enshrined therein as 'mandatory requirements'.[31] The GCF Environmental and Social Policy also uses 'shall' and 'will' language and outlines clear consequences for both accredited entities and the GCF itself—as accredited entities are *inter alia* required to prepare environmental and social risk and impact assessments, have in place environmental and social management systems that conform to the Policy, ensure public access to information and consultation on environmental and social risks and impacts, and make available appropriate grievance mechanisms at the activity and accredited entity levels; while the GCF is expected to condition its accreditation of entities and base its screening and monitoring of activities also on adherence to the Policy.[32]

Still, even with respect to those financial mechanisms where environmental and social standards would seem to play a more prominent role in the accreditation of entities and the approval of activities, it is often unclear whether entities have actually been refused (re-)accreditation on the basis of their inability to manage environmental and social risks and impacts, or activities have been rejected/suspended on the basis of their non-compliance with the relevant environmental and social standards (although these are not the only tests by which to assess the effectiveness of environmental and social standards).[33]

As far as the (re-)accreditation of entities is concerned, among best practices is the GEF secretariat's regular review, since 2019, of the compliance by partner agencies with the GEF policies on environmental and social safeguards, gender equality and stakeholder engagement. Nonetheless, the secretariat has adopted a facilitative and non-confrontational approach by allowing additional time for partner agencies to achieve full compliance (at the time of the first report, at the end of 2019, only four agencies were considered to fully comply with the relevant policies).[34]

Regarding the screening of activities on the basis of their compliance with environmental and social standards, proponents of GCF activities need to submit an 'environmental and social safeguards report' as well as a gender assessment and action plan; and, after approval of the activity, to provide updates on the implementation of environmental and social safeguards in their annual performance reports. A thorough examination of the practice of the GCF in these areas does not appear to have been undertaken yet, although a study on the application of the Fund's interim environmental and social standards revealed various failings.[35]

On the whole, the legal status of multilateral climate finance institutions' environmental and social safeguards and—what matters most—their enactment are uneven. Whereas implementation gaps are to be expected, of special interest to this article are the availability and effectiveness of grievance mechanisms, in case of non-spontaneous compliance of the activities with the relevant safeguards.

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[30] UN-REDD (n 16) 23.
[31] GEF (n 8) 11.
[32] GCF (n 19).
[33] For a discussion on evaluating the effectiveness of environmental impact assessments, see M Cashmore et al, 'The Interminable Issue of Effectiveness: Substantive Purposes, Outcomes and Research Challenges in the Advancement of Environmental Impact Assessment Theory' (2004) 22 Impact Assessment and Project Appraisal 295.
[34] See the most recent report by the GEF secretariat: GEF, 'Progress Report on Agencies' Compliance with Minimum Standards in the GEF Policies on: Environmental and Social Safeguards. Gender Equality; and Stakeholder Engagement' GEF/C.62/Inf.06 (1 June 2022).
[35] A Perrault and S Leonard, 'The Green Climate Fund: Accomplishing a Paradigm Shift? Analysis of the GCF Approach to Safeguards, Indigenous Rights, and Participatory Processes' (Rights and Resources Initiative 2017).

3 LIMITATIONS OF THE COMPLAINT MECHANISMS OF MULTILATERAL CLIMATE FUNDS AND CARBON MARKETS

The increasing adoption of environmental and social safeguards has not always been followed by the establishment of complaint mechanisms in the context of the relevant multilateral climate funds and programmes. As it will be shown, this is a gap in the enforcement of the safeguards that no other mechanism has convincingly managed to fill. Moreover, even when complaint handling or dispute resolution procedures are in place within multilateral climate finance institutions, their effectiveness can be questioned in various respects. If we assume as effectiveness criteria for non-judicial grievance mechanisms those listed in Principle 31 of the United Nations Guiding Principles on Business and Human Rights (UNGPs)—namely, legitimacy, accessibility, predictability, equity, transparency, rights-compatibility and source of continuous learning[36]—the complaint mechanisms of multilateral climate finance institutions fall short in several ways.

3.1 Complaint mechanisms at the activity and implementing entity level

Before examining in greater detail the complaint mechanisms of multilateral climate finance institutions and their shortcomings, it is worth noting that their lack or relative laxity could be explained by the requirement—generally included in environmental and social standards—that effective complaint procedures be provided at the activity and implementing entity levels to those aggrieved. Such complaint mechanisms are expected to be closer to those affected by the activities and therefore more easily and timely available.

However, it is evident that complaint mechanisms that are managed by entities having been awarded projects or more or less directly involved in their implementation cannot really be impartial (and therefore legitimate),[37] and provisions requiring these mechanisms to be 'independent of teams preparing and supervising projects and programs, transparent, and effective as neutral third parties able to assist in resolving disputes'[38] are an insufficient guarantee. Anonymity might also be more difficult to ensure at the activity level. Additionally and importantly, the consequences of activity- and implementing entity-level mechanisms' findings for the start or continuation of projects are not always clearly spelled out in the relevant procedures—or have otherwise proved to be unpredictable in practice.[39]

In the legal odyssey that has accompanied the Barro Blanco project, concerning the construction of a dam in Panama and approved under the CDM in 2011, complaints submitted by the affected indigenous communities to the project developer went unheeded. In May 2014, a group of indigenous residents and some nongovernmental organizations resolved to address the newly established joint Independent Complaints Mechanism of the Dutch and German development banks, who were lenders in the project. A year later, the report by the Independent Complaints Mechanism concluded that the two development banks had failed to uphold their own environmental and social standards in various respects.[40] While the two banks appear to have adopted corrective measures particularly as regards

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[36] UN Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' UN Doc A/HRC/17/31 (21 March 2011) (UNGPs) Principle 31.

[37] According to the commentary to Principle 31 of the UNGPs, ibid, 'legitimacy' implies that '[s]takeholders for whose use a mechanism is intended must trust it'; it is further specified that '[a]ccountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust'.

[38] GEF (n 8) Minimum Standard 2.

[39] A mechanism is 'predictable', according to Principle 31(c) of the UNGPs (n 36), when 'providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation'.

[40] FMO-DEG Independent Complaints Mechanism, 'Panel Report No. 1: Barro Blanco Hydroelectric Project, Panama' (29 May 2015) <https://www.deginvest.de/%C3%9Cber-uns/Verantwortung/Beschwerdemanagement/Barro-Blanco/>.

the screening and credit approval of future projects,[41] no clear impact on the Barro Blanco project can be discerned: the loan was not withdrawn by the banks, nor was any kind of compensation paid to the individuals negatively impacted.

By way of another example, UN-REDD-supported efforts to implement a REDD+ strategy in Nigeria—with a particular focus on Cross River State, which is classified by Conservation International among the 36 world's biodiversity hotspots[42]—have raised over the years various issues in terms of disruption of traditional livelihoods, loss of economic opportunities for forest dwellers (with no suitable alternative provided) and lack of local participation in the design and implementation of activities.[43] It does not, however, appear that those concerns were effectively and timely addressed at the activity or national level, to the extent that in 2016 (activities started in 2008) a National Safeguards Working Group was specifically created with a view to strengthening safeguards in the implementation of REDD+ policies in Cross River State and Nigeria.[44] Nevertheless, recent reports point to persisting problems.[45]

3.2 Complaint mechanisms of multilateral climate funds and programmes

The above examples are clearly illustrative of the shortcomings affecting project- and implementing entity-level complaint mechanisms (as well as the complaint mechanisms of bilateral funding agencies). Despite such issues, UN-REDD has not established a procedure to examine complaints alleging the non-compliance of activities supported by UN-REDD with its own Social and Environmental Principles and Criteria, nor to solve conflicts that might arise between affected communities and REDD+ participating countries or implementing partners. In 2015, guidelines for REDD+ countries were adopted on 'establishing and strengthening grievance redress mechanisms'; however, while representing an important reference point for participating countries, the guidelines remain explicitly voluntary[46] and are focused on 'dialogue, joint fact-finding, negotiation, and problem solving'.[47] At any rate, no redress procedure is provided for at the international level before UN-REDD bodies should national mechanisms fail to be established in accordance with the guidelines.

Within other multilateral climate funds, centralized mechanisms are provided for that, however, are only endowed with a facilitation or mediation role in case of disputes between the implementing entities/project developers and aggrieved parties—something which does not fully account for the imbalance that often exists between multinational corporations or international agencies on the one hand and local communities on the other, so that equity issues arise.[48] Since 2016 (i.e. five years after

41 See the monitoring reports of 2016 and 2017 by the Independent Complaints Mechanism, available at <https://www.deginvest.de/%C3%9Cber-uns/Verantwortung/Beschwerdemanagement/Barro-Blanco/>. No subsequent report could be found, even though the involvement of the Dutch development bank only stopped in 2021: 'FMO's Involvement in Barro Blanco Ends' (20 April 2021) <https://www.fmo.nl/news-detail/5543f425-9d57-491d-8391-b000d7808d36/fmo-s-involvement-in-barro-blanco-ends>.

42 Conservation International, 'Biodiversity Hotspots' <https://www.conservation.org/priorities/biodiversity-hotspots>.

43 See, among others, EO Nuesiri, 'Feigning Democracy: Performing Representation in the UN-REDD Funded Nigeria-REDD Programme' (2017) 15 Conservation and Society 384; and I Ekott, 'Investigation: How a $4 Million UN Climate Programme Impoverished Nigerian Communities' (Premium Times, 21 April 2016) <https://www.premiumtimesng.com/news/headlines/202150-investigation-4-million-un-climate-programme-impoverished-tortured-nigerian-communities.html>.

44 Nigeria National Safeguards Working Group, 'Cross River State REDD+ Safeguards Principles & Criteria: Assisting the Design of REDD+ Policies and Measures' (March 2017).

45 K Ogunyale, 'Inside the Illegal Trading of Forest Woods in Cross River Community' (The International Center for Investigative Reporting, 6 May 2022) <https://www.icirnigeria.org/inside-the-illegal-trading-of-forest-woods-in-cross-river-community/>.

46 Forest Carbon Partnership Facility and UN-REDD, 'Joint FCPF/UN-REDD Programme Guidance Note for REDD+ Countries: Establishing and Strengthening Grievance Redress Mechanisms' (June 2015) 2.

47 ibid 4.

48 As explained by the commentary to Principle 31 of the UNGPs (n 36), '[i]n grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and

the approval of the first projects and three years after the adoption of its Environmental and Social Policy), the Adaptation Fund has managed—through its secretariat—an Ad Hoc Complaint Handling Mechanism. The Mechanism addresses grievances against the activities supported by the Adaptation Fund through 'a participatory approach', by relying on alternative dispute resolution and acting 'to effectively facilitate dialogue among stakeholders, mediate/assist in resolving issues raised, and develop and share lessons to improve future operations'.[49] What happens if the parties cannot come to a mutual understanding and agree on a solution is not entirely clear (or predictable)[50] although, at least in case of non-cooperation by a party in the implementation of the agreed dispute resolution strategy, it is established that 'the secretariat may refer the complaint to the [Ethics and Finance Committee], who may recommend to the Board the measures included in the Risk Management Framework'.[51] It should also be considered that the procedure before the Mechanism can only be activated one year after the implementing entity's grievance mechanism fails to reach a solution[52]—which is not illogical from the perspective of subsidiarity of international redress mechanisms but can be problematic in the case of ineffective procedures at the entity level. In any case, it appears that the Ad Hoc Complaint Handling Mechanism is yet to receive a complaint,[53] which puts into question its accessibility, in the sense of 'being known to all stakeholder groups for whose use [it is] intended, and providing adequate assistance for those who may face particular barriers to access' (Principle 31(b) UNGPs).

Albeit in a different way, the Conflict Resolution Commissioner instituted in the GEF context is also subsidiary to the grievance mechanisms of implementing agencies. While complainants can directly approach the Commissioner with their concerns, in the case of complaints concerning GEF-supported projects and programmes, the Commissioner 'will inform the complainant of the availability of the Grievance and Accountability mechanism of the project implementing agency' and 'will forward the complaint to the Agency Grievance and Accountability mechanism'.[54] In relation to 'non-project related complaints', the Commissioner can facilitate dialogue and promote alternative dispute settlement.[55]

The webpage of the Conflict Resolution Commissioner transparently shares information regarding complaints raised in relation to GEF-funded activities, which have been or are being addressed by the grievance mechanism of a GEF partner agency or by other available complaint mechanism. The fact remains that, in relation to the 14 allegations of non-compliance with environmental and social safeguards, in no case was the GEF directly involved in the resolution of the complaint nor was GEF funding suspended or revoked except in two instances, concerning related conservation projects in the Republic of Congo and Cameroon. In those cases, the UN Development Programme (UNDP, partner agency in the projects) suspended (in one case) and closed (in the other) the projects, as a response to the concerns raised by the UNDP Social and Environmental Compliance Unit following investigations that also included field missions.[56]

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often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions.'

[49] Adaptation Fund, 'Ad Hoc Complaint Handling Mechanism (ACHM)' (7 October 2016) paras 2 and 5 in particular.

[50] See n 39.

[51] ibid para 16. The explicit identification of such measures would have arguably been helpful; in any case, they seem to include the suspension or cancellation of the implementing entity's accreditation: Adaptation Fund, 'Risk Management Framework for the Adaptation Fund' (amended October 2014).

[52] Adaptation Fund (n 49) para 3.

[53] The relevant webpage reports 'no active complaints in the process currently': Adaptation Fund, 'Complaints and Reports' <https://www.adaptation-fund.org/projects-programmes/accountability-complaints/complaints-reports/>. No mention of past complaints could be found in the reports by the Ethics and Finance Committee, to which any final assessment report by the ACHM is to be submitted.

[54] See the webpage of the GEF Conflict Resolution Commissioner: <https://www.thegef.org/projects-operations/conflict-resolution-commissioner>.

[55] ibid.

[56] ibid. While the results of the procedure and the way forward appear to have been discussed with the GEF secretariat and council, the GEF was in any case only involved after completion of the complaint procedure.

In contrast to the subordinate character of the mechanisms just mentioned, it is the express policy of the GCF 'to provide for grievance and redress at GCF, accredited entity, and activity levels', and to ensure that the acknowledgment that complaint mechanisms at the local and activity levels can be effective 'does not limit in any way the ability of complainants to access the GCF independent Redress Mechanism directly'.[57] Accordingly, accredited entities are specifically required to ensure access to the GCF Independent Redress Mechanism by those aggrieved and to implement any corrective action and remedy prescribed by the GCF Board at the recommendation of the Mechanism.[58] The mandate of the Mechanism is wide-ranging and more protective of individual complainants, compared to the mandates of other climate funds' complaint mechanisms. First of all, the Independent Redress Mechanism can not only promote a friendly resolution of the grievance between the parties, but also ascertain violations of GCF environmental and social standards, including through the conduct of investigations and the exercise of the power to initiate proceedings *proprio motu* (if those affected would not be able to access the Mechanism).[59] The power to self-initiate proceedings is of particular significance also in light of the fear of retaliation that affected communities and activists might have in openly challenging the implementation of projects. Additionally, the GCF Independent Redress Mechanisms provides confidentiality to the complainants, if so requested, and it has adopted specific rules and operating procedures against retaliation, thereby enhancing accessibility.[60]

As a result of the proceedings, the Mechanism can issue recommendations (to be endorsed by the GCF Board), whose implementation the Mechanism monitors.[61] Such recommendations can consist in the indication of steps to be taken by the GCF, accredited entity or project developer to re-establish compliance with the GCF policies; the development of a remedial plan by the GCF, together with the accredited entity and the Independent Redress Mechanism; and, significantly, the payment of financial compensation in favour of those who suffered from the violations.[62] Interestingly and innovatively, the GCF Board recently adopted 'guidelines to facilitate Board consideration of Independent Redress Mechanism reports', which strengthen the predictability of the proceedings and the enforceability of the Independent Redress Mechanism's recommendations.[63]

The complaints received by the GCF Independent Redress Mechanism are not numerous. Since 2017, when the Mechanism became operational, out of 207 activities approved by the GCF (starting in 2015) eight complaints have been submitted.[64] Of those, two were rejected as ineligible; one was withdrawn; one resulted in a friendly settlement between the parties; one has been suspended while the complainant seeks further information on the project from the GCF secretariat; one is being monitored, after the GCF secretariat committed to implement a number of remedial actions; one is the subject of a compliance investigation, after alternative dispute resolution failed; and the most recent one is yet to be examined, having been submitted in June 2022. In one instance (the case currently under monitoring), the preliminary investigation was undertaken at the initiative of the

[57] GCF (n 19) paras 73 and 76.
[58] ibid para 14(a)(vi).
[59] GCF, 'Decision of the Board on updated Terms of Reference of the Independent Redress Mechanism (Revised)' B.BM-2017/10 (25 September 2017). The Mechanism is also entrusted with reviewing refusals of project proposals based on their non-compliance with GCF policies, advising on the improvement of GCF policies and procedures, and building the capacity of accredited entities with respect to grievance mechanisms.
[60] See GCF, 'Procedures and Guidelines of the Independent Redress Mechanism' (28 February 2019) paras 80–83; and GCF, 'Supporting Operating Procedures of the Independent Redress Mechanism on Retaliation' (22 January 2021). The complaint mechanisms of other multilateral climate funds also refer to the provision of confidentiality, but generally in less detail and with no explicit policy on protection against retaliation: see Adaptation Fund (n 49) paras 20–22; and the webpage of the GEF Conflict Resolution Commissioner (n 54).
[61] GCF (n 59) para 13(d)-(f).
[62] ibid para 14.
[63] GCF, 'Decision of the Board on the Guidelines to Facilitate Board Consideration of Independent Redress Mechanism Reports on Reconsideration Requests, Grievances or Complaints' B.BM-2021/16 (13 July 2021).
[64] See the 'Case register' page of the Mechanism's website: <https://irm.greenclimate.fund/case-register>. Additionally, a request for reconsideration of a project's refusal (see n 59) was submitted by Argentina and later withdrawn.

Mechanism itself, after its staff—in the exercise of their monitoring activities—found articles raising concerns about the protection of the affected indigenous communities' rights to land and obtainment of their free, prior and informed consent.[65] All in all, while the GCF Independent Redress Mechanism represents the most advanced complaint mechanism among those instituted by multilateral climate funds, more can arguably be done in terms of raising awareness about its existence and functioning, strengthening its accessibility, and undertaking self-initiated investigations.[66]

In addition to climate finance institutions, the World Bank Group has increasingly funded climate-related activities, and it is worthy of mention in light of its complaint mechanisms, which are among the oldest ones and have served as a model—in various respects—for the complaint mechanisms created by multilateral climate funds and programmes. The GCF Independent Redress Mechanism, for instance, is indebted to the Compliance Advisor Ombudsman of the World Bank Group, which specifically reviews the actions of the Group's private lending institutions and has both dispute settlement and complaint handling mandates as well as investigative functions, including at its own initiative.[67] On the other hand, the World Bank's Inspection Panel, which has received complaints about activities related to loans and grants to countries since the early 1990s, has recently been complemented by a Dispute Resolution Service.[68] While the complaint mechanisms in question have been pioneering in many respects and have gained considerable experience, shortcomings have been highlighted from various quarters regarding the organization's compliance with its environmental and social standards as well as its response to grievances.[69] Reviews ensued[70] and some reforms have recently been enacted.[71]

3.3 Complaint mechanisms of carbon markets

As for carbon markets, the CDM was never equipped with specific, predictable procedures to ascertain and remedy any environmental and social externality which could be caused by the activities proposed or already approved under the CDM, even though the achievement of sustainable development in developing countries is a fundamental aim of the CDM, together with the reduction of emissions. While the CDM Executive Board, which approves the activities and issues the corresponding credits, has found itself competent to deny, suspend or revoke the registration of activities should these not meet the relevant emission-related requirements, it has left all assessment related to sustainable development to the competent national authorities and maintained that it lacks the appropriate legal basis to entertain complaints alleging human rights violations or negative environmental impacts caused by CDM-supported activities.[72] This notwithstanding the fact that

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[65] Independent Redress Mechanism, 'IRM Initiated Proceedings: C-0002-Peru. Summary of the Preliminary Inquiry Report, and Undertakings Provided by the GCF Secretariat' (8 May 2019).

[66] This is notwithstanding the fact that the Mechanism appears, on two other occasions, to have looked for further information with a view to possibly starting self-initiated investigations (see the list of 'pre-cases' at <https://irm.greenclimate.fund/document/history-irm-pre-cases>), and it also has undertaken some outreach activities.

[67] See the website of the Compliance Advisor Ombudsman: <https://www.cao-ombudsman.org/>.

[68] See the website of the new Accountability Mechanism, which encompasses the Inspection Panel and the Dispute Resolution Service: <https://www.worldbank.org/en/programs/accountability>.

[69] See, among others, International Consortium of Investigative Journalists (ICIJ), 'Evicted and Abandoned: The World Bank's Broken Promise to the Poor' (ICIJ, 16 April 2015) <https://www.icij.org/investigations/world-bank/>.

[70] Review Team, 'External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness. Report and Recommendations' (9 June 2020) <https://www.worldbank.org/en/about/leadership/brief/external-review-of-ifc-miga-es-accountability>; and the three-year review process of the Inspection Panel's Toolkit, informed by a 2018 external review: DD Bradlow, 'External Review of the Inspection Panel's Toolkit' (14 May 2018).

[71] See 'IFC/MIGA Independent Accountability Mechanism (CAO) Policy' (28 June 2021); IBRD and IDA, 'Resolution No. IBRD 2020-0005 Resolution No. IDA 2020-0004. The World Bank Accountability Mechanism' (8 September 2020); and IBRD and IDA, 'Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003. The World Bank Inspection Panel' (8 September 2020). Problems remain, however: see, among others, D Desierto et al, 'The "New" World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab' (EJIL:Talk!, 11 November 2020).

[72] A Neslen, 'Carbon Credits Tarnished by Human Rights "Disgrace"' (Euractiv, 3 October 2011).

developing countries would find it difficult to refuse the much-needed international funding to finance their low-carbon transition.[73]

Discussions have been ongoing at the UNFCCC level on the establishment of a CDM appeals procedure at least since 2009, but they have centred around demands from project developers for a forum for reconsideration of rejection decisions. At any rate, the debate has never led to the creation of a complaint mechanism and was formally concluded in Glasgow in view of the transition towards the new SDM under the Paris Agreement.[74] At the same time, albeit still in the absence of a complaint mechanism, in 2015 the CDM Executive Board finally determined to forward human rights-related complaints 'to the relevant bodies within the United Nations system'.[75] Nevertheless, it appears that only one case has been forwarded to date—to the UN Special Rapporteur on human rights and the environment, in relation to the Barro Blanco dam project in Panama;[76] with no direct impact on the registration of the activity with the CDM, as the Special Rapporteur could not suspend or revoke such registration. Ultimately, after years of mounting pressure, at the end of 2016, the Panamanian government itself asked for the withdrawal of the Barro Blanco project from the CDM register.[77] However, while the project's initial registration with the CDM is widely considered to have been crucial in securing the funds necessary for the construction of the dam, in particular from the Dutch and German development banks, de-registration—five years after the approval of the project, once funds had already been utilized and construction works finalized—did not prevent the dam from going online, thus forcing the relocation of families, destroying crops and flooding religious sites.[78]

Notwithstanding the less than optimal track record of the CDM in redressing the adverse environmental and human rights impacts of its activities, discussions over Article 6(4) of the Paris Agreement and its SDM never devoted much attention to the creation of an appropriate grievance mechanism, much like to the adoption of environmental and social safeguards. After rather limited debates in Katowice and Madrid, a single-sentence provision to the effect that 'stakeholders … may appeal decisions of the [SDM] Supervisory Body or request that a grievance be addressed by an independent grievance process' was agreed upon, again mainly as a consequence of the advocacy efforts by independent experts and non-governmental organizations.[79] No other detail on the characteristics and functioning of this process is provided and no connection is made to the environmental and social safeguards that the Mechanism should be equipped with. It is critical that the SDM Supervisory Body—which is tasked with both drafting the safeguards and 'developing provisions' with regard to the appeal of its decisions and grievance resolution—will allow for complaints addressing social and environmental harm and for their examination by a body that

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[73] C Sutter and JC Parreño, 'Does the Current Clean Development Mechanism (CDM) Deliver Its Sustainable Development Claim? An Analysis of Officially Registered CDM Projects' (2007) 84 Climatic Change 75.

[74] UNFCCC 'Decision 2/CMP.16: Guidance Relating to the Clean Development Mechanism' UN Doc FCCC/KP/CMP/2021/8/Add.1 (13 November 2021) para 8(b). For an overview of the relevant scholarly debate, see C Voigt, 'Responsibility for the Environmental Integrity of the CDM: Judicial Review of Executive Board Decisions' in Freestone and Streck (n 7) 272.

[75] CDM Executive Board, 'Meeting Report: CDM Executive Board Eighty-seventh Meeting' CDM-EB87 – Version 01.1 (29 November 2015) para 52.

[76] See the replies to 'Stakeholder Comments Regarding Ongoing Human Rights Concerns Associated with the Barro Blanco Hydroelectric Power Plant Project (CDM Project #3237)' INQ-04645 (26 April 2016) <https://cdm.unfccc.int/stakeholder/submissions/index.html>. In other instances of communications raising environmental and human rights-related concerns, the CDM Executive Board advised stakeholders to address their complaints to the designated national authority (see communications nos. INQ-04859, INQ-09024 and INQ-10494). Overall, only a small fraction of the communications to the Board revolve around adverse environmental and social impacts, even though CDM-approved projects have been among the most problematic in this respect.

[77] Letter by Emilio Sempris, Minister of the Environment of Panama, to the CDM Executive Board (13 October 2016) <https://cdm.unfccc.int/Projects/DB/AENOR1261468057.59/view>.

[78] D Grossman, 'Dam Lies: Despite Promises, An Indigenous Community's Land Is Flooded' (The Revelator, 5 March 2018) <https://therevelator.org/dam-lies-indigenous-flooded/>.

[79] Decision 3/CMA.3 (n 28) Annex, para 62. For a more detailed analysis of the proposals that emerged in Katowice and Madrid, see CT Antoniazzi, 'What Role for Human Rights in the International Climate Change Regime? The Paris Rulebook Between Missed and Future Opportunities' (2021) 15 Diritti umani e diritto internazionale 435, 461ff.

guarantees independence, accessibility and effectiveness.[80] The latest developments, however, do not bode well: in a meeting of the Supervisory Body at the beginning of COP27 in November 2022, in relation to the 'requirements' to be developed by the Supervisory Body to minimize negative environmental and social impacts of activities involving removals, a recommendation was adopted to acknowledge—rather contradictorily—that 'the enforcement of environmental and social protection laws is a national prerogative of the host Party'.[81] In the face of persistent disagreement among parties, a final decision on the issue was essentially postponed by inviting parties and observer organizations to submit their views on 'avoidance of … negative environmental and social impacts' by removal activities.[82]

3.4 Conclusions on the current limitations of complaint mechanisms

Ultimately, considerable room for improvement exists with respect to the complaint handling and dispute resolution mechanisms of multilateral climate finance institutions. In some instances, the reluctance of States to create an ad hoc complaint mechanism and the refusal of existing bodies to interpret their mandate extensively has to date prevented a review of projects based on their respect for human rights (this is especially the case for carbon market mechanisms). Within other multilateral climate funds and programmes, complaint mechanisms have been established, but—as has been shown in this section—shortcomings variously hinder their effectiveness. Among the most pressing actions to remedy such shortcomings are a revision of the relationship with activity- and entity-level mechanisms; the attribution of appropriate investigative powers (including the power to conduct field missions), as well as the prerogative to initiate proceedings; the provision of adequate forms of redress for victims; and facilitation of access for complainants, including by accepting the submission of complaints in any language, minimizing formal requirements and admissibility conditions, ensuring protection against retaliation to the extent possible, and requiring that complete and accessible information about the complaint mechanism be provided to the affected communities by the project developer.[83]

Moreover, a structural weakness affecting most complaint mechanisms relates to the response to their findings and recommendations by the competent bodies of the respective climate finance institutions. While the outcomes of proceedings before these mechanisms are and will remain non-binding, much more should be done in terms of ensuring that the findings of complaint mechanisms are given appropriate consideration, particularly by requiring that any departure from their recommendations is based on an adequate statement of reasons and that such statement of reasons is made public, as well as by strengthening the monitoring of the recommendations' implementation. In this respect, the adoption of guidelines, within the GCF, 'to facilitate Board consideration of Independent Redress Mechanism reports' represents a step forward that should be followed by other institutions.

Such reinforcements of multilateral climate finance institutions' complaint mechanisms are needed in light of the insufficiency of activity- and entity-level grievance mechanisms, due to the vested interests that project developers—as well as, depending on the circumstances, accredited entities and national authorities—have in the approval of climate-related projects. While some accredited/implementing entities might be able to establish rather robust complaint mechanisms (such as the UNDP Social and Environmental Compliance Unit mentioned above), not all entities have the

[80] For some proposals in this direction, see the sources mentioned above in n 27.
[81] Supervisory Body (of Article 6.4 Mechanism), 'Recommendation: Activities Involving Removals under the Article 6.4 Mechanism' A6.4-SB003-A03 (6 November 2022).
[82] UNFCCC 'Draft Decision -/CMA.4: Guidance on the Mechanism Established by Article 6, Paragraph 4, of the Paris Agreement' Advance Unedited Version (19 November 2022) para 19.
[83] For additional insights on how to strengthen complaint and accountability mechanisms, drawing on examples from the development finance sector, see C Daniel et al (eds), 'Glass Half Full? The State of Accountability in Development' Finance (SOMO 2016); and Accountability Counsel et al, 'Good Policy Paper: Guiding Practice from the Policies of Independent Accountability Mechanisms' (2021).

same capabilities (e.g. until very recently, a majority of GEF partner agencies were found to be non-compliant with the Facility's environmental and social safeguards; see Section 2). The existence of complaint mechanisms within multilateral climate finance institutions would therefore act as a further, stronger safeguard should the entity-level mechanisms fail; it would guarantee equality of treatment for projects financed by the same institution; and it would ensure that the institutions that are ultimately responsible for the disbursement of funds are held accountable and given the opportunity to remedy any shortcoming. Incidentally, while its Social and Environmental Compliance Unit was not directly involved in the scandals, the UNDP's implementation of various GEF- and GCF-funded projects was not long ago rocked by serious accusations of corruption and financial mismanagement, which were found not to be adequately handled by the competent internal oversight bodies.[84]

To these arguments it might be objected that, in addition or as an alternative to complaint handling at the activity or entity level, courts at the national and international levels offer effective redress to those negatively impacted by climate change mitigation and adaptation activities, and they therefore guarantee the right to a remedy. However, as the next section shows, victims face considerable obstacles in pursuing judicial remedies in such instances, particularly when it comes to multilaterally funded initiatives.

4 LIMITATIONS OF JUDICIAL AVENUES

Recent years have witnessed a considerable expansion of climate-related litigation, which has increasingly emerged as a valuable tool to elicit climate action, especially at the national level.[85] While a majority of the claims in question demand more decisive action from governments and corporations in terms of climate change mitigation and adaptation, and a certain number of complaints have been submitted by corporations pushing back against climate action, a third group of cases—to date still relatively limited, but growing—have challenged not climate action per se, but its means of implementation. Applicants in these cases ask that the enactment of mitigation and adaptation measures guarantees, among other things, alternative job opportunities and/or housing solutions to those negatively impacted, public access to information and participation in decision-making, and the free prior and informed consent of any affected indigenous community. These cases, generally based on human rights-related arguments, have been referred to as 'just transition' cases[86] and have been brought against both governments and private entities.[87]

The relevance of this trend for the negative impacts caused by activities funded by multilateral climate finance institutions is clear. Nonetheless, to this author's knowledge, only a limited number of complaints have been submitted to courts regarding such activities, notwithstanding the multiple reports of violations. One such instance concerns the abovementioned Barro Blanco project, whose issues were, among other legal avenues, also submitted to national courts. In December 2016, however, the Panamanian Supreme Court rejected the last two petitions: according to reports, one was refused as time barred, while the other seems to have been rejected on the merits, by accepting

[84] E White and L Hook, 'UN Agency Hit with Corruption Allegations at Climate Projects' (Financial Times, 30 November 2020); and C Farand, 'GCF Considers Renewed Partnership with UNDP, amid Corruption Investigations' (Climate Home News, 4 October 2021) <https://www.climatechangenews.com/2021/10/04/gcf-considers-renewed-partnership-undp-amid-corruption-investigations/>.

[85] J Setzer and C Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (Grantham Research Institute on Climate Change and the Environment 2022).

[86] A Savaresi and J Setzer, 'Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13 Journal of Human Rights and the Environment 7, 28–30.

[87] See, as an example, *Sindicato de Trabajadores de Empresa Sociedad Maritima y Comercial Somarco Limitada y Otros con Ministerio de Energia,* decided by the Chilean Supreme Court on 9 August 2021 (Case No 25, 530-2021) <http://climatecasechart.com/non-us-case/company-workers-union-of-maritima-commercial-somarco-limited-and-others-with-ministry-of-energy/>.

the assessment made by the competent national authority of the project as 'in the public's interest' and 'urgent'.[88]

Another case that was brought to the attention of national courts concerns the expansion—supported by the International Finance Corporation (IFC), which, within the World Bank Group, deals with private-sector lending—of palm oil plantations in the Bajo Aguán valley in Honduras. The implementation of the project resulted in a conflict between the corporations involved and dispossessed villagers, which in turn led—among multiple human rights violations—to the deaths of dozens of peasants and human rights activists, mostly attributed to the corporations' private security guards.[89] After failed attempts before Honduran courts and the lack of tangible consequences following a critical report by the Compliance Advisor Ombudsman, a group of complainants instituted proceedings against the IFC before courts in the United States (US), where the institution has its seat.[90] The proceedings, which are still ongoing, stand to benefit from a landmark US Supreme Court's decision determining that the IFC does not enjoy absolute immunity in US courts;[91] however, the case that originated the Supreme Court's ruling (*Jam et al v IFC*), brought by a group of Indian farmers and fishermen challenging the operation of a large coal-fired power plant financed by the IFC, ultimately failed on jurisdictional grounds, as the district and appeal courts maintained that the contested acts took place in India.[92]

These cases are exemplary of the difficulties that complaints against multilaterally funded climate activities face before national courts. Some hurdles are common to other climate-related cases—e.g. the margin of discretion of governments in designing and implementing climate action, or the technical nature of many of the issues involved. Additional ones are connected to the fact that a multitude of actors take part in the planning, screening, approval, implementation and monitoring of these multilaterally supported activities—from the multilateral fund/carbon market mechanism to the competent national authorities, project developer(s), intermediaries, third parties that might be entrusted with validating the project, etc. This might create uncertainty as to the most viable redress mechanisms among available ones, possibly resulting in time-consuming legal activities and the time-barring of claims while pursuing other unfruitful avenues (such as in the Barro Blanco case). Moreover, the fact that potential defendants are generally based in different countries, with varying rules about the admissibility of claims and the competence of courts, might give rise to jurisdictional issues (as in the *Jam et al v IFC* case) and more generally to gaps in judicial protection or to inconsistent judgments.

Should complainants then try to hold multilateral funds and programmes directly accountable, further obstacles are bound to materialize: for starters, not all of these entities have legal capacity—and therefore the ability to participate in proceedings. The GEF has no explicit legal capacity, and the capacity of the CDM Executive Board is debated.[93] Even when a multilateral fund or programme has international juridical personality and/or legal capacity, it and its organs might enjoy immunity from legal proceedings, which, depending on the organization's founding instrument and regulations

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[88] C Mejia Giraldo, 'Panama's Barro Blanco Dam to Begin Operation, Indigenous Pleas Refused' (Mongabay, 24 March 2017) <https://news.mongabay.com/2017/03/panamas-barro-blanco-dam-to-begin-operation-indigenous-pleas-refused/>.

[89] Human Rights Watch, '"There Are No Investigations Here": Impunity for Killings and Other Abuses in Bajo Aguán, Honduras' (Human Rights Watch 2014).

[90] EarthRights International, 'Juana Doe et al. v. IFC: Honduran Farmers Sue World Bank Group for Complicity in Human Rights Violations' <https://earthrights.org/case/juana-doe-et-al-v-ifc/>.

[91] *Jam et al v International Finance Corp*, 586 U.S. ___ (2019).

[92] EarthRights International, 'Budha Ismail Jam, et al v. IFC: An Indian Fishing Community Takes on the World Bank' <https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/>.

[93] For an overview of the international legal personality and legal capacity of some international funds, see UNFCCC Transitional Committee, 'Workstream II: Governance and Institutional Arrangements. Background Note: Review of the Legal Status of Select International Funds and Financial Institutions' TC-2/WSII/2 (29 June 2011). Regarding the CDM Executive Board, see Voigt (n 74) 290–291.

as well as national laws, might be absolute or provide for exceptions.[94] Once again, the situation varies across financial institutions—and it is evolving (see the US Supreme Court's decision mentioned above). Finally, the issue of whether multilateral financial institutions owe obligations directly towards individuals and communities affected by the activities that they fund is far from settled,[95] even though the opinion is increasingly shared that international organizations—including multilateral financial institutions—are bound by at least some human rights obligations (particularly of a customary nature or minimum obligations),[96] which adds to States' obligations in the context of their participation in international organizations[97] (although the primary obligation to respect, protect and fulfil human rights lies with the territorial State).

Similar difficulties are reflected at the international level, particularly before regional human rights commissions and courts, which represent the main forums available to aggrieved individuals and communities. Additionally, regional human rights mechanisms, due to their subsidiary nature (requiring the prior exhaustion of domestic remedies) as well as the length of their proceedings, may not be able to prevent violations nor ensure the restoration of the pre-existing situation. Prompt compliance by States with their judgments and orders is a further factor to be considered.[98]

In May 2014, the Inter-American Commission on Human Rights had ordered the Honduran government to adopt precautionary measures in favour of several villagers and human rights defenders of the Bajo Aguán area; nevertheless, the Commission felt compelled to 'express concern' only a few months later as evictions and harassment continued,[99] and it still considered the situation worrying in its 2019 country report on Honduras.[100] With respect to another case, involving the construction of a mega dam in Brazil (although not financed by a multilateral climate fund) and its negative impacts on indigenous communities, the Inter-American Commission first requested the government to implement some precautionary measures in 2011; subsequently, in 2015, it started an examination on the merits of the complaint, with submission of final arguments by the parties in 2018.[101] However, no report with the findings by the Commission has been published and the dam has become fully operational in 2019. A request for precautionary measures lodged with the Commission in 2016 with respect to the Barro Blanco project has apparently not yielded any results.[102]

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[94] On the CDM, as well as for an overview of other UNFCCC bodies and organs, see UNFCCC 'Privileges and Immunities for Individuals Serving on Constituted Bodies Established under the Kyoto Protocol: Note by the Secretariat' UN Doc FCCC/KP/CMP/2005/6 (16 September 2005).

[95] See, focusing on potential litigation by private project proponents, JD Werksman, 'The Legitimate Expectations of Investors and the CDM: Balancing Public Goods and Private Rights under the Climate Change Regime' (2008) 2 Carbon and Climate Law Review 95.

[96] See, e.g., Commission on Human Rights, 'The Right to Food. Report of the Special Rapporteur on the Right to Food, Jean Ziegler' UN Doc E/CN.4/2006/44 (16 March 2006) paras 39–45 (and the literature mentioned therein); International Law Association-Committee on Accountability of International Organisations, 'Berlin Conference (2004). Final Report' (May 2004); and Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (28 September 2011) Principle 16.

[97] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (22–26 January 1997) para 19; and Maastricht Principles (n 96) principle 15.

[98] On the Inter-American human rights system, which to date has been the most concerned with 'just transition' cases, see F Basch et al, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with Its Decisions' (2010) 7 Sur – International Journal on Human Rights 9.

[99] Inter-American Commission on Human Rights, 'IACHR Expresses Concern over Threats against and Arrests of Campesino Leaders in Bajo Aguán, Honduras' (29 August 2014) <https://www.oas.org/en/iachr/media_center/PReleases/2014/094.asp>.

[100] Inter-American Commission on Human Rights, 'Human Rights Situation in Honduras' (Organization of American States 2019).

[101] For an overview of the national and regional legal proceedings initiated against the project, see 'Consórcio Norte Energia Lawsuit (re Belo Monte dam in Brazil)' <https://www.business-humanrights.org/en/latest-news/cons%C3%B3rcio-norte-energia-lawsuit-re-belo-monte-dam-in-brazil/>.

[102] Giraldo (n 88). No order for precautionary measures could be found in the database of the Commission as of July 2022.

Overall, there exist various obstacles to access to court—at both the national and international levels—against multilaterally funded climate projects especially.

5 CONCLUSIONS

Growing awareness about the negative impacts that climate action can have on the surrounding environment and on the rights and livelihoods of the local populations has led an increasing number of multilateral climate finance institutions to adopt environmental and social safeguards applicable to the activities that they support.

As this article has shown, however, serious shortcomings affect the complaint mechanisms that should ensure the enactment of such safeguards, by allowing affected individuals and groups to share their concerns, resolve their disputes with project developers, correct the implementation of activities and obtain redress for any harm suffered. While the availability of complaint mechanisms at the activity and implementing entity levels is important to ensure a readily accessible and timely forum for those aggrieved, these mechanisms often do not offer sufficient guarantees of independence. On the other hand, traditional judicial mechanisms face severe limitations in preventing and redressing these kinds of violations, due to the complexity of the activities in question, the number and nature of the actors involved and the nature of the harm.

This contribution argues that establishing or strengthening complaint handling and dispute settlement mechanisms within multilateral climate finance institutions is the most appropriate solution to fill this enforcement gap. At present, most—but not all—institutions have equipped themselves with redress mechanisms; however, considerable room for improvement exists in ensuring their effectiveness. In particular, it is important that the mechanisms in question be endowed with a broad mandate, including both the promotion of alternative dispute resolution and the ascertainment of violations; that they be given appropriate investigative powers as well as the power to open investigations at their own initiative and to protect complainants against retaliation; that awareness is raised about the existence and functioning of the mechanisms among potential victims; and that the mechanisms' findings have concrete consequences for the implementation of the contested activities and, where this is impossible, lead to appropriate compensation. The latter aspect presupposes that the mechanisms' findings are adequately considered by the competent bodies of climate finance institutions and that appropriate monitoring mechanisms are put in place.

On the one hand, effective complaint mechanisms within multilateral climate finance institutions strengthen the right to a remedy of complainants, by providing them with an independent review (which cannot always be ensured at the activity and implementing entity levels) and a more accessible forum than courts (with their lengthy proceedings, demanding admissibility conditions, higher standards of proof, etc.). On the other hand, well-functioning complaint mechanisms are in the interest of the multilateral climate funds and host countries as well, with a view to avoiding the high reputational costs that are connected with supporting activities that result in serious environmental damage or human rights violations. Moreover, also in light of the upsurge of climate-related litigation and of the evolving interpretation of both the human rights obligations of States and international organizations and their immunity, the operation of effective complaint mechanisms could at least partially protect host countries and multilateral climate finance institutions from (likely soaring) lawsuits and intervene in time to prevent the implementation of harmful activities.

Therefore, also in view of the increasingly prominent role that climate finance is going to play, the establishment and effectiveness of complaint mechanisms within climate finance institutions are going to be key in building a low-carbon transition that protects biodiversity and respects and promotes human rights.

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