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INTERNATIONAL LAW AND THE GOVERNANCE OF CLIMATE FINANCE: NAVIGATING GLOBAL INSTITUTIONAL COMPLEXITY

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DECLARATION

This is to certify that the work contained within has been composed by me and is entirely my own work. No part of this thesis has been submitted for any other degree or professional qualification.

Signed:

Abstract

This thesis is of legal clarification, analytical discovery and method. It questions the relationship between international law and the institutional complexities of global governance by taking climate finance as a fruitful ground of analysis. Furthermore, it provides a novel systematization and critical appraisal of the international law applicable in the context of climate finance.

Climate finance can be broadly defined as the transfer of financial resources from industrialised states to developing countries for the purposes of climate mitigation (reducing greenhouse gasses emissions) and adaptation. Although numbers are uncertain, currently states face not just the policy challenge of scaling up climate finance to needed levels, but also the one of forming a sustainable and effective institutional structure. In fact, the scant international obligations contained in the United Nations Framework Convention on Climate Change and its Kyoto Protocol have developed into a complex international and multilevel regulatory realm, where numerous and multifarious institutions de facto implement the treaties by acting as intermediaries for the sourcing and disbursement of financial resources towards developing countries.

In addition to offer a detailed outline of the regulatory roles and development of these 'climate finance institutions', the thesis relies on an understanding of 'governance' and 'legitimacy' as two fundamental but multifaceted conceptual devices. Because international law faces some 'cognitive limits' in dealing with the governance aspects of the institutional complex of climate finance, a new conceptualization, based on the idea that such institutions compete and at the same time seek to complement their activities, underpins an analysis of inter-institutional instruments. This allows discovering some legal practices, which promote

complementarity in the context of geographical, functional and regulatory institutional overlaps.

Despite these emerging realities, the 'effectivity' of climate finance institutions still faces legitimacy challenges, as their activities and regulations are often contested by a wide array of actors (states, private entities, and national groups). This work proposes a comparative analysis between six climate finance institutions, based on a theoretical stand that a legal analysis of institutional legitimacy should be based on some relevant procedural components. The comparative analysis, based on four regulatory factors, provides numerous elements for a reflection on the interplay of legitimacies among climate finance institutions.

Equipped with a legal clarification of the principles and the substantive international legal issues provided in the first chapter, the thesis concludes with three lines of argument. First, climate finance institutions will increasingly face the need to balance the existing bias towards contributor countries with the emerging concept of country ownership of funds, while enhancing their accountability. Second, the analysis unfolds and structures several substantive and institutional tensions, which require constant and further engagement from lawyers in interpreting and framing future developments. The third and broader argument is, instead, of legal method: methodologically it is a more fruitful path for international lawyers to deal with the legitimacy of (global) governance, rather than with the governance of legitimacy. While the intellectual goal of 'governing legitimacy', followed by several scholars, hinges on a, refutable, managerial idea of the law, the pluralist legal structure of global governance opens uncountable spaces for lawyers to reconceptualise and discover new 'intimated' practices of law.

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At the start of the Ph.D. programme in 2010, I viewed the writing of a doctoral thesis as a lonely endeavour. As pictured in my head, it was quite a romantic idea: countless hours spent before the computer screen researching, trying to make sense of a Babylonian amount of documents, while outside the misty air of Edinburgh at night would surround a warm, candlelit office in the Old College, and give it an aura of profound and mysterious importance…

After four years, perhaps I am still keeping a romantic idea, but a much different one, as I know now that this thesis is the fruit of a collective effort. Sure I did the most, because countless hours have been spent indeed! Yet in no way this could be possible without the help and support of many individuals.

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“If you don’t look out, the law goes up in smoke”

Bertolt Brecht, *The Caucasian Chalk Circle*, 1944

ABBREVIATIONS

AF	Adaptation Fund
AFB	Adaptation Fund Board
BAP	Bali Action Plan
BPs	Bank Procedures
CAS	Country Assistance Strategy
CBD	Convention on Biological Diversity
CBDR	Common But Differentiated Responsibilities and Respective Capabilities
CDM	Clean Development Mechanism
CEO	Chef Executive Officer
CERs	Certified Emissions Reductions
CIFs	Climate Investment Funds
CMP	Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol
COP	Conference of the Parties of the United Nations Framework Convention on Climate Change
CRS	Creditor Reporting System
CSO	Civil Society Organisation
CTF	Climate Technology Fund
CUP	Cambridge University Press
DNA	Designated National Authority
DOE	Designated Operational Entity
EAP	Environmental Action Plan
EB	Executive Board
EIA	Environmental Impact Assessment
EU	European Union

FAO	Food and Agriculture Organization
FCPF	Forest Carbon Partnership Facility
FPA	Financial Procedures Agreement
GAL	Global Administrative Law
GCF	Green Climate Fund
GEF	Global Environment Facility
GHGs	Greenhouse Gasses
IATI	International Aid Transparency Initiative
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
IDA	International Development Association
IET	International Emissions Trading
IFC	International Financial Corporation
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
IN-LAW	Informal International Law-making
IO	International Organization
IPA	International Public Authority
IPCC	Intergovernmental Panel on Climate Change
KP	Kyoto Protocol
LDCF	Least Developed Countries Fund
LDC	Least Developed Country
MDB	Multilateral Development Bank
MEA	Multilateral Environmental Agreement

MIGA	Multilateral Investment Guarantee Agency
MoU	Memorandum of Understanding
MRV	Measuring, Reporting and Verification
NAMA	National Appropriate Mitigation Action
NAPA	National Adaptation Programme of Actions
NEEDs	National Economic, Environment and Development Study
NGO	Non-Governmental Organization
NIE	National Implementing Entity
NMM	New Market-based Mechanism
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OECD-DAC	Development Co-operation Directorate of the Organisation for Economic Co-operation and Development
OPs	Operational Policies
OPS	Overall Performance Study
OUP	Oxford University Press
Para	Paragraph
REED+	Reducing Emissions from Deforestation and Forest Degradation
RfRs	Requests for Reviews
SCCF	Special Climate Change Fund
SCF	Standing Committee on Finance
SCF	Strategic Climate Fund
SIDS	Small Island Developing States
STAP	Scientific and Technical Advisory Panel
STAR	System for Transparent Allocation of Resources
TFC	Trust Fund Committee
UN	United Nations

UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UN-REDD	UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
UNTS	United Nations Treaty Series
WB	World Bank
WBIP	World Bank Inspection Panel
WTO	World Trade Organization

INTRODUCTION

In April 2014 the Intergovernmental Panel on Climate Change (IPCC), a Nobel prize-winning international body, in its fifth assessment report provided further scientific evidence of the already grim prospects for the Earth's climate if humanity will persist on the current greenhouse gasses (GHGs) emissions path. Anthropogenic GHGs emissions between 1970 and 2010 have increased by 80%[1], reducing the chance to limit GHGs concentration in the atmosphere at a level suitable to avoid disastrous consequences in the next decades.[2] Sadly, such a high increase also shows the failures of international and national climate policies adopted since the signing of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, and its 1997 Kyoto Protocol.[3]

While there is little doubt that transformative changes in the world economy and society are required to embark on a needed mitigation path, the same goes for building policies and infrastructures able to make livelihoods and ecosystems adapt and be resilient to increasingly changing climatic patterns.[4] It is the gargantuan scale of these two pillars of the international climate change regime (mitigation and adaptation) which make climate change a highly-complex and pressing challenge.

On the international plane the issue is further complicated by equity concerns. The UNFCCC recognizes in one of its core principles the "different responsibilities and

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[1] G Blanco *et al.*, 'Chapter 5 - Drivers, Trends and Mitigation' in *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014), at 4.

[2] This level is broadly accepted to range between 450 and 550ppm of CO_2eq, so to avoid a raise of 2C°of the global mean temperature from pre-industrial levels. See D Victor *et al.*, 'Chapter 1 – Introductory Chapter', in Ibid, at 34.

[3] Respectively, *United Nations Framework Convention on Climate Change*, New York, adopted on 9 May 1992, entered into force on 21 March 1994, 1771 UNTS 107; and *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, adopted on 11 December 1997, entered into force on 16 February 2005, UN Doc FCCC/CP/1997/7/Add.1, 10 December 1997; 37 ILM 22.

[4] See I. Noble *et al.*, 'Chapter 14 – Adaptation Needs and Options' in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014), at 7-10.

respective capabilities" of states[5] in reaching the ultimate objective of the Convention, namely a "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[6] Due to political and moral reasons at the time of its adoption, the UNFCCC binds only developed states[7] to adopt national mitigation measures and take the lead in curbing emissions,[8] while developing countries have been legally unrestrained from pursuing their economic growth with no emissions-related mitigation restrictions. After more than twenty years, rapid changes in the global economy and in emissions patterns from fast-growing economies, such as China and India, have inevitably led all the Parties to renegotiate and reconsider those equity bases that first buttressed the UNFCCC: it is argued that in a way also some developing states should embrace some kind of legally-binding emissions targets for the future. Yet, despite the yearly meetings of the UNFCCC Conference of the Parties (COP) and the numerous sessions of the subsidiary technical bodies of the Convention, currently the Parties have managed to only agree on a negotiating path leading to "[…] a protocol, another legal instrument or an agreed outcome with legal force under the Convention" by 2015.[9] Thus, an internationally binding agreement on clear mitigation efforts from all major emitting states is still not in place.

Against this background, the object of this doctoral thesis is climate finance, an indispensable equity component for meeting the challenges of climate mitigation and adaptation.

There is neither a legal nor a widely accepted definition of climate finance, but the matter can be approached by referring to some broad international legal obligations contained in the UNFCCC and the Kyoto Protocol, paralleled by a global phenomenon and a

[5] UNFCCC, Article 3(1).
[6] Ibid., Article 2.
[7] Listed in Annex I of the Convention.
[8] Ibid., Article 4(2)(a).
[9] Decision 1/CP.17, FCCC/CP/2011/9/Add.1, 15 March 2012, para 2.

remarkable policy challenge. In the context of the differential treatment between developed and developing states, the UNFCCC generally provides that the former shall provide "new and additional" financial resources in order to support the latter in setting up climate mitigation and adaptation measures.[10]

If these are the core of international obligations, nonetheless states, international financial institutions, multinational banks, private financial intermediaries, as well as other private investors have through time sourced, leveraged and transferred increasing capital for climate-related activities in developing countries jurisdictions. The range of financed activities that contribute to either reduce GHGs emissions or adapt local livelihoods and ecosystems to climate change is extremely vast. As a phenomenon climate finance can take the form, for instance, of a large-scale hydropower plant co-financed by the host state, private banks, and multilateral development banks; in a bundle of small-scale, off-grid, renewable energy projects in rural areas sustained by carbon market instruments; in an education project for rural farmers to cope with weather variability financed by a charitable foundation; or in a public-private joint programme aimed at substituting traditional light bulbs with energy-efficient LED lights in highly-populated urban areas.

While joint public and private capital flows for climate activities from industrialized economies to developing countries are roughly estimated in a range of USD 39-120 billion a year in the last three years,[11] this amount is certainly insufficient to match the actual needs of developing countries –particularly the least developed ones.[12] Moreover, it is clear that the emerging developing economies will also need to sensibly reduce their emissions, if the world is to reach the 'safe' global warming target of 2C°,[13] and that this entails conspicuous financial costs. Furthermore, the harsh realities of recent climate disruptions in Sub-Saharan

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[10] UNFCCC, Article 4(3) and (4).

[11] S Gupta *et al*, 'Chapter 16 - Cross-cutting Investment and Finance Issues', in IPCC, *Climate Change 2014*, *supra* note 1, at 3.

[12] Admittedly, macroeconomic scenarios on investment needs, for though skewed, all point to the existence of a financial gap. See B Buchner, *et al*., 'The Global Landscape of Climate Finance 2013', Climate Policy Initiative, October 2013, at 32-3, <http://climatepolicyinitiative.org/wp-content/uploads/2013/10/The-Global-Landscape-of-Climate-Finance-2013.pdf>.

[13] See *supra* note 2.

Africa, small-island and low-lying coastal states confirm that the least developed countries will be the ones to pay the biggest in price in terms of social and environmental changes. Therefore, while the phenomenon of climate finance evidences an increasing level of capital transfers to developing countries, the policy problem requires not only a dramatic increase in its quantity, but also its effective delivery for both mitigation and adaptation.

The recent responses to the climate finance problem in international negotiations under the UNFCCC concretised in a collective pledge by industrialized countries to raise the amount of financial transfers to USD 100 billion a year by 2020,[14] and in the establishment of a new multilateral trust fund, the Green Climate Fund, aimed at sourcing and disbursing a "significant proportion" of this pledge, particularly in adaptation.[15] However, the same pledge also clarifies that such resources shall come both from public and private sources.

For analytical purposes, this work will adopt a twofold definition of climate finance. It will primarily focus on the phenomenon of *public* financial resources mobilized by developed states and other international institutions, and disbursed for the purposes of climate mitigation and adaptation projects in developing countries. However, it will also consider the private climate finance as channelled by institutions that, as will be seen, exercise public authority at the international and transnational level.

Thus the overall aim is to address the international legal issues of just part of the 'phenomenon climate finance' and, as a consequence, just part of the policy challenge, mainly because covering both public and private climate finance would overly extend the range of private and public international legal issues involved.

[14] Decision 2/CP.15, UN Doc. FCCC/CP/2009/11/Add.1, 10 March 2010 [hereafter, 'Copenhagen Accord'].
[15] Decision 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, para 100.

In this narrower context, the core purpose of this doctoral thesis is twofold. On one side is to provide the first comprehensive legal clarification of the international law applicable to climate finance. Indeed, apart from some scholarship addressing specific issues, there is no overall assessment of climate finance under public international law, leading to a legal systematization and critical assessment of its substantive practices in view of its future challenges.

The second, and more central, aim is to address some emerging legal questions stemming from climate finance's institutional complexity. As will be seen below, the international financial obligations under the UNFCCC give ample discretion to developed states in choosing the institutions that gather and channel their public climate finance. This has led to a complex institutional structure populated by numerous institutions with different functions and legal natures, which *de facto* contribute to the implementation of the Convention. Institutional complexity is a common feature in current global governance structures; however, it does pose new policy problems and legal questions.

The policy problem relates to the challenge of scaling up climate finance to the necessary levels and relates to the task of delivering a sustainable and effective institutional structure of financial disbursement towards developing countries. Yet, both the low numbers of finance disbursed, and the inter-institutional issues that emerged after decades of practice tell us that there is still much to understand, plan and reconsider.

The legal questions are perhaps more subtle but strictly connected to the policy issue: how does international law relate to such institutional complexity? Do international institutions participate as active lawmakers, and under what law? Where do international institutions source their legitimacy to regulate and decide on each climate-related project and programme, often affecting local groups and the environment? And what role does law play in the institutional complex of climate finance taken as a whole enterprise?

These are the main questions that this work will try to answer under a legal understanding of 'governance' and 'legitimacy' as two fundamental but multifaceted conceptual devices. As will be seen, because this object of analysis has been little explored by international legal scholars, broader theorizations will be needed with a view of carving out a solid method of legal analysis.

Accordingly, the thesis is divided into two parts and six chapters.

Part 1 is dedicated to the legal clarification of the substantive international law on one side, and to the legal assessment of the institutional governance of climate finance on the other.

Chapter one starts by placing climate finance in the context of general concepts and principles of international law, and of the (emerging) *lex specialis* of international development law. In particular, climate finance will be framed in relationship with the general concept of sustainable development as a key concept of general international law, and with the special legal principle of common but differentiated responsibilities within the international climate change regime. In addition, the same chapter will delve into a further clarification of some specific international obligations contained in the climate treaties, such as those related to the 'novelty' and 'additionality' of finance, and to the limit of covering only the incremental costs of projects. Also, substantive legal practices of international development will be addressed, such as financial instruments and the use of conditionalities in financial agreements.

After tackling these substantive legal issues, Chapter II will set the stage for the institutional analysis of climate finance under the law. It will offer a detailed and comprehensive outline of the creation, development and proliferation of those climate finance institutions working as financial intermediaries of public climate finance. The outline will be generally divided between climate finance institutions acting within the international legal regime of the UNFCCC and the Kyoto Protocol, and those that, despite being legally

untied from such regime, nonetheless act as *de facto* implementers of its international obligations on finance.

In Chapter III, concluding the first Part of the thesis, the complex landscape emerged will be re-conceptualized under the lens of institutional complexity. The chapter will expose some limits inherent to international law, when dealing with the problems emerging from uncoordinated, incoherent and overlapping institutional activities. This will lead to reconsider the key facts and dynamics occurring in the institutional realm of climate finance according to more recent, 'heterodox', international legal approaches. In its final section, the chapter will discover some 'intimations' of law in the emerging practices and instruments seeking complementarity among climate finance institutions, with critical implications for law and governance.

The first set of findings will prompt Part 2 of the thesis, which will shift the attention to a parallel set of issues stemming from the institutional complexity of climate finance: as for other areas of global governance, the legitimacy of individual institutions is contested by the very entities that create them (states), and by other actors affected by or engaged with these institutions, such as civil society organizations, local groups and private enterprises. Legitimacy in climate finance is a key driver of further institutional complexity and proliferation with their ensuing problems.

Hence, Chapter IV will be entirely dedicated to discuss the theories and methods of a legal analysis of institutional legitimacy of the most relevant climate finance institutions. After identifying the legitimacy problem as a problem of 'social', and not 'formal', institutional legitimacy, the chapter will delve into an empirical analysis of legitimacy contestations brought against climate finance institutions: this will lead to discover four regulatory factors of procedural legitimacy,[16] assumed to influence the effectivity of each institution as perceived by states and other actors.

[16] These are i) iinternational governance and decision making; ii) access and disbursement modalities of finance; iii) participatory processes; and iv) accountability mechanisms.

The following Chapter V will consist of a comparative analysis of institutional legitimacy for six relevant climate finance institutions: the Global Environment Facility, the Adaptation Fund, the Clean Development Mechanism, the Green Climate Fund, the Climate Investment Funds, and the World Bank. A careful comparison of the instruments regulating the four regulatory factors individuated in the preceding chapter will lead to innovative insights on how the similarities and differences of such processes contribute to the formation of legitimacy.

To conclude, the final Chapter VI will offer some cross-cutting reflections from the findings throughout the thesis. Two strands of conclusion will be singled out, where the first will attain to the realm of climate finance: some crucial themes that influence the *interplay of legitimacies* among institutions will be assessed, as well as some underlying tensions stemming from the substantive law which together pose a challenge for scaling up climate finance in the long-term.

The second strand will look at the broader question of what role international law (and law in general) plays in the increasing institutional complexities of global governance. Some international legal literature on the matter will be criticised and a *legal method* of re-imagination and discovery proposed.

PART 1

CHAPTER I
CLIMATE FINANCE, INTERNATIONAL LAW AND ITS IMPLEMENTATION

INTRODUCTION

In the introduction to this work, climate finance has been described as a form of inter-state financial support with a specific aim: the one of bringing about mitigation and adaptation activities in developing countries.

In general terms, there are many forms of financial support taking place between states, often divided between multilateral and bilateral (state-to-state) forms of financial support. Two classic examples of multilateral finance are the two Bretton Woods institutions, the International Monetary Fund and the World Bank. Despite having different core ends (international monetary stability for the IMF and poverty reduction for the World Bank)[1], both institutions provide financial support to states in their monetary and development policies.[2] While the IMF and the World Bank are multilateral in their nature, since states participate through their quota to its capital base and membership, states also engage in bilateral financial activities especially through loans, guarantees or international aid.

Being a form of support from states, climate finance is relevant under international law not only because it finds its legal foundations in an international treaty, the United

[1] See the *Articles of Agreement of the International Monetary Fund*, Bretton Woods, adopted on 22 July 1944 as amended in 2008, entered into force on 27 December 1945, <http://www.imf.org>, Article I(v); and *Articles of Agreement International Bank for Reconstruction and Development*, adopted on 22 July 1944 as amended in 2012, entered into force on 27 December 1945, <http://web.worldbank.org>, Article I.
[2] DD Bradlow and DB Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010).

Framework Convention on Climate Change (UNFCCC),[3] but also because its rationale can be understood as a form of development cooperation in the field of sustainable development. It is therefore a sub-species of those inter-state economic supports often defined as 'international development' or 'development cooperation', whose nature as a branch or *lex specialis* of international law is still debated.[4] More specifically, climate finance is a jigsaw in the complex puzzle of the protection of the global environment within sustainable development pathways.

This chapter will provide an understanding of climate finance under international law on two levels. First, it will canvass the matter from the widest perspective, by addressing the relationship between climate finance and two core concepts and principles of international law: the general concept of sustainable development (section 1), and the special principle Common But Differentiated Responsibilities and Respective Capabilities (CBDR)[5] embedded in the UNFCCC (section 2).

Secondly it will systematize and clarify the international legal obligations related to climate finance stemming from the UNFCCC, and the international practices branching off from those obligations (section 3).

The main claim is that there is a reciprocal relationship between the norms buttressing international climate finance and the applicable general principles and concepts of international law. Such relationship is mutual because, while the law and practice of climate finance contributes to interpret and give significance to those two indeterminate formulas, at the same time the CBDR principle and the concept of sustainable development offer a systematic and normative justification for climate finance activities.

[3] United Nations Framework Convention on Climate Change, New York, adopted on 9 May 1992, entered into force on 21 March 1994, 1771 UNTS 107 [hereinafter and throughout the whole work 'UNFCCC' or 'the Convention'].
[4] P Dann, *The Law of Development Cooperation: a Comparative Analysis of the World Bank, the EU and Germany* (CUP 2013).
[5] The acronym is shortened to ease the reading.

However, when the analysis shifts to the specific obligations and practices of states and institutions, the 'building blocks' of climate finance are characterised by indeterminacy and contested formulas between contributing and recipient countries.

1. SUSTAINABLE DEVELOPMENT AND CLIMATE FINANCE

There is interplay between climate finance and the wider normative context of sustainable development. As a form of inter-states' support, climate finance is aimed at realising transformational shifts of many sectors in developing economies by bringing about mitigation and adaptation-related infrastructures, policies and projects. The rationales of climate finance are aligned with the ones of sustainable development. The latter has been notably defined by the 1987 World Commission on Environment and Development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." [6] Hence, sustainable development is a concept that seeks to strike a balance between two core interests by the international community: the one to further development and better living conditions, especially in least developed countries, and the one of avoiding that such development could severely alter social and environmental conditions for the generations to come.

Also climate finance is concerned with development, as it aims to set up the conditions for a low carbon future in countries that are in economic disadvantage and, at the same time, enhance their climate resilience of their livelihoods and ecosystems. At the same time, it takes into account inter-generational concerns, because investments on carbon mitigation and adaptation are most likely to spread their positive effects on people and the environment in the long term.

[6] World Commission on Environment and Development, *Our Common Future*, UN Doc. A/42/427, 4 August 1987, Annex, at 54.

If those are the similarities between the two concepts, unravelling the normative effects of sustainable development in the practices of international climate finance is a difficult task. The UNFCCC states that "[t]he Parties have a right to, and should promote, sustainable development".[7] However, it is contested whether a general 'right to sustainable development' by developing countries exists in international law,[8] particularly because it is uncertain whether sustainable development could be regarded as a right, a set of positive obligations, or a general principle of international law. Moreover, even supposing a clear legal nature of the concept, its actual meaning would be probably too indeterminate to create rules of conduct on states.[9]

In an international legal system dominated by the principle of states' sovereignty on their territories and on the exploitation of their national resources,[10] it is difficult to envision or even impose universal sustainable development standards without states' agreement.[11] Because of this conundrum, the International Court of Justice (ICJ) has understandably made little progress by defining sustainable development first as a 'concept'[12] and more recently as an 'objective'[13], while other international tribunals have dealt indirectly with its normative nature and generally stated its relevance for states activities and interpretation of treaties.[14]

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[7] UNFCCC, Article 3(4).

[8] P Birnie, A Boyle, and C Redgwell, *International Law and the Environment* (3rd edn, OUP 2009), at 115.

[9] PM Dupuy, 'Où en Est le Droit International de l'Environnement à la Fin du Siècle?' (1997) 101 *Revue Générale de Droit International Public* 873, at 886.

[10] By way of illustration, *Rio Declaration on Environment and Development* [hereinafter 'Rio Declaration'], UN Doc. A/CONF.151/26/Rev.1 (Vol.1), 14 June 1992, Annex I, Principle 2: "States have […] the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[11] On this issue and the need of 'environmental indicators' see G Handl, 'Sustainable Development: General Values versus Specific Obligations' in W. Lang (ed), *Sustainable Development and International Law* (Graham & Trotman 1995), at 40.

[12] *Gabcikovo-Nagymaros Project (Hungary vs. Slovakia*), Judgment, ICJ Rep.1997, 7, para 140.

[13] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Rep. 2010, 14, para 177. Sustainable development as an object is also mentioned in the preamble of the *Marrakesh Agreement Establishing the World Trade Organization*, adopted on 15 April 1994, entered into force 1 January 1995, (1994) 33 ILM 1144.

[14] See the *Iron Rhine ("IJzeren Rijn") Railway (Belgium vs. Netherlands)*, PCA Arbitral Award, 24 May 2005, para 59, where the tribunal acknowledged the relationship between the duty to prevent transboundary environmental damage and Principle 4 of the Rio Declaration on the concept of sustainable development. At the intersection between international trade law and environment see *United States – Import Prohibition of certain Shrimp and Shrimp Products,* Appellate Body Rep., WT/DS58/AB/R, 12 October 1998, para 131, where sustainable development served as an interpretative tool to deem the livestock of turtles an 'exhaustible natural resource' according to Article XX(b) of the General Agreement on Tariffs and Trade, adopted on 15 April 1994, entered into force on 1 January 1995 (1994) 33 ILM 1153.

A recent International Law Association draft report recognized that there has been "[…] little movement in the development of the legal foundations of sustainable development"[15] and that " […] the question as to the legal status of sustainable development [has proved - DR] sterile".[16] Yet regardless of the legally-binding nature of sustainable development, its presence in over 300 conventions –of which more than a third of multilateral character– certainly make it an "unavoidable paradigm" in current states' decisions and conducts.[17]

For Sands sustainable development amounts to a *lex specialis* of international law in the fields of development, environment and human rights,[18] for others it works as a "conceptual matrix",[19] a "meta-principle",[20] or even as a principle of international law[21] which itself contains further concepts that can clarify extant international obligations. These concepts are generally regarded to be i) inter-generational equity; ii) intra-generational equity; and iii) integration.[22] Inter-generational equity seeks to limit current levels of exploitation of natural resources and damages to the environment, in a way that future generations will be able to enjoy them in a similar or better manner than present generations.[23] Intra-generational equity, instead, addresses unbalances in the current economic and environmental systems, whereby developing nations face disadvantages in coping with their development needs, eradicating poverty and protecting their environment.

[15] This sounds in contrast with Principles 27 of the Rio Declaration which calls for cooperation in development of international law in the field of sustainable development.
[16] ILA Committee on International Law on Sustainable Development, (2012) Draft Report to the Sofia Conference, at 6, <http://www.ila-hq.org>.
[17] V Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 *European Journal of International Law* 377.
[18] P Sands, 'International law in the Field of Sustainable Development', in W Lang (ed), *Sustainable Development and International Law* (Graham & Trotman 1995) 54.
[19] Dupuy, 'Où en Est le Droit International de l'Environnement à la Fin du Siècle?', *supra* note 9, at 886.
[20] V Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (New edition. OUP 2001) 19, at 31.
[21] C Voigt, 'The Principle of Sustainable Development' in C Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP 2013) 146-57, at 154-5.
[22] Barral, 'Sustainable Development in International Law', supra *note* 17.
[23] E Brown Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8 *American University Journal of International Law and Policy* 19, at 21.

Intra-generational concerns are today widely recognized by relevant UN Declarations,[24] and buttress the legal machinery of many Multilateral Environmental Agreements (MEAs), including the UNFCCC with its CBDR principle.[25] Finally, the integration principle –also present in UN declarations, treaties and international disputes–[26] stands at the core of sustainable development as it requires states to take into account environmental concerns in their developmental activities. Referring to the principle of integration it has been argued that "[…] the most far-reaching aspect of sustainable development is that for the first time it makes a state's management of its own domestic environment a matter of international concern in a systematic way."[27]

Sustainable development, intended as an 'interstitial norm',[28] permeates numerous aspects of climate finance. The use of the integration principle to interpret climate finance provisions in the UNFCCC explains the role of climate finance as a sustainable development component in developing countries' policies as well as the need for single climate related projects and programmes to take into consideration other economic, social and environmental factors across all the phases of implementation. Supposing, for instance, the construction of a high-scale, internationally financed, hydropower plant in a developing country, while its contribution to the national renewable energy production and avoidance of

[24] See Rio Declaration, Principle 5; restated in *The Future We Want*, Report of the UN Conference on Sustainable Development, UN Doc A/CONF.216/16, 20-22 June 2012, Resolution 1, para 76.
[25] UNFCCC, Article 3(1).
[26] For highly participated declarations see Rio Declaration, Principle 4; see, more recently, the outcome document of the 2012 Rio de Janeiro UN Conference on Sustainable Development, *The Future We Want*, *supra*, para 3. As to MEAs see UNFCCC Article 3(4); *United Nations Convention on Biological Diversity*, adopted on 25 June 1992, entered into force on 19 December 1993, 1760 UNTS 79, Article 6(b) which reads that parties shall "integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies."; and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, adopted on 22 March 1989, entered into force on 5 May 1992, 28 ILM 649 Article 4(2)(a), where it is prescribed that each party must ensure that the generation of hazardous wastes "is reduced to a minimum taking into account social, technological and economic aspects."; although not an MEA, see also the *United Nations Convention on the Law of the Sea*, adopted on 10 December 1982, entered into force on 16 November 1994, 21 ILM 1261, Article 207(4), providing that states in controlling pollution from land-based sources shall take into account *inter alia* "the economic capacity of developing States and their need for economic development."
[27] Birnie, Boyle, and Redgwell, *International Law and the Environment*, *supra* note 8, at 85.
[28] Lowe, 'Sustainable Development and Unsustainable Arguments', *supra* note 20: his definition is similar to Lowe's 'meta-principle' discussed above.

emissions is clear, at the same time the principle of integration would require the state and other intervening international institutions to take into account the impacts from its construction and operation on the local environment and livelihoods. Indeed, as will be seen below, international institutions have incorporated sustainable development concerns in their own regulations.

Another example of this 'integrating effect' of sustainable development in climate finance can be found in the Clean Development Mechanism (CDM) of the Kyoto Protocol,[29] often hailed as a successful climate finance and technology transfer mechanism. Article 12 of the Kyoto Protocol, establishing the CDM, requires that mitigation projects should be beneficial to the achievement of the sustainable development of developing countries. In practice, CDM regulations require national administrations to release an 'approval letter', stating that the project falls within their national sustainable development strategies.[30] Because without the approval letter a mitigation project cannot be validated under the CDM approval cycle, the interpretation and application of the integration principle appears within discretion of developing countries.

These two last examples showcase the hurdles in defining enforceable sustainable development standards applying evenly to all states and other international subjects. The direct application of sustainable development standards in the national context is eventually an affair left to the discretion of governments according to the principle of states sovereignty in public international law. As aptly noted, legal claims to hold a state responsible under international law for violating sustainable development standards are unlikely to succeed before international tribunals, not only because of the indeterminacy of the concept, but also because there are no direct means for individuals or group within a state to hold such state internationally responsible. [31] Furthermore, a supposed uniform practice of sustainable

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[29] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, adopted on 11 December 1997, entered into force on 16 February 2005, UN Doc FCCC/CP/1997/7/Add.1, 10 December 1997; 37 ILM 22, Article 12 [hereafter and throughout the whole work 'Kyoto Protocol', 'the Protocol', or 'KP'].
[30] Decision 3/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, Annex, para 40.
[31] Birnie, Boyle, and Redgwell, *International Law and the Environment*, *supra* note 8, at 125-7.

development standards might prove detrimental, since sustainable policies and practices need flexible frameworks to take into account the peculiarities of each case.

Shifting the focus from states to international organizations, the principle of integration also sustains the activities of Multilateral Development Banks (MDBs), which are highly involved in climate mitigation and adaptation finance. For instance, the Environmental Impact Assessment (EIA) is a compulsory element of project financing in the World Bank's Operational Policies,[32] resulting in a complex screening process that integrates natural and social implications of a given project.[33] Other major MDBs also involved in climate finance follow suit by conditioning their support to their social and environmental safeguards.[34]

Finally, the principle of integration in sustainable development implicitly shapes the debate about the issue of 'country ownership' of climate-related funds. As will be seen more in detail, a substantive issue in the development of climate finance involves the modalities of access to funds by developing countries. The general claim by recipient countries is that not only access to funds should be streamlined, but the channelled sums should be managed at country level with less interference by MDBs or implementing agencies.[35] If it is uncontested that the principle of integration requires the framing and implementing of climate policies taking into account environmental and social standards, the direct access to climate funds by developing countries can result in a reduced regulatory influence by financing institutions on the environmental and social safeguards for each project. In other words, 'country-

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[32] World Bank, *Environmental Assessment*, OP 4.01, January 1999, as amended on April 2013, <http://go.worldbank.org/K7F3DCUDD0>.

[33] Ibid., para 2.

[34] See the Asian Development Bank's *Safeguards Policy Statement*, June 2009, <http://www.adb.org>; The European Investment Bank and European Bank of Reconstruction and Development are signatory of a declaration embracing environmental principles and practices stemming from the EU Treaties and EU secondary legislation See <http://www.eib.org/projects/topics/environment/epe/index.htm>. For the African Development Bank see its *Environmental and Social Assessment Procedures for Public Sector Operations*, June 2001, <http://www.afdb.org>.

[35] Expectedly this is a claim pervasive across all international development. See, notably, *Declaration of Paris on Aid Effectiveness*, OECD Doc. DCD/DAC/EFF(2005)1/FINAL, 3 February 2005, paras 33-4. On the role of implementing agencies in the delivery of climate finance see Chapter II below, at 91.

ownership' does not question whether to apply the principle of integration to single projects and programmes, but *who* is the regulatory authority to shape and apply the principle: either the recipient developing country or the financial institutions. Understandably, results might change, and thus the implementation of the integration principle, if implementing agencies are left out from the process.

To conclude, despite the uncertain status of sustainable development in international law, the concept offers some systematic clarity to the role of climate finance in international development. At the same time, some international provisions and processes of climate finance appear to absorb and implement key principles of sustainable development.

To be sure, this concept not only is constantly evolving, but there are also signs of a paradigm shift to other ideas, such as 'green economy', or 'green growth'.[36] Aside from some reasoned critical views,[37] however, the concept of sustainable development is indeed useful to provide some legal clarifications as to the 'place' of climate finance in international law.

2. THE ROLE OF THE COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND RESPECTIVE CAPABILITIES PRINCIPLE

Shifting the discussion from a general contextualization of climate finance in international law to the specific realm of the climate change regime,[38] the principle of Common But

[36] E Morgera and A Savaresi, 'A Conceptual and Legal Perspective on the Green Economy' (2013) 22 *Review of European, Comparative & International Environmental Law* 14.

[37] Voigt, 'The Principle of Sustainable Development', *supra* note 21, generally criticizing that integration cannot be reached without a clear goal, which the concept lacks; and M Koskenniemi, 'Hegemonic Regimes' in Margaret A. Young (ed), *Regime Interaction in International Law* (CUP 2012) 305-324, at 319-20, arguing that the linguistic hybrid of 'sustainable development' is used to formally conceal unsolved political struggles between international legal regimes.

[38] For climate regime it is here meant the body of provisions and regulations comprising the climate change treaties, and the decisions of the Conference of the Parties of the UNFCCC and the Meeting of the Parties of the Kyoto Protocol, the two supreme bodies of the conventions. On the climate treaties as a regime see, implicitly, also B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, at 507.

Differentiated Responsibilities and Respective Capabilities (CBDR) and the specific international obligations on climate finance appear to be in a symbiotic relationship: the evolving implications from this principle reflect the developments occurred in climate finance since the entry into force of the UNFCCC.

2.1. The evolving nature of the CBDR principle

Article 3(1) of the UNFCCC reads:

> "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."

Despite its 'soft' language marked by the use of the verb 'should' instead than 'shall', this provision lays down a differentiation amongst states, assigning a greater share of responsibility and commitments to the developed ones. As Hey explains, "[t]he concept of common but differentiated responsibilities in international environmental law entails that while pursuing a common goal States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake."[39]

To be sure, differentiations among countries agreed in the context of international issues that necessitate concerted action are not new to international law. Examples span from the International Labour Organization Constitution, to the system of preferential treatment in the General Agreement on Tariffs and Trade, or to the governance arrangement of the common Seabed Area in the UN Convention of the Law of the Sea.[40] In the field of international environmental law, the CBDR is present in several MEAs and multilateral declarations. Apart from being a cornerstone of the UNFCCC regime, the principle has until

[39] E Hey, 'Common but Differentiated Responsibilities', 2011, Max Planck Encyclopaedia of Public International Law, online ed., para 1.
[40] Respectively, *The Constitution of the International Labour Organization*, adopted on 1 April of 1919, entered into force on 28 June 1919, available as amended at <http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO>; and *supra* notes 14 and 26.

recently worked as a tenet in multilateral climate negotiations for developing countries to claim minor commitments and increased financial and technological support.[41]

The main effect of CBDR in the climate regime is that it alters and deviates from the principle of sovereign equality between states,[42] to create a specific treatment justified by equity considerations. In other words, the formal equality guaranteed through the principle of sovereignty is replaced by a more substantive equality, based on the multilateral agreement of the Parties.[43] In fact, in a formal application of equality among states, differentiations are left to the different levels of power and to the relations among nations.[44] The need of closer cooperation to tackle global environmental threats such as climate change has moved the redistribution of responsibilities from the area of power to the one of law by progressively developing principles of differentiations and substantive equality.

However and in a similar fashion to the case of sustainable development, it is unclear what the normative effects and legal nature of this principle are. Scholars seem to agree on the lack of sufficient *opinion juris* to qualify it as a custom of international environmental law.[45] Referring to the wording in the UNFCCC, the CBDR principle has been defined as a "soft binding obligation",[46] or even as "a non-legally-binding concept"[47]. Even views about its normative effects are contrasting, with some arguing that the CBDR has not been helpful

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[41] See, for instance, *The Future We Want*, *supra* note 24 , para 91.
[42] As codified in the UN Charter, Article 2(1).
[43] P Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' (1999) 10 *European Journal of International Law* 549, at 551.
[44] Soltau correctly notes that "in reality, of course, states vary widely with respect to their military power, economic might, and strength if their institutions." See F Soltau, *Fairness in International Climate Change Law and Policy* (CUP 2011), at 180.
[45] Ibid., at 190.; CD Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98 *The American Journal of International Law* 276, at 299.; and P Cullet, 'Differential Treatment in International Law', *supra* note 43, at 579.
[46] Ibid, at 575.
[47] Soltau, *Fairness in International Climate Change Law and Policy*, *supra*, at 190.

in practice,[48] and others that it constitutes an inescapable common ground from which climate negotiations must build on.[49]

Despite the different language,[50] the substantive effect of the CBDR principle in the UNFCCC regime is similar to the one of sustainable development. It is widely accepted that a strong interaction exists between the two principles, both embracing strong equity, inter-generational,[51] and intra-generational concerns.[52] In particular, through years of practice in norms implementation and negotiations, both the CBDR and sustainable development principles have been subject to continuous evolution. When Barral notes that the meaning of sustainable development varies according to the changing social, environmental and scientific scenario,[53] the same seems to apply to the CBDR principle in the UNFCCC.

The evolving character of the CBDR principle can be traced from the time of negotiating the UNFCCC text, when the broad political set consisted of a division between the developed and developing countries interests.[54] The rationale for the inclusion of the CBDR in the text was to lay down a principle that would have taken in consideration the historical responsibilities of advanced economies and the need of support for the developing countries' group. This resulted in a set of more onerous commitments by developed (Annex

[48] Because "(1) There is no agreement on what it means; (2) there is no agreement on when it applies; (3) it is over-argued; and (4) it breeds laziness in the negotiating process." S Biniaz, 'Common but Differentiated Responsibilities' (2002) 96 *American Society of International Law Proceedings* 358, at 359.

[49] J Brunnée and S J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010), at 166; and E Brown Weiss, 'Common but Differentiated Responsibilities' (2002) 96 *American Society of International Law Proceedings* 358, at 366.

[50] In the UNFCCC it is stated the developing countries have a right and obligation to sustainable development, while parties to the Convention only *should* protect the climate system in accordance with the CBDR principle (respectively UNFCCC, Articles 3(4) and (1)).

[51] Brown Weiss, 'Common but Differentiated Responsibilities', *supra* note 23; and Hey, 'Common but Differentiated Responsibilities', *supra* note 39, at para 5.

[52] Hey, ibid., para 12, stressing that "the concept of common but differentiated responsibilities can be understood as a translation of the concept of intra-generational equity to the inter-State level."

[53] Barral, 'Sustainable Development in International Law', *supra* note 17, at 382-3.

[54] D Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal of International Law* 451, at 478 and 501.

I) Parties[55] and in the subsequent adoption of the 1997 Kyoto Protocol imposing binding emissions caps only to Annex I countries.[56]

The political scenario showed signs of change from 2007, when the UNFCCC Conference of the Parties (COP), the supreme decisional body of the Convention[57] adopted a negotiating roadmap, the Bali Action Plan (BAP), with a view of finding a new global agreement on crucial aspects of climate change, including enhanced mitigation measures by the developed *and* developing countries groups.[58] At the 2009 COP meeting in Copenhagen, where high hopes were cast on a new comprehensive agreement on climate, the focus of negotiations shifted on getting major developing economies such as China and India, to formally adopt clear mitigation commitments. This led to a backlash in negotiations which still remains live.[59] After more than fifteen years from the adoption of the UNFCCC, the environmental and economic conditions grounding a future multilateral agreement on the climate have changed, given the sheer rise of emissions[60] and higher economic growth rates of some developing countries.[61] Such shift entailed a call by some for further differentiations within the developing countries group, which would inevitably affect the conceptualization of the CBDR principle.[62] In the negotiations for a post-2015 agreement set up under the 'Durban Platform for Enhanced Action'[63] on climate this resulted in a progressive "softening the edges of the CBDR principle".[64]

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[55] UNFCCC, Article 4(2) and (3).
[56] Kyoto Protocol, Article 3, and Annex B.
[57] UNFCCC, Article 7.
[58] Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008, para 1(b)(i) and (ii).
[59] D Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem' (2010) 104 *American Journal of International Law* 230, 232.
[60] It is estimated that by 2004 and 2005 Chinese GHGs emissions have overpassed US ones. See the World Resources Institute's Climate Analysis Indicators Tools at < http://www.wri.org/project/cait/>.
[61] Mostly the so called BASIC block, Brazil, South Africa, India and China.
[62] On this line see MJ Bortscheller, 'Equitable but Ineffective: How the Principle of Common but Differentiated Responsibilities Hobbles the Global Fight against Climate Change' (2009) 10 *Sustainable Development Law and Policy* 49.
[63] Given the failure in reaching agreement for a post-2012 period, the Durban COP shifted the expected year for a deal to 2015, with a view of developing "[…] a protocol, another legal instrument or an agreed outcome with legal force under the Convention […]": Decision 1/CP.17, *supra* note 9, para 2.
[64] J Brunnée and C Streck, 'The UNFCCC as a Negotiation Forum: towards Common but More Differentiated Responsibilities' (2013) 13 *Climate Policy* 589, at 596.

Starting from the 2009 Copenhagen Accord, passing through the Cancun Agreements at COP16, and more recently with the Durban Platform for Enhanced Action,[65] the cleavage between Annex and non-Annex I parties has been progressively reduced, and similarly the reliance on a static interpretation of the CBDR principle favoring developing countries as whole. The Copenhagen Accord, a last-ditch non-binding deal adopted by twenty-eight countries,[66] called developing countries to implement mitigation actions (National Appropriate Mitigation Actions - NAMAs) that could be measured, reported, and some of them internationally financed.[67] At the following COP16 in Cancun, the COP formalized the outcome of the Copenhagen Accord into a COP decision:[68] the use of an almost identical language to embark developed and developing countries' onto future mitigation efforts was accompanied by a less prescriptive language for all parties in relation to mitigation commitments.[69] Finally, a significant step has been done in 2011 in Durban, where the COP established another negotiating platform to come up with an agreement no later than 2015.[70] As has been noticed, the striking feature of the COP decision laying down the nuts and bolts for the Durban negotiating path is that the CBDR principle is recalled only in marginal provisions,[71] without even being mentioned in the preamble as often happened before.

The changing nature of the CBDR principle reflects the political balances among UNFCCC Parties: the developed countries block, with the US at the front, sets as a condition to a future agreement on the climate the adoption by major developing economies of clear emissions targets. Concurrently, emerging economies are reluctant to enter the path of pre-set emissions targets, which would imply abatement costs and limitations to economic development. To some this represents a better way to understand the CBDR both in

[65] Respectively, Decision 2/CP.15, *supra* note 14; Decision 1/CP.16, *supra* note 15; and Decision 1/CP.17, *supra*.
[66] In the following months 141 states have associated with it. See L Rajamani, 'The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves' (2011) 60 *International & Comparative Law Quarterly* 499, at 500.
[67] Copenhagen Accord, para 5.
[68] At the Copenhagen Conference the COP only 'took note' of the Copenhagen Accord. Meaning that there was no consensus on formally adopting the document text.
[69] Rajamani, 'The Cancun Climate Agreements' , *supra* note 66, 503.
[70] Decision 1/CP17, *supra* note 63.
[71] Decision 2/CP17, Ibid.; and L Rajamani, 'The Changing Fortunes of Differential Treatment in The Evolution of International Environmental Law' (2012) 88 *International Affairs* 605, 618.

economic[72] and political terms.[73] To others it marks a new challenging period for the conceptualization and application of the principle.[74]

2.2. The symbiotic relationship between the CBDR principle and climate finance

As for the case of sustainable development, there is strong interaction between the legal obligations on climate finance and the CBDR principle, mainly in a way that the evolutive nature of the latter influences the former. It is widely recognized that a crucial component of the CBDR principle consists of providing financial support countries that are less able to cope with global warming.[75] In such a context the UNFCCC contains a relevant provision that more than an obligation has the nature of a binding statement by the 'differentiated' developing countries. Article 4(7) reads:

> 'The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.'

Arguably, this provision shows a prime characteristic of climate finance in the context of the CBDR principle and international law. It constitutes a condition for the implementation of developing countries' climate change measures, but, while the provision was adopted in 1992 including current major economies, the current negotiations and developments within the COP reveal a shift towards further differentiations among the non-Annex I countries.

It is noteworthy that in the UNFCCC text there are already differentiations among developing countries. Article 4(8-9) obliges the developed countries to "give full

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[72] See Stone, 'Common but Differentiated Responsibilities in International Law', *supra* note 45, at 284, distinguish between three hypothetical economic understanding of CBDR and arguing the current one to be inefficient.
[73] Bortscheller, 'Equitable but Ineffective', *supra* note 62, at 51.
[74] L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61 *International & Comparative Law Quarterly* 501, at 507-511.
[75] Cullet, 'Differential treatment in international law', *supra* note 45; and Hey, 'Common but Differentiated Responsibilities' *supra* note 39.

consideration" of financing needs for developing countries that have a specific position given the adverse effects from global warming and the severe impacts of implementing response measures on their territories.[76] Special consideration must also be given to the Least Developed Countries (LDCs). These two paragraphs draw additional differentiations among the developing countries' group. As will be seen, their implementation has almost entirely been centered on the financing of adaptation measures in LDCs or other developing countries that would suffer disproportionate burdens from climate change.[77] Finally, another differentiation in the financing obligations of the UNFCCC consists of recognizing the special position of those states that, after the dismantling of the USSR, have been facing a transition toward the establishment of market economies. Article 4(3) of the Convention obliges only parties listed in Annex II –not including economies in transition– to provide financial support to developing countries. As has been noted, the following practice of climate finance within the UNFCCC made the status of those economies in transition even more marked, since they have been *de facto* eligible to receive support under the Article 11 Financial Mechanism of Convention.[78]

The CBDR can be framed in different ways, depending on the political balances between the parties.[79] As for the concept of sustainable development, it works as a common denominator for negotiations, but can also serve as an interpretative tool and shape specific provisions of the climate change regime. Climate finance stands at the heart of the

[76] UNFCCC Article 4(8) offers the following, non-exhaustive, list of countries: (a) Small island countries; (b) Countries with low-lying coastal areas; (c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay; (d) Countries with areas prone to natural disasters; (e) Countries with areas liable to drought and desertification; (f) Countries with areas of high urban atmospheric pollution; (g) Countries with areas with fragile ecosystems, including mountainous ecosystems; (h) Countries whose economies are highly dependent on income generated from the production, processing and
export, and/or on consumption of fossil fuels and associated energy-intensive products; and (i) Land-locked and transit countries.
[77] See Chapter II below, at 55.
[78] F Yamin and J Depledge, *The International Climate Change Regime: A Guide To Rules, Institutions And Procedures* (CUP 2004), at 573.
[79] Stone, 'Common but Differentiated Responsibilities in International Law', *supra* note 45.

implementation of the CBDR principle. Yet the current shift of significance of the latter is likely to affect the legal architecture of the former.

There are already some developments that redesign and soften the sheer division between Annex I and non-Annex I countries also in climate finance. For instance, as a unilateral move, since January 2013, the European Union Emissions Trading Scheme has been accepting CDM offset credits stemming only from projects in LDCs,[80] thus excluding the eligibility of credits from countries like China and India which host the biggest share of CDM projects.[81] Similarly, LDCs are considered the primary target of finance in the context of adaptation to climate.

Finally, the CBDR principle informs the process of access and disbursement modalities and the balancing of scarce resources between mitigation and adaptation needs. As will be seen below, access and disbursement modalities set up a formal process of countries eligibility for tapping into certain multilateral trust funds; at the same time they 'divide the pot' of sourced money between potential recipients. It is evident that, depending on how the CBDR principle is understood, different solutions ensue with practical effects on ways finance is channeled.

Given these evolving character of the CBDR principle, it might be the case that, if until recently developing states have been successful in working as a united block, the current blurring of the Annex I/non-Annex I divide might also impact on climate finance flows, building up selective country groupings within the developing ones.

[80] See Directive 2003/87/EC of the EU Parliament and the Council, OJ L. 275, 32, as amended by Directive 2009/29/EC, OJ L.140/63, Article 11a(4).
[81] See <http://cdm.unfccc.int/Statistics/Public/CDMinsights/index.html>.

3. THE BUILDING BLOCKS OF INTERNATIONAL OBLIGATIONS RELATED TO CLIMATE FINANCE

While sustainable development and the CBDR principle provide the general legal framework for the climate finance machinery, other substantive obligations –stemming either from the climate change regime or from the practices in international development– further define some core elements for their implementation. Noticing how these practices affect the specific understanding of the CBDR principle, Hey claims that "another side of the story"[82] emerges when one addresses the actual building blocks of climate finance obligations.

The purpose of this section is to concentrate on these core practices, with a view of understanding the contested grounds where states and international institutions play when acting as contributors, intermediaries, and recipients of finance.

Two different aspects are taken into account. First, when approaching the issue of the multilateral obligations related to climate finance, the problem of incremental costs on one side, and additionality and predictability of financial flows on the other are at center stage. The second aspect is based on the assumption that the specific legal relationship in the financial transaction between the entities providing the finance and the recipient state sheds light on the way international obligations of climate finance are actually implemented. The obligations and the conditions that the international actors agree on in climate-related financial instruments reflect such relationship. In particular, two elements are relevant: i) the type of financial instrument (grant, concessional loan, market based loan, etc.; and ii) the conditionalities often attached to the core financing obligations.

[82] Hey, 'Common but Differentiated Responsibilities', *supra* note 39, para 13.

3.1. Incremental costs

The concept of incremental cost is a crucial limitation to the financing obligations of developed countries in the UNFCCC, as it is markedly less than the full costs of a climate-related project or programme.

The financing obligation in Article 4(3) of the UNFCCC states that developed countries are to cover just the “full incremental costs” for the implementation of climate related measures in developing countries. The concept of incremental cost in climate finance amounts to the additional economic burden sustained by developing countries to implement a climate related project or programme that diverts from a business-as-usual scenario. A hypothetical case could be made of a developing country willing to reduce local pollution and GHGs emission of one of its cities by renovating its public road transportation: the incremental costs to be covered by international climate finance would then broadly amount to the difference between the costs of acquiring, for instance, buses with unleaded gasoline engines (business-as-usual benchmark), and the costs of modernizing the fleet with methane vehicles, assuming this last solution being more expensive.

Despite the proven difficulty in applying this concept for specific programmes or projects, public climate finance in the UNFCCC still hinges on incrementality and is likely to do so also with the operationalization of the recently-established Green Climate Fund. Incrementality is nonetheless challenged: the shifting balances in international negotiations show how developed Annex I counties are increasingly less willing to pay for the full incremental costs of projects in emerging economies such as China and India.

The UNFCCC substantive obligations by Annex II Parties consist of the provision to developing Parties of two different kinds of finance:

1– The covering of the *full costs* incurred by developing countries in setting up a national inventory of greenhouse gasses’ emissions and in preparing communications to the UNFCCC Secretariat; and

2– The covering of the *full incremental costs* for the implementation of –*inter alia*– mitigation and adaptation policies and programmes.[83]

The first type of finance has not proven controversial, because aimed to fund relatively inexpensive activities, such as the establishment of national inventory of anthropogenic GHGs emissions in developing countries and the preparation of national communications to the UNFCCC Secretariat according to Article 12 of the Convention.

The challenging commitment is rather the second, because the range of activities and the quantity of financial transfers required are vast.

Right after the adoption of the Convention, Sands commented that these provisions might have emerged as "[…] one of the more unusual, and perhaps costly commitments in the Convention."[84] Apart from the abatement costs for industrialized countries in reducing emissions, Sands' comment proved right, given that the actual financing needs dwarf the funds actually provided by the developed states under the UNFCCC.[85] The main rationale behind the introduction of the incremental costs concept lies in the intention by industrialized states to limit their contribution to just the additional costs sustained by developing countries in implementing the general commitments of the Convention.[86]

To be sure, the presence of the incremental costs' requirement in multilateral environmental financing is not limited to the UNFCCC but can be found in other MEAs adopted during the same period. The concept made its first appearance in the Multilateral Fund of the Montreal Protocol on the Substances that Deplete the Ozone Layer,[87] and has

[83] UNFCCC, article 4(3) recalling the list of climate related measures to be adopted by all parties in article 4(1) [*emphasis* added].
[84] P Sands, 'The United Nations Framework Convention on Climate Change' (1992) 1 *Review of European Community & International Environmental Law* 270, at 275.
[85] B Metz, 'The Climate Financing Problem', in RB Stewart, B Kingsbury, and B Rudyk (eds), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009) 42-48.
[86] Bodansky, 'United Nations Framework Convention on Climate Change', *supra* note 54.
[87] *Montreal Protocol on the Substances that Deplete the Ozone Layer*, adopted on 16 September 1987, entered into force on 1 January 1989, 1522 UNTS 293, as amended in 1990, Article 10.

then been replicated in the 1992 UN Convention on Biological Diversity,[88] the 1994 UN Convention to Combat Desertification,[89] and the Kyoto Protocol.[90]

Since the creation of the Financial Mechanism of the UNFCCC the interpretation and application of incrementality has been *de facto* delegated to the appointed operational entity of the mechanism, the Global Environment Facility (GEF). Determining the incremental cost for funding under the GEF has proved controversial since the beginning,[91] with states representatives in the GEF Council providing contrasting interpretations. The basic agreement was that the GEF was to finance projects and programmes that would achieve global environmental benefits.[92] However, it was disputed whether also the costs for domestic environmental benefits should have been accounted into the notion of incremental costs, because, if so, the amount of finance for recipient countries would have been higher.[93] After an initial decision to exclude the costs for domestic environmental benefits,[94] in 2007 a renewed operational policy by the GEF confirmed the domestic component for the accounting of the incremental costs.[95]

What eventually emerges is that the practical identification of incremental costs is not only challenging, but highly dependent on the political context in which it is framed.[96] The current operational policy of the GEF explicitly recognizes that the individuation of

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[88] *Convention on Biological Diversity*, *supra* note 26, Article 20(2).
[89] *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, adopted on 12 September 1994, entered into force on 26 December 1996, UN Doc. A/AC.241/27, Article 20(2)(b).
[90] Kyoto Protocol, Article 11(2)(b).
[91] See Decision 11/CP.2, UN Doc. FCCC/CP/1996/15/Add.1, 29 October 1996, para 1(b), providing guidance to the GEF in adopting a pragmatic approach on the incremental cost application on case-by-case basis. This was reiterated in Decision 2/CP.4, UN Doc. FCCC/CP/1998/16/Add.1, 25 January 1999, para 3(c); and in Decision 5/CP.8, UN Doc. FCCC/CP/2002/7/Add.1, 28 March 2003, para 4(c).
[92] *Instrument Establishing the Global Environment Facility*, Geneva, adopted on 16 March 1994, 33 ILM 1273.
[93] A Jordan and J Werksman, 'Additional Funds, Incremental Costs and the Global Environment' (1994) 3 *Review of European Community & International Environmental Law* 81, at 84-5, referring to the difference between gross and net incremental costs.
[94] See GEF Council, GEF/C.7/Inf.5, 29 February 1996, para 16.
[95] GEF Council, GEF/C.31/12, 14 May 2007, para 21.
[96] See A Huhtala and P Ambrosi, 'Monitoring Climate Finance and ODA', May 2010, World Bank Development, climate and finance issues brief 1, <http://climatechange.worldbank.org>, at 8.; and Jordan and Werksman, 'Additional Funds, Incremental Costs and the Global Environment, *supra* 93 note, at 81.

incrementality is to be left on negotiations between all the actors in the project, with a central role given to the GEF Secretariat.

Moreover, it is still unclear what will be the future role of incrementality in the UNFCCC. At the 2010 meeting in Cancun the COP, while endorsing the 'Copenhagen pledge', did not clarify whether this money will cover the incremental or full costs of mitigation.[97] The following meeting in Durban clarified that the newly-established Green Climate Fund is to support both full and full incremental costs,[98] yet the modes and types such cost coverage are still under formulation by the Green Climate Fund's Board.

What stands from years of practice and literature on the argument[99] is that incrementality is practically determined through political processes and that, because it constitutes a quantitative limit to the climate finance obligations posed by developed states, it constitutes a ground of contention for current and future climate finance.

3.2. New, additional, adequate and predictable finance

While the limit set by incremental costs restricts the quantity of money to be transferred by Annex II countries, other substantive UNFCCC obligations spell out some guarantees for recipient countries on the *overall amount of finance*. Those requirements state that climate finance flows under the Convention shall also be *new, additional*, and that "[t]he implementation of these commitments shall take into account the need for *adequacy* and *predictability* in the flow of funds".[100] This formula has been proposed by the developing countries group during the negotiations for the Convention, but in that occasion its exact

[97] Decision 1/CP.16, *supra* note 15, paras 95-112.
[98] Decision 3/CP.17, *supra* note 9, Annex, para 35.
[99] See also C Streck, 'Ensuring New Finance and Real Emission Reduction: A Critical Review of the Additionality Concept' (2011) 2 *Carbon and Climate Law Review* 158; and J Werksman, 'Consolidating Global Environmental Governance: New Lessons from the GEF?' in N Kanie and PM Haas (eds), *Emerging Forces in Environmental Governance* (United Nations University 2004) 35.
[100] UNFCCC, Article 4(3) [*emphasis* added]. However at COP16 in Cancun states agreed to include adequacy and predictability in the 'hard' requirements of finance: see Decision 1/CP.16, *supra* note 15, para 2(d).

meaning was not specified, with the US even refusing its entry into the final text until the very end of negotiations.[101]

Similarly to the concept of incrementality, the practical definition of what can be earmarked as new and additional finance generated long-lasting debates and still there seems to be no accepted solution. Since the adoption of the UNFCCC text, the individuation of the counterfactual scenario against which one could recognize future funding as genuinely 'new and additional' appeared challenging. The basic understanding at the time of negotiations seemed to be that such finance should have added to and not be sourced from existing development aid. Yet, after almost two decades of that provision being into force, there are still no binding international standards on how to account for existing aid and, hence, measure new and additional finance, the only exception being the non-binding self-reporting activity under the OECD-DAC's Rio-Markers.[102] The issue is also inevitably linked with the one of finding a legal definition of 'climate finance' itself, because 'new and additional' are adjectives defining also the 'Copenhagen pledge' made by industrialized countries for long-term finance.[103] Being a legal requirement under the UNFCCC, 'new and additional' can be plausibly interpreted as a qualifier of such funds in the sense that what cannot be accounted as 'new and additional' would also not add to the fulfillment of the Copenhagen pledge. An alternative view might be that the rationale of novelty and additionality stands in a guarantee that climate finance shall not consist of existing foreign aid shifted for climate-related purposes. This is why, understandably, practitioners, think tanks and economics scholars are concerned about the question of accounting for new and additional finance, with the aim of extrapolating trends and compare them.[104]

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[101] Bodansky, 'United Nations Framework Convention on Climate Change', *supra* note 54, at 451.
[102] Streck, 'Ensuring New Finance and Real Emission Reduction', *supra* note 99, at 159-60.
[103] See the Copenhagen Accord.
[104] B. Buchner, A. Falconer, M. Hervé-Mignucci, and C. Trabacchi, 'The Landscape of Climate Finance 2012' (Climate Policy Initiative December 2012); and A Michaelowa and K Michaelowa, 'Coding Error or Statistical Embellishment? The Political Economy of Reporting Climate Aid', 2010, Zurich CIS WP No 56; A Atterige *et al*., 'Bilateral Finance Institutions and Climate Change: a Mapping of Climate Portfolios', SEI WP 2009, <

Apart from the text of the Convention, the issue has been replicated in the almost exact terms during the BAP negotiations, the new formula being that financial resources should be "adequate, predictable, sustainable, new and additional".[105] The following negotiating process for a new climate deal, passing through the Copenhagen Accord, the Cancun Agreements and Durban, rather than remaining stuck on the interpretative challenge of financial additionality, has wisely set up two mechanisms[106] for enhancing transparency in estimating climate finance flows, in this way creating a more solid ground to develop a common understanding. On one side, the Cancun and Durban COP established a new body, the Standing Committee on Finance under the COP. with the main functions of "[…] improving coherence and coordination in the delivery of climate change financing, rationalization of the financial mechanism, mobilization of financial resources, and measurement, reporting and verification of the support provided to developing country Parties[…]".[107] Among its various tasks, the Standing Committee must prepare biennial assessments of climate financial flows.

Another innovation is the NAMA registry, which seeks to create a virtual platform with transparent data on mitigation actions by developing countries, together with their eligibility and conditions to be internationally financed. As introduced above, the BAP recognized that non-Annex I countries would undertake measured and verified mitigation policies on their territories. Such efforts are labeled as NAMAs, in contrast with the parallel but supposedly more stringent "nationally appropriate mitigation commitments or actions by the developed countries".[108] The Copenhagen Accord and the Cancun Agreements provide

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http://www.sei-international.org/ >; and J Corfee-Morlot *et al.*, 'Financing Climate Change Mitigation: Towards a Framework for Measurement, Reporting and Verification, October 2009, OECD-IEA, COM/ENV/EPOC/IEA/SLT(2009)6.; see also the project AidData for climate change related development assistance at <http://www.aiddata.org>.

[105] Dec. 1/CP.13, *supra* note 58, para 1(e)(i).

[106] On this see also RB Stewart, B Rudyk, and K Mattes, 'Governing a Fragmented Climate Finance Regime' in Hassane Cisse and others (eds), *The World Bank Legal Review: 3* (World Bank Publications 2011) 363-388.

[107] Dec. 2/CP.17, *supra* note 9, para 121.

[108] Ibid., para 4.

that NAMAs are to be measured and verified by an independent international system and that, depending on the consent of the developing country, some of them can be eligible for international financing.[109]

A COP decision in the Durban meeting stresses the matching role of the NAMA registry, in the sense that mitigation measures reported by developing countries can be coupled with international finance for mitigation. While the registry receives information on a voluntary basis, it is likely that NAMAs published in the registry will be more successful in receiving the required finance, in particular through the Financial Mechanism.

The developments under NAMAs show the efforts by the COP to leapfrog the unwieldy debate on what constitutes 'new and additional' climate finance by setting up processes towards a clearer understanding of current efforts and needs. The aim is clearly to set the basis for a more efficient system of financial transfers, but also to indirectly create the future baselines and scenarios from which 'new and additional' efforts can be later gauged.

Along with novelty and additionality, the UNFCCC Parties agree on the need to seek predictability and adequacy of financial flows, meaning that industrialized economies would promote an economic support to be constantly delivered and quantified according to the contingent needs of developing countries. The UNFCCC text and several COP decisions stress the need to consider predictability and adequacy when implementing the financial commitments of the Convention. The UNFCCC bodies have been promoting initiatives to improve the adequacy of flows, an example being the National Economic, Environment and Development Study (NEEDs) Project, which however has proven ineffective;[110] or the more

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[109] See Copenhagen Accord, para 5; and Dec.1/CP.16, *supra* note 15, para 53.

[110] The NEEDs project is a comprehensive study on financial needs assessment to implement mitigation and adaptation measures in developing countries according to their national development plans. According to Article 12(4) of the Convention, developing countries can propose specific projects for international financing. Para 7 of the same article requires the COP to arrange for the provision of such finance and carry on an assessment of its needed amounts. Being a voluntary project, only eleven countries participated to the development of national

recent (and more useful) work programme on long-term finance, which clarified and proposed means to overcome some policy barriers in promoting mobilization, enabling environments between international actors and within developing states[111]

Despite the recent pledge of USD 100 billion per year by 2020 ('Copenhagen pledge'), the developed countries block might not yield stable financing flows for three reasons: first, the pledge is not legally binding under international law, meaning that if industrialized states collectively or individually fail to provide the pledged sums, no international responsibility would ensue. Second, the uncertainty on finding the sources to fulfill the pledge, coupled with the current budgetary restriction of many industrialized countries due to the unstable global financial situation make the quest of predictability and adequacy even more challenging. Thirdly, there is no 'burden-sharing agreement' between industrialized countries on the individual efforts of their public finance contributions.

In regards to the predictability and adequacy of climate finance, Yamin and Depledge note their importance for a challenge like climate change, against the background of the political and technical difficulties from developed countries governments to formally commit to stable financial flows beyond different electoral cycles.[112] A determination procedure was set up to enhance the predictability of the funds. Article 11(3) of the Convention requires the COP to determine the necessary amount of finance to implement its commitments. The determination procedure was further specified in the Memorandum of Understanding between the COP and the GEF, where a collaborative process of determination was set.[113] Such process required the GEF replenishment to be 'based on' the COP's assessment of

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reports. A 2010 Synthesis report by the UNFCCC Subsidiary Body for Implementation (UN Doc. FCCC/SBI/2010/INF.7) has not received comprehensive feedback and following by states and the COP.

[111] *Report on the outcomes of the extended work programme on long-term finance*, UN Doc. FCCC/CP/2013/7, 1 November 2013.

[112] Yamin and Depledge, *The International Climate Change Regime*, *supra* note 78, at 267.

[113] Memorandum of Understanding between the COP and the GEF, Decision 12/CP.2, UN Doc. FCCC/CP/1996/15/Add.1, 29 October 1996, Annex, para 9.

funding, while the GEF should "clearly indicate the rationale by which the amount described as "new and additional" is regarded as such, vis-à-vis other sources of ODA [Official Development Assistance - DR]."[114]

The joint determination by the GEF and the COP has been *de facto* replaced by an assessment process between the GEF and its trustee, the World Bank. The results would then be communicated directly to contributing states for the replenishment face of the GEF. Such practice has not guaranteed predictability, in the sense of a long-term vision of financial flows. Rather, it left to contributing countries the final determination of the amounts to be channeled. Moreover, the process applies only to resources managed through the Financial Mechanism of the Convention, thus excluding other extra-UNFCCC financing activities, which as will be seen currently represent the majority of climate finance.

3.3. Financial instruments

The issues discussed above give context to the more general principles and concepts applicable to climate finance. However, exploring the means how international obligations are actually implemented can reveal the legal and financial relationships under international law between the states and intermediary international institutions.

Indeed, the implementation of UNFCCC's requirements on climate finance and their rationale can be further explained through the current practice of financial instruments agreed between states, and other international institutions. This is because such instruments often consist of bilateral agreements,[115] agreements between an international organization and the recipient state, or international contracts containing the type of support, the modalities of principal and interest repayment, and the 'conditionalities' agreed in order to transfer the various tranches of payments for the project. Conditionalities to financial streams are a particular feature of development finance to sovereign entities. They generally consist

[114] Annex to the Memorandum of Understanding between the COP and the GEF, Ibid.
[115] Traditionally called also 'foreign aid agreements'. P Dann and M Riegner, 'Foreign Aid Agreements', Max Planck Encyclopaedia of Public International Law, online ed., May 2011.

of 'strings' or requirements that condition the delivery of finance to specific internal measures that the recipient state must enact. Since they raise specific debates on the future of climate finance, they will be treated separately below.

Bearing in mind that the object of this discussion involves primarily public international climate finance, the realm of financial instruments is extremely complex and ranges from typical ODA instruments to debt and equity profit-aimed participations. A conceptual line is often traced between ODA and other flows in development finance.

ODA is a statistical definition –conventionally agreed between international organizations such as the OECD, the IMF and the World Bank– which identifies financial support by industrialized states less onerous on recipients than market-rated instruments, and holding the specific aim of fostering developing countries development, LDCs in particular. The OECD states that distinguishing feature of ODA is a 'grant element' in the financial transaction. "[T]he grant element is defined as the difference between the face value of the loan and the discounted future debt service payments to be made by the borrower. The discount rate used in the ODA calculation is constant over time and across currencies, and fixed at 10 per cent."[116] Therefore, to be qualified as aid, a financial instrument between a contributing institution[117] and a recipient country must hold three necessary characteristics: i) it has to have a development objective (in the case of climate finance, climate change resilience); ii) a fourth of the finance must be a grant, meaning that part of the finance will not be paid back by the recipient country; iii) the remaining sums can be asked back but at a 'concessional' rate of interest to be lower than market rates.[118]

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[116] OECD-DAC, *Converged Statistical Reporting Directives for the Creditor Reporting System and the Annual DAC Questionnaire*, OECD Doc. DCD/DAC(2013)15/FINAL, 11 June 2013, at para 16.

[117] The development aid jargon often refers to supporting countries as 'donor' states. That adjective is improperly used, as donations are limited to the grant component of the support. More than donors, even in aid assistance states are often lenders. They lend sums with less onerous conditions, but they still lend and do not donate money. Therefore, in the context of climate finance this work adopts the adjective 'contributor' to qualify developed states.

[118] OECD-DAC, *Converged Statistical Reporting Directives for the Creditor Reporting System and the Annual DAC Questionnaire*, *supra*, para 44.

What does not constitute ODA takes usually the form of other debt instruments, often loans at market-level interest rates, equity, meaning that the public finance from a developed country takes the form of direct investment by participating with shares into specific project and programmes, and export guarantee to private sector enterprises from developed countries. The matter is made more complex by two facts: firstly, such instruments have most of the times mixed components (grant, concessional and non-concessional) and sources (private and public);[119] secondly, financed projects sometimes have mixed goals among which climate change mitigation and adaptation represents just a share.[120]

The difference between ODA and non-ODA, concessional and non-concessional finance is relevant in assessing the implementation of UNFCCC provisions by developed countries. This, in fact, raises some interpretative questions about the financial nature of UNFCCC obligations on climate finance.

Article 4(3) of the Convention indicates that substantive finance obligations should be implemented according to the Financial Mechanism defined in Article 11. The latter not only states that finance under the Financial Mechanism should be on a grant or concessional basis, but in paragraph 5 it also provides that:

> 'The developed country Parties may also provide and developing country Parties avail themselves of, financial resources *related to the implementation of the Convention* through bilateral, regional and other multilateral channels.'[121]

As will be seen in the next chapter, this latter provision not only ushered into the climate finance arena numerous international institutions, but it also states that their

[119] See, for instance, the GEF/IBRD co-financed project 'Western Kenya Integrated Ecosystem Management' GEF Project Document AFTS2, 25 January 2005, Project ID p072981, wherein the GEF provided USD 4.1 in grant in co-financing and Kenya accessed further USD 3.5 through an IBRD Specific Investment Loan. Data <http://www.worldbank.org/projects >.

[120] See, for instance, the multi focal area GEF project 'Recovery and Protection of Climate and Biodiversity Services in the Paraiba do Sul Basin of the Atlantic Forest of Brazil', Project ID 4834, which mingles climate and biodiversity benefits, <http://www.thegef.org/gef/project_detail?projID=4834>.

[121] [*emphasis* added].

financing activity *can account for the implementation* of the Convention's financial obligations on Annex I countries.

The relation between this provision and the current practice of financial instruments leads to two alternative interpretations about the actual nature and rationale of climate finance:

1– Non-concessional instruments by multilateral or bilateral institutions do not belong to the bulk of UNFCCC-covered finance;

2– or, if they do, then finance for UNFCCC's implementation is *de facto* not fully based on grant and concessional loans towards developing countries, but it also embraces public finance through non-concessional debt and equity instruments at market rates.

On the legal plane, choosing one interpretation or the other is crucial for compliance, regardless of the issue of accounting for such finance. The binding language of Article 4(3) suggests the existence of an international obligation of results (the covering of full incremental costs). Hence, an interpretation under the "ordinary meaning" of the text in the context of the Convention, [122] as in the first hypothesis, would cut out from compliance all those financial instruments that –despite aimed at climate related measures– are non-ODA or non-concessional in character. Conversely, the actual practice after almost twenty years since the coming into force of the UNFCCC seems to have shifted toward the second interpretative option.[123]

As there are no official data on the amount of transferred finance, this also applies to the type of financial instruments used. A recent report by an international think tank has found that about a third of bilateral climate finance takes the form of non-concessional loans and, in tiny portion, equity. The bulk of finance flowing through multilateral channels

[122] *Vienna Convention on the Law of Treaties*, adopted on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, Article 31(1)
[123] Ibid., Article 31(3)(b).

follows suit, with the result that almost half of bilateral and multilateral funds are channeled via non-concessional loans.[124]

Also the 'Copenhagen pledge', formally recognized by the COP in 2010,[125] seems to suggest the second option, as it abandoned any referral to grant and concessional components of climate finance, but it extended its sources also to private capital.[126]

Because COP decisions are adopted through consensus and represent a form of decision and law-making within a treaty regime, it is possible to affirm that climate finance legally includes concessional and non-concessional instruments. This, however, inevitably affects the understanding of the basic rationale of climate finance, especially if confronted with the CBDR principle and sustainable development. Hence, if climate finance is a form of support to developing countries, justified by their particular status and need to develop sustainably, such support does not mean gratuity. Apart from grant instruments, developing states agree on concessional or non-concessional debt instruments.

This normative shift of the 'Copenhagen pledge' has a twofold effect. On one side, it expands the scope of the Convention to financial instruments not clearly covered before. On the other, it might conflict with the original (literal) interpretation of the Convention provisions on financial instruments. The issue, however, is unsettled and is still ground of conflict between developed and recipient countries particularly in the context of future, long-term finance.

A final type of financial instrument that is peculiar to the case of climate mitigation is the so called 'carbon finance', which relies on the existence of marked-based regulatory

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[124] See Buchner, *et al*, 'The Global Landscape of Climate Finance 2013', CPI Report, <http://climatepolicyinitiative.org/publication/global-landscape-of-climate-finance-2013/> .
[125] Decision 1/CP.16, *supra* note 15.
[126] Decision 1/CP.17, *supra* note 9, para 125. In addition, the UN Secretary General High Level Advisory Group on Climate Financing in its report clearly embraces non-ODA finance as eligible in the context of future developing countries' finance needs. See Report of the Secretary-General's High-Level Advisory Group on Climate Change Financing, 5 November 2010, <http://www.un.org/wcm/webdav/site/climatechange/shared/Documents/AGF_reports/AGF%20Report.pdf>, at 12-16.

schemes of GHGs mitigation, and of markets of carbon allowances and credits. A more in depth account of how marked-based mechanisms work is given the next chapter.[127] Here is noteworthy that one of the Kyoto Protocol's marked-based mechanisms, the Clean Development Mechanism (CDM), is designed to support the realization of mitigation projects in developing countries. Finance for projects is sourced thanks to the sale of Certified Emissions Reductions (CERs) –a kind of offset credits– for the amount of greenhouse gasses emissions abated by each project. CERs can be sold in carbon markets that recognize such credits as eligible for compliance in international and domestic emissions trading schemes.

In terms of financial sources the CDM is a hybrid instrument in the sense that depending on the actual financer for projects and purchaser of CERs, sources can be either public or private. At the same time, the CDM hinges on a complex international administrative framework to be explored later. Therefore, carbon finance does not fully enter within the conceptual boundaries adopted in this work. Nevertheless, the CDM is worth a mention among financial instruments, not because it is an instrument *per se*, but for the particular position of developing countries. Rather than being direct recipients of finance, they benefit from additional support for mitigation activities and technology transfer without necessarily entering into direct grant or debt transactions: often a relief for developing states budgets.

3.4. Conditionalities

Rarely does international aid or financial support come without strings attached.[128] Apart from the amounts, goals and modalities, contributing states and climate finance institutions often attach sets of contractual conditions in their financial instruments (in finance towards sovereigns they are called 'conditionalities') aimed at safeguarding repayment and the sound and efficient spending toward their goal. Conditionalities stand at the heart of the legal

[127] See Chapter II below, at 67.
[128] P Collier, *et al*., 'Redesigning Conditionality' (1997) 25 *World Development* 1399.

relationship between the releaser and the recipient of finance and have been ground of longstanding contentions between contributor and developing countries, because they limit political discretion, can and add burdens and transitional costs to the process of channeling development finance.

The main rationale lying at the basis of conditionalities is the interest from the lending entity in guaranteeing that its support is efficiently managed and spent. However, sometimes fierce critiques have been cast against certain conditionalities which have been seen to conceal specific political agendas from contributors.[129]

To be sure, the practice of conditional lending to sovereign entities can be traced back for centuries.[130] After the Second World War and with the rise of globalization, its contemporary version has as main actors multilateral financial institutions with the IMF and the World Bank as the two core multilateral lenders for stabilization and development purposes.[131] The practice of conditionalities in these two institutions has changed through the years, so that different types have been imposed for different aims.[132] In particular, Collier *et al*. highlight that among the intrinsic objectives of conditionalities are the ones of inducement and selectivity.[133] Conditionalities with inducement bring "[…] the government to do something it would not have chosen to do"[134] in the absence of aid, while selectivity expresses the focus of finance delivery on those developing countries that already provide a satisfactory legal and political environment to make finance expenditures effective.

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[129] C Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011).

[130] One notable example is the bankruptcy of the Florence-based Bardi bank due to their unpaid loans made to Edward III of England for the Hundred Years' War. Conditionalities for loans took the form of tax exemptions for the business activities of the Bardi family in England. See ES Hunt, 'A New Look at the Dealings of the Bardi and Peruzzi with Edward III' (1990) 50 *The Journal of Economic History* 149.

[131] MC Tsai, 'Globalization and Conditionality: Two Sides of the Sovereignty Coin' (1999) 31 *Law and Policy in International Business* 1317.

[132] See the distinction made between financial, macroeconomic and structural conditionalities in SL Babb and BC Carruthers, 'Conditionality: Forms, Function, and History' (2008) 4 *Annual Review of Law and Social Science* 13.

[133] P Collier, *et al*.,'Redesigning Conditionality' 'Redesigning conditionality', *supra* note 130, at 1400-1: the other objectives are paternalism, restraint and signaling.

[134] Ibid.

In climate finance the system of conditionalities has its own peculiarities because of the intersecting claims by providers and recipients. As the narrative goes, developing countries tend to deem climate finance a form of compensation for the efforts they will have to sustain for a threat mainly caused by industrialized states, who in turn claim that developing countries emissions reductions are necessary to avoid dangerous global warming. Accordingly, their financial efforts must efficiently result in mitigation and adaptation measures.[135]

Werksman details three main sources of conditionalities in climate finance: i) policies agreed multilaterally within the UNFCCC and its financial institutions; ii) policies set unilaterally by donor states in their bilateral finance activities and carbon portfolios; and iii) policies established by the developing countries for the purposes of national mitigation and adaptation plans.[136] The same author asserts that the recent challenges in climate negotiations on finance arise from the fact that such policies do not align and, as a result, conditionalities are often inconsistent with national strategies and the interests of recipient governments.[137] Expectedly, this has led to a sense of frustration from developing countries for the coercive nature of conditionalities.

Part of the recent reforms of the Financial Mechanism is attributable to this issue. The establishment of the Green Climate Fund, as an operating entity of the mechanism acting alongside the GEF, has been triggered by the developing countries' discontent about conditionalities imposed by the GEF and its implementing agencies.[138] Furthermore, consensus on an agreed set of conditions to financial flows, which would increase 'ownership' of the finance to developing countries, seems today an inevitable component for

[135] J Werksman, 'From Coercive Conditionality to Agreed Conditions The Only Future for Future Climate Finance' in Richard B. Stewart and others (eds), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009) 189-196, at 190.
[136] Ibid., at 191.
[137] Ibid.
[138] Ibid.

a future agreement in climate negotiations.[139] A similar discourse applies to the practices of conditionality in bilateral climate finance, which is carried on by national rather than international/multilateral institutions[140].

Looking at the very heart of the conditionalities conundrum, the issue of country ownership on the delivered sums is pivotal, as it shapes the contours of the general international obligations on climate finance. In other words, the delivered finance is not only meant to support a developing country in bringing about climate related measures, but it also requires that the same country shall approve an array of policies and activities that the lending entity deems necessary for the sound execution of the project.[141]

With the task of delivering part of the 'Copenhagen pledge' and with the increasing political role of developing countries in climate negotiations, it is likely that the balance between national priorities and lenders' conditionalities will shift towards increased 'country ownership' by developing countries . Yet, as will be seen, this might come at a legitimacy cost of the institution adopting processes with 'high' country ownership. This is already taking place through various reforms in the most significant climate finance institutions which are re-shaping the governance structure within and outwith the UNFCCC regime. The significance and effects of country ownership for governance and legitimacy of climate finance institutions stand at the center of this work.

CONCLUSIONS

[139] Ibid, at 189.
[140] See Chapter II below.
[141] Babb and Carruthers, 'Conditionality', *supra* note 134, at 21.

This first chapter sought to provide a novel systematization and a legal clarification of the international law applicable to climate finance, to serve as a substantive understanding of the context in which the institutional governance of climate finance has developed.

The international legal concept of sustainable development and the CBDR principle as expressed in the UNFCCC frame and, at the same time, give significance to the aims of climate finance, intended as a form of international support. However, to provide an account of its substantive international obligations, it has been worth looking at the core limitations and guarantees agreed by the Parties in the UNFCCC, as well as at the legal instruments often used in the practice of climate finance institutions.

The emerging portrait is sketchy on various accounts. Firstly, the legal framework at the basis of climate finance obligations is affected by indeterminacy due to the lack of agreement on general principles and specific concepts such as incrementality and additionality. This should be no surprise, since the UNFCCC has been adopted through multilateral law-making procedures based on consensus:[142] whereas its merit is to bring about a deal with the largest possible number of states, the prohibition to make reservations to the text inevitably leads to a compromise package in terms of legal output.[143] This means that ambition and legal clarity have been sacrificed.

Secondly, twenty years of COP decisions, coupled with the changing practices in the use of financial instruments, inevitably shed light on the concrete significance of treaty obligations. Indeed, they seem to depart from a literal interpretation of the Convention when it comes to the nature of the financial support to be provided in developing countries. The recent 'Copenhagen pledge' does not state whether to include just grants and concessional finance, or also other forms of financial support such as loans at market rates, carbon finance, including private and public schemes. Since the mixed solution seems to be the one

[142] Rule 27 of the Rules of Procedure of the Intergovernmental Negotiating Committee for the UNFCCC stated that the Committee "shall make the best endeavours to ensure that the work [...] is accomplished by general agreement". Concurrently, the INC should have followed the voting procedures of the UN General Assembly's Rules of Procedure. See the *Report of the Intergovernmental Negotiating Committee for the UNFCCC*, UN Doc. A/AC.237/5, 8 March 1991.

[143] A Boyle and C Chinkin, *The Making of International Law* (OUP 2007), at 157-62.

currently accepted, then it is possible to assert that Article 11 of the Convention is only partially prescriptive under the climate change regime, and that the normative activity by the COP and the legal practice by relevant institutions have stretched the nature of support to other financial instruments.

Finally, the interest of financing countries and institutions to guarantee efficiency and effectiveness of flows has led to a practice of conditionalities that poses additional burdens and transitional costs not directly addressed in the UNFCCC's text. Such practice not only gives significance to the broad treaties obligations, but also tells that in some cases the access to climate finance requires developing states to accept further conditions that are at times felt intrusive of their sovereignty.

With such an understanding of the substantive international law and the building blocks of climate finance, the next chapter will enter into the main object of this work: the institutional governance sorrounding these activities.

CHAPTER II
AN OVERVIEW OF THE INTERNATIONAL INSTITUTIONAL STRUCTURE

INTRODUCTION

This chapter will shift focus from the substantive issues of climate finance under the principles of international law to its complex institutional structure formed since the adoption of the UNFCCC in 1992. It will provide a mapping of the current types of institutions which source and disburse public flows of finance, as well as a contextualization of their role in such a global activity.

The institutional dimension of climate finance is the core subject of this work. After more than twenty years of implementation of financial obligations under the UNFCCC, it is widely recognized that the financial needs of developing countries have not been met,[1] particularly the costs of climate adaptation for least developed countries. While the reasons for lagging behind are many, it is posited that the progressive fragmentation of the institutional channels of climate finance not only represents a pressing issue, but it also holds a relevant legal dimension which is underestimated by current policy actions,[2] as well as the legal scholarship.

This chapter will equip the reader with an outline of current institutions and will serve as starting point for framing the factual and legal issues in the following chapters. It is divided in three sections according to the legal domain to which those institutions belong: the first will introduce the two international institutions working as operating entities of the

[1] See, for instance, UN, 'Report of the Secretary-General's High-level Advisory Group on Climate Change Financing', 5 November 2010, para 9, <http://www.un.org/wcm/webdav/site/climatechange/shared/Documents/AGF_reports/AGF_Final_Report.pdf>.

[2] A recent work programme under the aegis of the UNFCCC spends little words on just specific aspects of the institutional fragmentation of finance: *Report on the outcomes of the extended work programme on long-term finance*, UN Doc. FCCC/CP/2013/7, 1 November 2013, at para 64. Similarly, a recent report by the OECD addresses the issue only partially and with reference to few institutions: OECD Environment Policy Committee, *Scaling up and replicating effective climate finance interventions*, COM/ENV/EPOC/IEA/SLT(2014)1, 28 May 2014, at 15-21.

UNFCCC Financial Mechanism: the Global Environment Facility, and the Green Climate Fund. The second analyzes the Clean Development Mechanism and the Adaptation Fund, the two climate finance mechanisms engendered under the Kyoto Protocol, as well as the proposed New Market Mechanism under a future climate agreement. Finally, the third section will offer an outline of those institutions which, despite working outside any formal linkage with the climate conventions, nonetheless channel the biggest bulk of climate finance. It categorizes them in four types: multilateral development banks; national bilateral agencies; public-private and inter-institutional partnerships; and implementing agencies.

1. THE UNFCCC FINANCIAL MECHANISM: FROM THE GLOBAL ENVIRONMENT FACILITY TO THE GREEN CLIMATE FUND

Being a common feature among Multilateral Environmental Agreements (MEAs), also the UNFCCC establishes in Article 11 a Financial Mechanism with the aim of supporting the implementation of developing countries obligations. Currently the Financial Mechanism is 'operated' by two international institutions, the Global Environment Facility (GEF) and the Green Climate Fund (GCF).

After almost two decades of relying exclusively on the GEF, the Financial Mechanism was also affected by the proliferation of climate funds, and the need to adapt the delivery of finance under the Convention to the shifting political balances between financing and recipient countries.[3] This process has recently culminated with the establishment of a new GCF and a consultative body to the COP, the Standing Committee on Finance. The Financial Mechanism has faced a first period of consolidation (1994-2001) characterized by the unique role of the GEF and its Trust Fund, which is shared between other MEAs financial

[3] L Gomez-Echeverri, 'Developing Countries and a Proposal for Architecture and Governance of a Reformed UNFCCC Financial Mechanism' in RB Stewart, *et al.* (eds), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009), 165.

mechanisms. Following the adoption of the Kyoto Protocol in 1997,[4] in 2001 a landmark COP meeting in Marrakesh set up two new funds dedicated to adaptation activities under the UNFCCC, the Special Climate Change Fund and the Least Developed Countries Fund; yet the management of these funds was once again entrusted to the GEF. The GEF 'dominating' role in the Financial Mechanism started to be questioned after that in 2007 a new negotiating path, under the COP's Bali Action Plan, envisioned new forms for "[e]nhanced action on the provision of financial resources […]" to be included in a future international agreement on the climate.[5] After years of negotiations and the impasse that the COP faced in 2009 in Copenhagen, in the following year a new operating entity of the Financial Mechanism, the GCF, was the resulting compromise of new political arrangements between developed and developing countries.

1.1. The Financial Mechanism

The 1972 Stockholm Declaration was the first international instrument to call for the establishment of technology and financial transfers mechanisms to tackle global environmental issues.[6] Its Principle 9 solemnly states that:

> "Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required."

Despite the level of consensus, fifteen years passed before states would come up with a first substantive achievement in international environmental financing: the adoption of the 1987 Montreal Protocol on Substance that Deplete the Ozone Layer.[7] Its Article 10

[4] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Tokyo: 11 December 1997, entered into force on 16 February 2005, UN Doc. FCCC/CP/1997/7/Add.1, Dec. 1/CP.3 Annex-I, <http://unfccc.int> [hereafter 'Kyoto Protocol' or 'the Protocol'].
[5] Decision 1/CP.3, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008, para 1(e).
[6] *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972, UN Doc. A/CONF.48/14/Rev.1.
[7] *Montreal Protocol on Substances that Deplete the Ozone Layer*, adopted on 16 September 1987, 1522 UNTS 293, as amended in 1990 in London with Decision II/2 of the Meeting of the Parties.

establishes simultaneously a financial mechanism and a Multilateral Fund for its operationalization.[8]

Building on the model of the Multilateral Fund, the UNFCCC Financial Mechanism is aimed at "[…] the provision of financial resources on a grant or concessional basis" and it is only 'defined' rather than 'established' by the Convention.[9]

This language exposes a lack of 'institutional concretization' in the sense that it appears uncertain whether the mechanism is an institution *per se*, or rather requires the implementation of other institutions. While the second option seems to be in line with the wording of the Article, which states that the Financial Mechanism's operation "[…] shall be entrusted to one or more existing international entities",[10] the same article provides that the same Financial Mechanism "[…] shall function under the guidance of and be accountable to[…]" the COP. This is an unfortunate language, because any guidance and accountability relationship would require an institutional nature of the Financial Mechanism, which it clearly lacks. To overcome this incongruence, the COP has rightly interpreted exerting guidance and accountability on the operating entities of the Financial Mechanism, rather than the Mechanism itself.

It is noteworthy that the discretion of the COP to 'cherry-pick' the international institutions working as operating entities is not present in the parallel cases of the Montreal Protocol and the 1992 Convention on Biological Diversity (CBD).[11] In particular the latter

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[8] Ibid., Article 10(2) specifies that the financial mechanism "shall include" the Multilateral Fund, allowing also the inclusion of "other means of multilateral, regional and bilateral co-operation". However, in stark contrast with the UNFCCC, the Multilateral Fund as virtually operated as the sole international institution operating the financial mechanism.

[9] UNFCCC, Article 11(1).

[10] Ibid.

[11] *Convention on Biological Diversity*, adopted on 06 May 1992, entered into force on 19 December 1993, 1760 UNTS 79.

envisions only a single "institutional structure" of finance for its financial mechanism[12] with the further clarification that the GEF should work as its *ad interim* institutional structure.[13]

Hence, given its indeterminate status and through the interpretation and practice by the COP, the UNFCCC Financial Mechanism has proved to be more an 'empty box' than an institution, to be subsequently filled by entities established or selected by the COP. A provisional choice was expressed already at the time of adoption of the UNFCCC, which in Article 21(3) appoints the GEF as the *ad interim* "[…] entity entrusted with the operation of the financial mechanism". The GEF has then been reconfirmed at the end of every fourth year review[14] and has acted as the sole operational entity of the Financial Mechanism until 2010, when the COP established the GCF.

The institutional openness of the Financial Mechanism goes in parallel with the flexibility provided to developed countries in choosing *other means outside the Financial Mechanism* for the implementation of the Convention's financial commitments. Article 11(5) reads:

> "The developed country Parties may also provide and developing country Parties avail themselves of, financial resources related to the implementation of the Convention through bilateral, regional and other multilateral channels."

This provision, which recognizes the role of institutions other than the operating entities of the Financial Mechanism, has set the legal basis for the progressive mushrooming of institutions and funds aimed at *de facto* implementing the UNFCCC's financial commitments, which will be treated in section 3 below.

[12] Ibid., Article 21.
[13] Ibid., Article 39.
[14] The first review of the Financial Mechanism has been initiated by the COP in 1998 with Decision 3/CP.4, UN Doc. FCCC/CP/1998/16/Add.1, 15 January 1999. Like the first, all the following reviews mostly consisted of an assessment of the GEF activities based on GEF reports, reports by the UNFCCC Subsidiary Body for Implementation, and synthesis documents by the UNFCCC Secretariat. The adoption of the last one coincided with the establishment of the GCF. See Decision 2/CP.16, UN Doc. FCCC/CP/2010/7/Add.2, 15 March 2011.

1.2. The Global Environment Facility

In all its 'virtues and vices' the GEF has been a crucial test ground and advancement for global environmental finance.[15]

The GEF was created in response to an "institutional gap"[16] created by two advancements in global environmental politics. In 1987 the UN World Commission on Environment and Development adopted the 'Bruntlandt Report', which *inter alia* called for a reorienting of the action of the existing multilateral financial institutions towards coordinated sustainable development financing.[17] Following, the 1989 Hague Declaration on the Environment envisioned a "[…] new institutional authority either by strengthening existing institutions or by creating a new institution […]".[18] In anticipation to possible contrasting demands from developing countries at the approaching UN Convention on the Environment and Development, in 1989 at an inter-ministerial meeting the World Bank, the IMF and the French Prime Minister agreed to give start to a fund which would finance projects benefiting the global environment.[19] After two years the World Bank set up the GEF as a three-year pilot program,[20] embedded within its own institutional structure, but hinging on the cooperation of the UN Environmental Programme (UNEP) and the UN Development Programme (UNDP).[21] Thus, the core aim was to establish a bridging entity between international agencies that could provide their own expertise, instead of creating a new independent institution.[22] Interestingly, donor states were already concerned with the proliferation of funds and institutions in a period of creation of different multilateral environmental regimes,[23] which were already feared to cause the legal challenge of 'treaty

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[15] C Streck, 'The Global Environment Facility - A role Model for International Governance?' (2001) 1 *Global Environmental Politics* 71, at 93.
[16] J Werksman, 'Consolidating Governance of the Global Commons: Insights from the Global Environment Facility' in G Handl (ed), *Yearbook of International Environmental Law*, vol. 6 (OUP 1995), 27-63, at 29-34.
[17] World Commission on Environment and Development, *Our Common Future*, *supra* note 6, at 329.
[18] *Hague Declaration on the Environment*, 11 March 1989, 28 ILM 1308.
[19] C Streck, 'The Global Environment Facility', *supra* note 15, at 72.
[20] World Bank, Executive Directors' Resolution No. 91-5, (1991) 30 ILM 1758.
[21] For their role in the institutional architecture of climate finance see below, at 91.
[22] Such cooperation was legally based on a tripartite agreement between the agencies. See World Bank, *Establishment of the Global Environment Facility*, April 1991, 30 ILM 1739, 1740.
[23] See Werksman, *supra note* 16, at 52.

congestion'.[24] Being a brand-new institution, at the time of its establishment there was no clear agreement on the GEF's structure and its future strategy.[25] This is why the constituting document contained very general indications on the operational modalities and inter-agency structure of the GEF. This was coupled by the lack of direction that participant countries could give to the fund.[26]

According to some authors, the GEF pilot has been dominated by the managing role of the World Bank and its contributing members, with developing countries and NGOs having little say on its constitution and activities.[27] Thus, during the negotiations for the UNFCCC in the Intergovernmental Negotiating Committee, developing countries sought an alternative for an increased control of financial resources by way of a new 'Green Fund'. On the opposite side, industrialized countries, with US and UK in first line, argued that the GEF was the best solution to serve as the Financial Mechanism of the Convention.[28]

Eventually the GEF was appointed as the interim financial entity of the UNFCCC and also of its 'cousin' treaty, the CBD. Moreover, both the conventions included a provision conditioning the GEF's appointment to an internal structural reform:[29] this actually culminated in 1994 with the adoption a new GEF Instrument[30] adopted jointly by the three cooperating institutions, the World Bank, UNDP and UNEP.[31] The Instrument reshuffled the GEF's governance with the creation of a Council, seconded by an Assembly, a Secretariat and a Scientific Technical Advisory Panel, all reflecting the general aim of increasing

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[24] E Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1992) 81 *Georgetown Law Journal* 675, 697-702.
[25] L Boisson de Chazournes, 'The Global Environment Facility: A Unique and Crucial Institution' (2005) 14 *Review of European Community & International Environmental Law* 193, 194.
[26] Werksman, *supra*, 50. In order to partake, participant countries had to deposit a minimum contribution of 4 million of Special Drawing Rights.
[27] See Werksman, Ibid.; and L Gomez-Echeverri and B Müller, 'The Financial Mechanism of the UNFCCC - A Brief History', April 2009, ECBI Policy Brief, 2, <http://www.oxfordclimatepolicy.org>; and D Reed, 'The Global Environment Facility and Non-Governmental Organizations' (1993) 9 *American University Journal of International Law and Policy* 191.
[28] D Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal of International Law* 451, at 538-539.
[29] See UNFCCC, Article 21(3); and CBD, Article 39.
[30] *Instrument for the Establishment of the Restructured Global Environment Facility*, Geneva 16 March 1994, 33 ILM 1283 [hereafter the 'Instrument']
[31] See UNDP Executive Board's Decision DP/1994/9; and the decision by the Governing Council of UNEP, Resolution SS.IV.1, 1994.

developing countries' participation to the GEF's decision-making process.[32] The Instrument also set up a GEF Trust Fund to serve as a source of finance for the MEAs financial mechanisms and for the other two focal areas.[33]

In this way, the original 'network structure'[34] of the GEF pilot could be enhanced thanks to the multiple roles that the restructured GEF would have covered across different international environmental regimes.

If that was the idea behind the restructuring, the GEF has faced several backlashes well described by the literature and the GEF's independent Overall Performance Studies.[35] On a general level, the GEF's restructuring had only partially solved the lack of participation by developing countries and had not eased typical donor-recipient contrasts.[36] That is because the GEF Council, the executive body of the GEF, decides on a double-weighted majority vote that eventually gives a major decisional role to contributor states.[37] The project cycle often resulted in a cumbersome and sluggish process.[38] Furthermore, the Instrument does not provide for clear linking norms with the internal regulations of the GEF's Implementing Agencies. Therefore, the latter would still apply their own internal regulations with the result that project proponents have to pass a double approval stage first by the GEF Council and then by the competent implementing agency.[39] Fostered competition, different comparative advantages and expertise underpinned the idea of clustering the work of three

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[32] For a detailed analysis of GEF's internal governance see Chapter IV below.
[33] Namely international waters and ozone layer depletion; see the Instrument, para 3.
[34] The term is borrowed from the homonymous case study: C Streck, 'The Network Structure of the Global Environment Facility', UN Vision Project on Global Policy Networks, undated, <http://www.thegef.org>.
[35] See Chapter IV below, at 187.
[36] A Ghosh and N Woods, 'Developing Country Concerns about Climate Finance Proposals' in RB Stewart *et al.* (eds), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009) 157-164, at 161.
[37] Article 25(c)(i) of the Instrument states: "[…] decisions requiring a formal vote by the Council shall be taken by a double weighted majority, that is, an affirmative vote representing both a 60 percent majority of the total number of Participants and a 60 percent majority of the total contributions."
[38] A recent OPS found that "[t]he key stakeholders in the GEF partnership perceive the GEF project cycle to be lengthy and bureaucratic", and that scarce improvements have been made since the last OPS. GEF Evaluation Office, *Assessment of the GEF Project Cycle*, OPS5 Technical Document No 18, 30 October 2013, at para 4(1) and (3), <http://www.thegef.org/gef/sites/thegef.org/files/EO/TD18_Assessment%20of%20the%20GEF%20Project%20Cycle.pdf>.
[39] Boisson de Chazournez, *supra* note 25, at 198.

implementing agencies, the World Bank, the UNDP and UNEP. Yet competition in many cases resulted in actual conflicts between these institutions, especially because the GEF operational policies and programmes do not provide for a detailed division of competences among implementing agencies.[40]

Shifting to its external dimension, the relationship between the GEF and the UNFCCC COP has suffered from indeterminacy of core inter-institutional provisions. The UNFCCC uses a weak language on the relationship between the COP and the GEF, which has not been strengthened when a Memorandum of Understanding (MoU) between the COP and GEF was adopted in 1995.[41] Stating –as Article 11 of the UNFCCC does– that the Financial Mechanism should follow the guidance and be accountable to the COP is not like imposing formal 'authority' on the GEF.[42] Neither the MoU nor subsequent decisions of the COP set up effective mechanisms to solve possible conflicts between the two institutions,[43] particularly in the context of Article 11(3)(b) of the Convention, which requires the COP to establish "[m]odalities by which a particular funding decision may be reconsidered in light of […] policies, programme priorities and eligibility criteria".

The GEF has responded to concerns expressed within the COP, by taking several initiatives such as enlarging the number of accredited implementing agencies from three to ten, in order to increase the range of comparative advantages between the agencies;[44] by opening direct access to funds to civil society and national or regional administrations

[40] Werksman makes the case of the so-called 'enabling-activities' programme aimed at building capacity in various developing countries for the purposes of Conventions' implementation. Each implementing agency proposes itself for these types of projects. See Werksman, 'Consolidating Global Environmental Governance', *supra* note 16, at 11.
[41] See Decision 12/CP.2, UN Doc. FCCC/CP/1996/15/Add.1, 29 October 1996, Annex. [hereafter the 'MoU'].
[42] B Müller, 'Under the Authority of the COP?', Novermber 2009, Oxford Energy and Environment Comment, <http://www.oxfordclimatepolicy.org>. Interestingly, the CDB in Article 21 instead states that its financial mechanism should also work under the 'authority' of the COP.
[43] Para 5 of the MoU provides a mechanism to reconsider funding decisions by the GEF Council. A party can initiate a complaint before the COP about Council decisions on projects that would be not in conformity with the COP guidance. The COP can only ask the GEF for further clarification without further consequences. See Werksman, 'Consolidating Global Environmental Governance', *supra* note 16, 7.
[44] The Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the Food and Agriculture Organization, the Inter-American Development Bank, the International Fund for Agricultural Development, the UNDP, the UNEP, the UN Industrial Development Organization (UNIDO) and the World Bank. See <http://www.thegef.org/gef/gef_agencies>.

through a process of accreditation;[45] or by applying a flexible approach on the determination of incremental costs on a case-by-case basis.[46]

Despite this, the level of pledges at each negotiation for the replenishment of the Trust Fund has never skyrocketed to levels matching the actual needs of global environmental finance, including climate change.[47] Already in 2006 Clémençon noted the lack of trust and the difficult positioning of the GEF in the midst of the concurrent action of MDBs and bilateral institutions.[48] As a result, in the area of climate change, the establishment of the Bali Action Plan in 2007,[49] and of the Climate Investment Funds[50] marked a political shift from the COP that tortuously led to the establishment of the GCF in 2010.

Nevertheless, currently the GEF is a key player in climate finance, especially in its role as a catalyst of funding through co-financing with other sources, both private and public.

The GEF manages the following funds related to climate change: the general Trust Fund, shared with the other financial mechanisms of other Conventions, the Special Climate Change Fund (SCCF) and the Least Developed Countries Fund (LDCF).[51] The first is the main fund operated by the GEF. It is not only aimed to climate change projects and programmes, but it also implements other MEAs financial mechanisms: the CBD, the UN Convention to Combat Desertification[52] and the Stockholm POPs Convention.[53] Contributing countries refill the fund according to a replenishment process taking place every four years.[54]

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[45] See the GEF Council, *Broadening the GEF Partnership under paragraph 28 of the GEF Instrument*, GEF/C.40/09, 26 April 2011.
[46] Werksman, 'Consolidating Global Environmental Governance', *supra* note 16, at 10.
[47] The Trust Fund of the GEF is replenished every four years through a negotiating process between the GEF and its donors. At the last replenishment, the GEF scored a record of pledges amounting to USD 4.43 billion (just 34 million more than the previous one), to be shared between its focal areas. See *Record funding for the global environment*, 16 April 2014, http://www.thegef.org/gef/node/10428.
[48] R Clémençon, 'What Future for the Global Environment Facility?' (2006) 15 *The Journal of Environment & Development* 50, at 65.
[49] Decision 1/CP.3, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008.
[50] See below, at 89.
[51] Decision 7/CP.7, UN Doc. FCCC/CP/2001/13/Add.1, 21 January 2002, paras 2 and 6 for the SCCF and LDCF respectively.
[52] *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, Paris, adopted on 14 October 1994, entered into force on 26 December 1996, 1954 UNTS 3.
[53] *Stockholm Convention on Persistent Organic Pollutants*, adopted on 22 May 2001, entered into force on 17 May 2004, 2256 UNTS 119.
[54] See GEF Instrument, Annex C, paras 2-8.

The SCCF and the LCDF are meant to be complementary to the other GEF funds and the Kyoto Protocol's Adaptation Fund.[55] The SCCF delivers finance mainly for adaptation and technology transfer,[56] whilst the LDCF covers the full costs borne by eligible developing countries for the development and implementation of their National Adaptation Programmes of Actions (NAPAs).[57] At the time of writing the LCDF resources amount to USD 415 million with 45 countries having completed their NAPA. Instead, the SCCF gained lower pledges and significantly less supply compared to its demand with an approved sum for projects of USD 145 million.[58]

Looking at over twenty years of activity, the GEF appears to be an institution with a consolidated governance model, offering a wealth of useful lessons for future climate and environmental finance. Its flexible structure allowed continuous transformations and internal reforms, although limited by its lack of institutional independence. The contrasting views of its constituencies, the conflicting interests of the implementing agencies and the lack of funds, have hampered the scaling up of activities from project to sectoral levels. The GEF's internal reforms have also come at slow pace, if compared to the changing realities in climate negotiations. These shortcomings have certainly contributed to a future decision of the COP that a new international institution was needed to scale up financial disbursement to the pledged levels of USD 100 billion per year by 2020.

[55] See below, at 93.
[56] Decision 5/CP.9, UN Doc FCCC/CP/2003/6/Add.1, 22 April 2004, para 2.
[57] The NAPAs process was started during the COP in Marrakesh. It finds its rationale in Article 4(9) of the UNFCCC, which stresses the importance to understand what adaptation actions are needed for the most vulnerable countries. Its aim is to make LDCs communicate and prioritize adaptation activities in their territories, since some adaptation policies would need urgent support by developed countries. See Dec. 5/CP.7, UN Doc. FCCC/CP/2001/13/Add.1, 21 January 2002, paras 12-5.
[58] Respectively at <http://www.thegef.org/gef/LDCF>; and *Evaluation of the Special Climate Change Fund*, 11 October 2011, GEF Doc. GEF/LDCF.SCCF.11/ME/02, at 1,,
<http://www.thegef.org/gef/sites/thegef.org/files/documents/Evaluation%20for%20SCCF.pdf>.

1.3. The Green Climate Fund

The launching of the GCF at the 2009 COP15 in Copenhagen[59] signaled a response to the political shifts in international climate negotiations, which have witnessed an increased political weight of emerging economies, particularly the so called BASIC countries.[60] In particular, the establishment of this institution can be interpreted as the result of developing countries' discontent about the internal governance and disbursement structures of the GEF.[61]

The GCF operates the UNFCCC Financial Mechanism with the GEF. Because it is yet to be operational, only further regulatory developments under its Board and subsequent practice will clarify the actual positioning of this institution in the global arena of climate finance, especially having as yardstick the previous experience with the GEF.

However, this does not reduce the importance of the negotiating process and the constitutive legal documents to the extent that they provide early signs about the role the GCF is likely to cover. In particular, the creation of the GCF should be read in the context of the parallel reforms in the UNFCCC related to increased mitigation efforts by non-Annex I parties in the context of Nationally Appropriate Mitigation Actions (NAMAs), and to the setting up of a Standing Committee on Finance to the COP.

In aftermath of the 2007 Fourth Assessment Report of the Inter-governmental Panel on Climate Change (IPCC), which confirmed and made more stringent the need of enhancing climate action at global level,[62] UNFCCC parties agreed on a new negotiating path, the Bali Action Plan.[63] The scope was to come up, *inter alia*, with a long-term emissions reductions goal to which also non-Annex I countries would contribute, together with an increased provision of financial resources for mitigation, adaptation and technology

[59] Decision 2/CP.15, UN Doc. FCCC/CP/2009/11/Add.1, 10 March 2010.
[60] K Hallding, M Jürisoo, M Carson, and A Atteridge, 'Rising Powers: the Evolving Role of BASIC Countries' (2013) 13 *Climate Policy* 608.
[61] J Werksman, 'Consolidating Global Environmental Governance, *supra* note 16.
[62] IPCC, *Climate Change 2007: Synthesis Report* (CUP 2007) at 56-62.
[63] Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008.

transfer.[64] A binary track of negotiations hinged on two newly established subsidiary bodies of the UNFCCC and the Kyoto Protocol.[65] During the two years of negotiations and before the 2009 COP15 in Copenhagen, it was evident that the political arena had changed, mostly because of the increased role of emerging economies both as polluters and as economic powers.[66] If developing countries were to accept more stringent obligations on their emissions reductions through the system of NAMAs,[67] a rearranging of the financial mechanism would have been a counter-balance to strike a deal.

At the Copenhagen COP15 in 2009, collective hopes for a new and comprehensive international agreement on the climate fell apart.[68] Lack of consensus on key issues and the risk of a diplomatic failure, led a closed group of developed and developing parties to meet for a last minute solution. The Copenhagen Accord was the resulting document; a non-binding one,[69] of which the COP only took note in its related decision. Nonetheless the Accord enshrines many features taken aboard in the following COPs in Cancun and Durban, including the intention to establish a 'Copenhagen Green Climate Fund' to channel a 'significant proportion' of the 'Copenhagen pledge'.[70]

In particular, the 'Cancun Agreements' formally establish and lay down the basic structure of the GCF.[71] According to the text, the Fund is to be governed by an intergovernmental Board made of 24 members with balanced representation between developed and developing states, to be supported by an independent Secretariat, and a

[64] Ibid., para 1(a) and (e).
[65] The Ad-hoc Working Group for Long-term Cooperative Action under the Convention (AWG-LCA) was established under the same BAP Decision (Ibid. para2). The AWG-LCA was preceded by the establishment of the Ad-hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) in 2005. See Dec. 1/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006.
[66] D Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem' (2010) 104 *The American Journal of International Law* 230, at 232; and Hallding, Jürisoo, Carson, and Atteridge, 'Rising powers', *supra* note 28.
[67] See the BAP Decision, *supra*, para 1(b)(ii).
[68] The Guardian, 'Low targets, goals dropped: Copenhagen ends in failure', December 18, 2009.
[69] L Rajamani, 'The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves' (2011) 60 *International & Comparative Law Quarterly* 499, at 500.
[70] See Copenhagen Accord, *supra* note 59, para 9.
[71] See Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 15 March 2011, para 102-112.

Trustee.[72] Whilst in Cancun consensus was forged just on a very initial structure, the COP decided to leave the remaining definition of the GCF to a Transitional Committee, made of forty representatives, twenty-five elected by developing parties.[73] The scope of the Committee was to find agreement and report to the COP on the many elements that would have made the GCF operational in the forthcoming 2011 COP17 in Durban, including the principles underpinning the working of this institution.[74] During the negotiating sessions of the Transitional Committee, the cleavage between developed and developing countries emerged as in almost the same fashion as in the GEF. On one side developed countries stressed the need to secure efficiency and effectiveness also through the imposition of fiduciary standards;[75] the use of financial instruments other than traditional grants and concessional loans;[76] and their view that a large proportion of long-term finance would not flow through the UNFCCC-based funds, including the GCF.[77] Conversely, developing countries were firm on the following points: provide a frame for climate finance within the broader issues of human development and poverty reduction; the consideration of developing countries most vulnerable to the effects of global warming;[78] a reform of the Financial Mechanism toward a less onerous use of conditionalities and debt instruments;[79] and an enhancement of 'country-ownership' of the funds.[80] Furthermore, and despite some contrary views,[81] developing countries envisioned private sector financing as only supplemental to

[72] Ibid.. In para 107 the COP formally invites the World Bank to serve as the interim trustee of the fund.
[73] Ibid., para 109.
[74] See Ibid., Appendix III. The TC was to decide inter alia on the legal and institutional arrangements, the rules of procedure of the Board, the financial instruments to be used, and on '[..] methods to enhance complementarity between the Fund's activities and those of other bilateral, regional and multilateral funding mechanisms and institutions'.
[75] See Australia's submission in Transitional Committee, *Submission by members of the Transitional Committee*, Internal reference document-1, 25 May 2011, <http://unfccc.int/cancun_agreements/green_climate_fund/items/5868.php> [hereinafter all the members' submission to the Transitional Committee are meant to be fund in the same web page].
[76] See the submission by France in Technical Committee, *Submission by members of the Transitional Committee*, Internal reference document-5, 8 July 2011.
[77] See Ibid., submission by the US.
[78] See Burkina Faso in Transitional Committee, *supra* note 75.
[79] See Ibid., the submission by the Philippines.
[80] See See Egypt's submission in Transitional Committee, *Submission by members of the Transitional Committee*, Internal reference document-3, 27 May 2011.
[81] See Peru in Transitional Committee, *Submission by members of the Transitional Committee*, Internal reference document-10, 26 August 2011.

public finance. Their main argument was based on the fact that private financing streams would be unpredictable and this would go against the agreement in the COP on stable flows from public sources.[82]

More surprisingly, some developing countries complained about the implementation of the negotiating process in the Transitional Committee.[83] They lamented that the Co-Chairs of the Committee and the Technical Support Unit, a group of experts and practitioners coming also from institutions already involved in climate finance, had taken over the process.[84] According to the Philippines' representative, the Transitional Committee had only the chance to submit views on the documents prepared by the Co-Chairs and the Technical Support Unit. Allegedly, this was in contrast with the terms of reference agreed by the COP.[85]

Despite the differing views, at the 2011 COP17 in Durban the UNFCCC parties adopted a decision on the GCF which incorporates the 'Governing Instrument' negotiated in the Transitional Committee.[86] Differently from the GEF, which manages three separate funds for climate protection, not only the GCF is to operate a single Fund under the auspices of the UNFCCC but it is also bestowed with juridical personality[87] and legal capacity to conduct its functions, as well as and privileges and immunities.[88] The Fund is to be guided –but not

[82] In the Cancun Agreements the COP decided that "[…] scaled-up, new and additional, predictable and adequate funding shall be provided to developing country Parties […]". See Decision 1/CP.16, *supra* note 71, para 97.
[83] See the submission by the Philippines in Transitional Committee, *Submission by members of the Transitional Committee*, Internal reference document-4, 7 June 2011.
[84] Aside from the Technical Support Unit, also other observers from civil society and NGOs participated actively with submissions. See for instance L Shalatek, 'The Design Process for the Green Climate Fund: Lots of Disagreement, Little Time', Heinrich Böll Fundation <http://www.boell.org/downloads/Schalatek_Design_Process_for_the_Green_Climate_Fund.pdf>; or Mueller, B. and Sharma, A., 'Submission of views', 20 May 2011, Oxford Institute for Energy Studies, <http://unfccc.int/files/cancun_agreements/green_climate_fund/application/pdf/oies_wsi_270511.pdf>; and Sierra, K., 'The Green Climate Fund: Options for Mobilizing the Private Sector, 26 August 2011, Climate & Development Knowledge Network, also link above.
[85] See the *Terms of Reference for the Design of the Green Climate Fund*, Decision 1/CP.16, *supra* note 82, Appendix III.
[86] See Decision 3/COP17, UN Doc. FCCC/CP/2011/9/Add., 15 March 2012, and Annex [hereinafter 'GCF Governing Instrument'].
[87] Ibid., Annex, para 7.
[88] Ibid., para 8; The issue of personality, legal capacity and immunities of the Fund will be treated below in this work in Chapter V.

formally bound– by the UNFCCC principles and the goals of efficiency and efficacy in the context of “new, additional, adequate and predictable financial resources”.[89]

Among the novelties contained in the Governing Instrument, the following appear the most relevant if compared to the GEF and other past experiences of climate finance:

1- The Fund will be divided into thematic funding windows with adaptation and mitigation as compulsory channels. It will be up to the Board to set up additional windows according to the circumstances and specific needs.[90]
2- A ‘private sector facility’ has been established with the aim of financing ‘directly or indirectly’ private entities in mitigation or adaptation activities.[91]
3- Beside the traditional access, based on the intermediation of implementing agencies,[92] a ‘direct access’ to the Fund is set up, where the word ‘direct’ expresses the possibility for recipient countries to nominate eligible national or subnational entities for accreditation in order to directly tap into the Fund’s resources.[93]
4- The range of financial instruments to be used by the Fund has been extended from grant and concessional loans to other instruments that the Board might identify.[94]

These innovations seem to reflect a new balance between the contributing and recipient countries in climate finance.

In the Governing Instrument developing countries secured the insertion of a ‘country-driven approach’ amongst the principles of the GCF, yet there is no clear legal definition of what such approach would entail. It could be that the expression ‘country-driven approach’ is a deflated version of ‘country-ownership’ of the funds. The last expression, advocated by

[89] Ibid., para 3.
[90] Ibid., para 37-9.
[91] Ibid., para 41.
[92] See below, at 91.
[93] Ibid., para 47.
[94] Ibid., para 54.

developing countries during negotiations, constitutes an emerging principle in the context of international development cooperation to indicate an enhanced decision-making role by national administrations in accordance to aligned development strategies.[95] It is diminished because 'ownership' expresses an idea of appropriation, which might contrast with the reality of conditionalities described in the previous chapter.[96] Therefore, a country-driven approach would still express the claim that developing countries should be the primary decision makers and managers of disbursed finance. However, their decision-making should not be unconditional or unbounded from effective and verifiable results. Direct access modalities seem to fall in the boundaries of this principle.

As for the developed countries, also their views are present in the text on various accounts. The principles of efficiency and efficacy are expressly mentioned in the Governing Instrument and recall the North's request that mobilized resources should be spent for their specific purposes and in a cost efficient manner.[97] Efficacy and effectiveness find specification in the provisions on direct access, where the Governing Instrument provides an assurance that national administrations of developing countries should meet the Fund's fiduciary standards in order to be formally accredited.[98] Projects and programmes financed through the Fund will be subject to monitoring and to a result measurement framework with performance indicators.[99]

While a more in depth analysis of some specific features of the GCF will be conducted in the second part of this work, this overview of the GCF's establishment already provides useful elements to situate this fund in the intricate normative and institutional framework of climate finance.

A good starting point seems to be a provision of the Governing Instrument, which reads:

[95] See *Declaration of Paris on Aid Effectiveness*, OECD Doc. DCD/DAC/EFF(2005)1/FINAL, 3 February 2005, paras 14-5.
[96] Chapter I above, at 40.
[97] GCF Governing Instrument, para 3.
[98] Ibid., para, 63.
[99] Ibid., para 57-8.

> "The Board will steer the Fund's operations so that they evolve with the Fund's scale and maturity and will exercise flexibility to allow the Fund to evolve over time and become the main global fund for climate change finance."[100]

The legal significance of this norm is obscure, given that the COP has no delegated power to legally bestow the GCF with any 'institutional primacy' in international climate finance. However, such wording tells the likely rationale behind the forging of the GCF; namely that the Fund should progressively hold *a primary role in climate finance* vis-à-vis the other numerous institutions engaged. In terms of quantity, it is unclear what share of the 'Copenhagen pledge' the GCF is expected to mobilize, although the Cancun Agreements provide that "[…] a significant share of new multilateral funding for adaptation should flow through [it]".[101] As for mitigation, it seems that the GCF has been deliberately designed with a high degree of institutional and operational flexibility. The power of the Board to set up different thematic windows allows for enhanced flexibility of the GCF in adapting to the shifting dynamics of climate finance. This is coupled with the creation of the special private sector facility. Bridging public with private climate finance has always been a crucial but daunting issue –mostly under the eyes of the financing countries. This has been for instance one of the areas of struggle by the GEF, which attempted some initiatives to spur collaborative approaches with the private sector.[102]

If such flexible and scalable structure of the Fund might prove optimal to enhance size and effectiveness of the operations, one can better appraise the institutional role of GCF if two other key innovations in the UNFCCC are considered: the NAMAs process, and the Standing Committee to the COP.

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[100] Ibid., para 32.
[101] See Decision 1/CP.16, *supra* note 71, para 100.
[102] In 2006 the GEF Council adopted a strategy for private sector engagement (GEF Council Doc. GEF/C.28/14) that culminated with the creation of the Earth Fund as a public/private partnership. However, only USD 50 million was set aside for such initiative. See below in this Chapter on the role of public/private partnerships in climate finance.

As introduced above, NAMAs consist of a process aimed to communicate developing countries planned mitigation policies, the amount of estimated emissions reductions and, more importantly, the amount of international finance required for each programme. Unlike the case of the Kyoto Protocol, where developed countries accepted binding emissions targets,[103] NAMAs are currently meant to work as non-binding targets under international law.[104] Furthermore, developing countries reporting NAMAs do not have to, but might consider funding certain NAMAs through international finance.

NAMAs were already envisioned in the 2007 BAP,[105] they have been confirmed in Copenhagen[106] and formally structured in Cancun and Durban.[107] As for the relationship between NAMAs and climate finance, it is noteworthy that in Durban the COP laid down the backbone for a NAMA registry. Such registry is meant to keep record of the mitigation actions communicated by developing parties that seek international support. As the decision recalls, the registry has the purpose of matching demand and offer of climate finance.[108] In the same decision the COP further notes that "[…] the financial mechanism may make use of information available in the registry […]". Thus, the registry might enhance transparency and ease information asymmetries among states, but also between different institutions engaged in climate finance, including the GCF and the GEF.

The second innovation is the constitution of a new body serving the COP. The Standing Committee on Finance is an intergovernmental body, whose scope is to coordinate action between the COP and the operational entities of the Financial Mechanism, and to promote coordination between UNFCCC- and non-UNFCCC-based climate finance

[103] See Kyoto Protocol, Article 3(1) and Annex B.
[104] Apart from the general non-binding nature of COP decisions, the latest decision at COP17 gives a clear sign on this: "[the COP invites] developing countries that wish to voluntarily inform the Conference of the Parties of their intention to implement nationally appropriate mitigation actions in association with this decision to submit information on those actions to the Secretariat". See Decision 1/CP.17, FCCC/CP/2011/9/Add 1, 12 March 2012, para 50.
[105] See Decision 1/CP.13, *supra* note 63, para 1(b)(ii).
[106] Copenhagen Accord, Decision 2/CP.15, *supra* note 59, para 5.
[107] Respectively Decisions 1/CP.16, *supra* note 71, para 47-67; and 1/CP.17, *supra*, para 31-62.
[108] Decision 1/CP.17, *supra*, para 44 and 51.

institutions.[109] The Standing Committee on Finance is therefore a consultative body to the COP. Rather than exercising substantive decision making, it operates through three main activities:

1- The submission of draft guidance to the COP on the GCF and the GEF;
2- The preparation of recommendations to foster coherence, effectiveness and efficiency of the GCF and GEF;
3- The organization of a communication forum "[…] among bodies and entities dealing with climate change finance in order to promote linkages and coherence".[110]

Thus, the vision behind the Standing Committee on Finance seems to be the one of having a coordinating body of climate finance outreaching to financing entities not institutionally linked in the international climate regime.

Several remarks can be made after having outlined the process of establishment of the GCF and other related mechanisms. As for finance mobilized under the UNFCCC, the medium term the GCF is likely to co-exist with the GEF, at least until the two find support and legitimacy from the COP. Yet the choice of keeping the GEF as an operational entity of the Financial Mechanism raises questions about its future role and the share of competence with the GCF. On this aspect there is no clear guidance from the COP[111] and the GEF,[112] while the GCF Board is still engaged in operationalizing its Fund. The Standing Committee on Finance, as facilitator of coordination, has a potential role in clarifying the current indeterminate situation.

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[109] The Standing Committee was formally established in Cancun in Decision 1/CP.16, *supra* note 71, para 112.
[110] Respectively Decision 1/CP.17, *supra* note 104, para 121 (c), (d), and (a).
[111] Decision 11/CP.17, UN Doc. FCCC/CP/2011/9/Add.2, 15 March 2012 seems to indicate a role of the GCF Trust Fund restricted to financing developing countries to cover their full agreed costs in preparing national communications according to Article 12(1) of the UNFCCC.
[112] See GEF Council, *Relations with the Conventions and Other International Institutions*, Agenda document GEF/C.43/03, 15 October 2012, Annex 1, <http://www.thegef.org/gef/sites/thegef.org/files/documents/GEF.C.43.03_Relations%20with%20the%20Conventions%20and%20Other%20International%20Institutions.pdf>.

Another crucial issue is to understand the role of the GCF vis-à-vis those non-UNFCCC institutions that are also to channel climate finance under the 'Copenhagen pledge' and long-term finance challenges.[113] The next chapter will explain that this is primarily a governance issue, which requires a novel theoretical and analytical framing against the background of a fragmented institutional framework. Nevertheless, the GCF appears to act in a horizontal relationship with other non-UNFCCC climate finance institutions. The absence of a clear institutional hierarchy between the UNFCCC COP and the GCF Board on one side, and other non-UNFCCC institutions, impair the GCF at the outset to hold any institutional primacy under the law on the sourcing and channeling of climate finance.

Being yet another intergovernmental global fund to finance mitigation and adaptation programmes, the GCF will be able to make a difference if its governance will garner enough legitimacy to enable it to source and leverage ambitious amounts of finance. Part II of this work will focus on these issues.

[113] In particular see below in subheading 3 of this chapter.

2. CLIMATE FINANCE IN THE KYOTO PROTOCOL AND THE PROPOSED NEW MARKET-BASED MECHANISM

The UNFCCC Financial Mechanism does not stand alone among the institutional mechanisms dedicated to North-South finance under the international climate change regime. The 1997 Kyoto Protocol, the first and only international instrument to impose binding emissions reduction goals on developed countries,[114] complements the UNFCCC-based climate finance on two different tracks. On one, it engendered a market-based mechanism, the Clean Development Mechanism, aimed at realizing mitigation projects on the territory of developing countries. On the other, the UNFCCC COP, and after the Kyoto Protocol's Meeting of the Parties (CMP),[115] set up an Adaptation Fund which, as the name suggests, is focused on financing activities that enhance climate resilience of livelihoods and ecosystems, particularly in least developed countries.

2.1. The Clean Development Mechanism

The Clean Development Mechanism (CDM) is a market-based and carbon offset mechanism.[116] It facilitates finance for mitigation projects in developing countries by rewarding project proponents and investors with Certified Emissions Reductions (CERs), which measure the verified emissions reductions or avoidance occurring during implementation. CERs can be used for compliance under the Kyoto Protocol as well as the EU Emission Trading Scheme;[117] they are also tradable assets in the primary and secondary carbon market. In the institutional mapping of this chapter, the CDM represents a hybrid and peculiar type of climate finance. It is hybrid because both private and public entities can act

[114] See Kyoto Protocol, Article 3(1) and Annex B. Notably, the effectiveness of the Protocol in reducing GHGs concentration in the atmosphere has been affected by the refusal by the US to ratify the treaty. It currently covers less than a half of worlds GHGs emissions, given also the exclusion of emerging economies from emission reduction commitments.

[115] The actual name of the supreme body of the Kyoto Protocol is 'Conference of the Parties serving as the meeting of the
Parties'. See Kyoto Protocol, Article 13.

[116] Ibid., Article 12. The implementing regulations to make the CDM operative have been adopted by the CMP in 2005: Decision 3/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006.

[117] The EU regional scheme has currently further limited the use of CERs to projects occurring in least developed countries, this has clearly impacted demand of CERs: Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, OJ L 275/32, cons. ver., as amended by Directive 2009/29/EC (OJ L 140/63), Article 11(a)(4).

as project proponents, or investors in projects.[118] It is unique, because at the moment it is the only market-based international climate finance scheme to have achieved ambitious levels of GHGs reductions.

The CDM is one of the three market-based flexibility mechanism established under the Kyoto Protocol.[119] These mechanisms ushered in a new approach to tackle problems caused by so called 'tragedies of the commons' such as global warming.[120] According to the traditional argument of liberal economists who posed the theoretical foundations for these mechanisms, the most economically efficient way to regulate polluters' behavior is to resort to a market-based, as opposed to traditional command-and-control approaches, where by contrast public authorities impose environmental standards, controls, and sanctions from their violation. Conversely, a market approach consists of 'internalizing an economic externality', meaning that what individual polluters would not account as a cost in their activities –nonetheless constituting a 'social cost'– is otherwise 'internalized' within their rational economic behaviors. This is achieved by applying property rights on the externality and by creating a market to efficiently allocate marginal costs,[121] under the assumption that transaction costs of 'running' the market would be lower than the benefits of efficient allocation.[122]

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[118] Kyoto Protocol, Article 12(9) reads: "Participation under the clean development mechanism […] may involve private and/or public entities […]".

[119] The other mechanisms are International Emissions Trading and Joint Implementation: respectively, Articles 17 and 6 of the Protocol. The legal literature on the Kyoto Protocol's flexible mechanism is vast. See for instance: D Freestone and C Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (OUP 2005); and D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond* (OUP 2009); and WT Douma, L Massai, and M Montini, *The Kyoto Protocol and Beyond: Legal and Policy Challenges of Climate Change* (TMC Asser Press 2007); and Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide To Rules, Institutions And Procedures* (CUP 2004).

[120] The expression was forged by Hardin. The tragedy originates when the rational behaviour of individuals engaged in the exploitation of an exhaustible resource leads to the mismanagement or even the extinction of that common resource that is freely enjoyable by actors. See G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science, New Series* 1243.

[121] The theoretical basis of market-based approaches was traced in the 1960's by two economists of the so called 'Chicago School'. See RH Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1; and H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *The American Economic Review* 347.

[122] This core *caveat* expressed by Coase (Ibid.) has not be taken properly into account by part of the legal scholarship and policy makers in the EU: see NS Ghaleigh, 'Two Stories About E.U. Climate Change Law and Policy' (2013) 14 *Theoretical Inquiries in Law* 43, at 47-55.

In other words, once the public authority has set an overall target of emission reductions, it then assigns emissions allowances to individual polluters reflecting their level of emissions reductions for a given period. These allowances take the form of tradable permits to emit a defined quantity of pollutants. Individual polluters are then free to trade allowances with the only obligation of returning a number of allowances equal to their verified level of emissions at the end of a given period, usually a fiscal year. Therefore, 'virtuous' polluters might end up with a surplus of allowances that they can sell on the market or bank for the following commitment period, while those emitting more than initially assigned will have to buy the missing allowances to be in compliance. The specific goal of this scheme is to reduce the aggregate abatement costs of emissions reductions, whilst still reaching the overall emissions reductions target.

The International Emissions Trading[123] (IET) and the rules to prove compliance via emissions units of the Kyoto Protocol[124] relies on these concepts, with the peculiarity that individual polluters are the developed countries listed in its Annex B. Yet the two processes alone do not amount to a means of international climate finance as understood in this work, because developing countries do not participate in the IET.

The IET and the EU Emissions Trading Scheme (ETS) instead work as the demand drivers of CDM credits. That is because CERs can also be used for compliance and traded under those mechanisms.[125] It is thus thanks to the IET that the international carbon market

[123] Kyoto Protocol, Article 17.
[124] Decision 13/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.2, 30 March 2006, Annex, paras 13-4 in particular.
[125] See Kyoto Protocol, Article 3, para 10-2. As for the implementing regulations, see Decision 13/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.2, 30 March 2006. However, it has been rightly noted that the main thrust to the CDM success in terms of participation has been given by the EU Emissions Trading Scheme which also accepted CDM and JI credits for compliance purposes. See A Michaelowa (ed), *Carbon Markets or Climate Finance? Low Carbon and Adaptation Investment Choices for the Developing World* (Routledge 2012) 1-38.

was first created through the demand of emissions allowances and Joint Implementation and CDM credits.[126]

The types of CDM projects are numerous and span across many sectors of a country's economy, from forestry to metal production.[127] Hence, only if the capital mobilized for a CDM project is sourced from a developed country's budget can it then be deemed public climate finance. The fact that CDM projects are often funded by mixed public-private schemes strengthens the idea of its hybrid nature as a climate finance mechanism.[128]

The same concept can be extended to the second baseline-and-credit mechanism of the Kyoto Protocol, Joint Implementation, with the only difference that this mechanism does not fit into the framework of this study, because only developed states and states from the ex-USSR block can be the recipient of Joint Implementation projects.[129]

Across more than ten years of activity, the CDM has created a complex system of transnational administration. Whilst the CMP holds the authority and guidance of the mechanism, technical decision-making and standard setting have been bestowed on an Executive Board (EB), made of states representatives elected by CMP according to regional representation requirements.[130] The EB's core tasks are to regulate on key issues for the functioning of the mechanism, such as approving methodologies for the calculation of project baselines;[131] accrediting Designated Operational Entities,[132] working as individual

[126] The World Bank estimated a volume of almost USD 3 billion of the CDM primary market for the year 2011. See World Bank, 'State and Trends of the Carbon Market: 2012', May 2012, at 49, table 3 <http://siteresources.worldbank.org/INTCARBONFINANCE/Resources/State_and_Trends_2012_Web_Optimized_19035_Cvr&Txt_LR.pdf>.

[127] The UNFCCC hosts a comprehensive database of all registered projects at <https://cdm.unfccc.int>. Also other two institutions produce regular and updated analysis of the CDM pipeline: the UNEP Risoe Center at <http://cdmpipeline.org>; and the Japanese Institute for Global Environmental Strategies at <http://www.iges.or.jp/en/cdm/report_cdm.html>.

[128] See <http://www.cdmpipeline.org/> for detailed data on CDM project participants.

[129] See Kyoto Protocol, Article 6, which enables only states listed in Annex I of the UNFCCC to participate. The same Annex includes countries 'that are undergoing the process of transition to a market economy'. These are the states that belonged to the USSR block before its collapse in 1990. In the previous chapter it has been noted how these category of states is a consequence of the application of the Common But Differentiated Responsibilities principle.

[130] For an in-depth analysis of the CDM internal governance see Chapter V below, at 191.

[131] Decision 3/CMP.1, *supra* note 116, para 5(d).

[132] Ibid., para 5(f).

project auditors; and deciding on the registration of projects and issuance of CERs within the CDM project cycle rules.[133] Furthermore, the EB regulations display an array of different instruments, under a specific hierarchical relationship.[134]

The CDM project cycle and the innovative features of its governance have spawned ample scrutiny by the literature. Concentrating just on the institutional issues and despite the recognition of its pioneering administrative structure,[135] in 1998 Werksman highlighted the crucial question of the CDM governance.[136] After years of implementation, criticism was cast on the practice of the EB in failing to exert its function in a manner compliant with broadly accepted administrative standards, such as efficiency, transparency, legality, etc. These standards were not only affected by the sluggish procedures, but also by the question of consistency in the decision-making practice of the Executive Board.[137] In addition, given that the EB *de facto* affects with its decisions the legitimate interests of individual entities participating in CDM projects,[138] various authors complained about the absence of a review mechanism of the Board's decisions vis-à-vis CDM regulations.[139] Some went even further with the hypothesis –later dismissed by practice– that private entities could initiate arbitrations or bring CDM institutions before national courts.[140]

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[133] Ibid., paras 35-52 and 64-66. Each project needs to pass through four steps, before the issuance of CERs: i) validation; ii) registration; iii) monitoring; iv) verification and issuance.
[134] *CDM Executive Board Decision and Documentation Framework*, EB 67 Rep., Annex 4 individuates CMP Decisions as hierarchically superior to three different kinds of decisions that the EB can take; it also clarifies the types of EB documents and their hierarchy from mandatory to non-mandatory.
[135] C Streck and J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) 19 *European Journal of International Law* 409.
[136] J Werksman, 'The Clean Development Mechanism: Unwrapping the "Kyoto Surprise"' (1998) 7 *Review of European Community & International Environmental Law* 147.
[137] See Streck and Lin, *supra*, 422-6.
[138] As will be seen below in Chapter III, this is relevant under a public law approach to the issue.
[139] Streck and Lin, *supra*. See also J Werksman, 'Defending the Legitimate Expectations of Private Investors under the Climate Change Regime: In Search of a Legal Theory for Redress' (2007) 39 *Georgetown Journal of International Law* 679; and M von Unger and C Streck, 'An Appellate Body for the Clean Development Mechanism: A Due Process Requirement', (2009) 1 *Carbon and Climate Law Review* 31.
[140] EE Meijer, 'International Institutions of the Clean Development Mechanism Brought before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice, The' (2006) 39 *New York University Journal of International Law and Politics* 873, at 896-900.

The CMP and the EB have been sensitive to the concerns expressed by practitioners and the literature.[141] This has led to a set of regulatory reforms, including opening participation to private actors in the context of reviews by the EB during the registration and issuance phase of the project cycle;[142] a clarification on the normative hierarchy amongst the different instruments;[143] and reformed terms of reference for the EB's members to guarantee expertise and avoid conflicts of interests.[144] Such improvements have not fully matched the suggestions coming from the literature, since a proper administrative mechanism to review the Executive Board's decisions has not yet come to place. However, the fact that at the time of writing circa 1.5 billion CERs have been issued, corresponding to a level of about 1.5Gt of CO_{2eq} reductions,[145] showcases the success of the CDM in terms of project numbers and amount of mitigation finance leveraged in developing states. Yet this success is being recently challenged by the current downfall of the global carbon market, which has severely affected the demand for CERs. Its causes are due to two main factors: first, the low prices of allowances and regulatory changes under EU ETS, by far the biggest carbon market and the biggest market for CER demand; second, the slow pace in negotiations for setting up a overhauling market-based mechanism for carbon pricing, which could potentially revamp the CDM.[146]

The institutional and regulatory structure of the CDM represents a primer for complex transnational administration. If the CDM's amount of finance is dwarfed by other channels within and outwith the UNFCCC,[147] it nonetheless appears to work as a complementary and

[141] See for instance Decision 2/CMP.5, UN Doc. FCCC/KP/CMP/2009/21/Add.1, 30 March 2010, para 7, where the CMP requests the Executive Board to improve its transparency, consistency and impartiality.
[142] See *Procedure for Review of Requests for Issuance of CERs*, EB.64 Report, 26 October 2011, Annex I.
[143] *CDM Executive Board Decision and Documentation Framework* , EB 67 Rep., Annex 4, undated.
[144] Decision 3/CMP.6, FCCC/KP/CMP/2010/12/Add.2, 15 March 2011, Annex I.
[145] CDM insights statistic as of June 2014 at <http://cdm.unfccc.int>.
[146] World Bank, *State and Trends of Carbon Pricing*, May 2014, at 38, <http://www.worldbank.org/en/news/feature/2014/05/28/state-trends-report-tracks-global-growth-carbon-pricing>.
[147] See the rough estimates by Buchner *et al.*, 'The Global Landscape of Climate Finance 2013', Climate Policy Initiative report, October 2013, ii, Figure ES-1.

flexible means of hybrid climate finance, able to attract financial sources according to a different institutional model (and, perhaps, more effective) from the more traditional ones.

2.2. The New Market-based Mechanism

The CDM is a project-based mechanism, in the sense that emission credits are rewarded on a case-by-case basis and confined to a single activity –or a bundle of activities– [148] in a limited geographic area of a developing country. This approach is unlikely to be compatible with the demanding transformational shifts in developing countries' economies in order to stay on track with a sustainable pathway of GHGs stabilization.[149] The coupling of scaled-up efforts in mitigation with the cost-efficiency rationale of market-based approaches constituted a point of consensus at the 2007 negotiations in Bali, when the BAP roadmap included the consideration of marked-based approaches in mitigation policies under a new climate agreement.[150] After four years of intense negotiations, the broad consensus of the BAP has concretized in a COP decision which 'defines' a new market-based mechanism (NMM), as a means *inter alia* to "[…] assist developed countries to meet part of their mitigation targets or commitments under the Convention."[151]

Thus, the attempt is to transfer the legacy and experience developed under the CDM under the broader UNFCCC umbrella, with the vision that the newly agreed NMM will apply to entire sectors of a developing country's economy under voluntary terms.

If these are the premises, the NMM is still under negotiations and its institutional nature nebulous.[152] More specifically it is still unclear whether the NMM would constitute a cap-and-trade, like the IET, or a baseline-and-credit mechanism such as the CDM. The last COP decision on the matter seems to go for the second option, as it requests parties to

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[148] It is possible to bundle two or more similar activities under a unified procedure named 'programme of activities' under the CDM. See Decision 7/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, para 20.

[149] That is, the '2C° target' as outlined in the Introduction.

[150] See Decision 1/CP.13, *supra* note 63, para 1(b)(v).

[151] Decision 1/CP.17, UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012, para 83, preceded by Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 15 March 2011, para 80.

[152] For an overview see S. Butzengeiger, *et al*., 'New Market Mechanisms for Mitigation: Getting the Incentives Right' in A. Michaelowa (ed), *supra* note 125, 146-67.

consider "[r]equirements for the accurate measurement, reporting and verification of emission reductions, emission removals and/or avoided emissions" and "[c]riteria […] for ambitious reference levels (*crediting thresholds and/or trading caps*)[…]".[153]

At the time of writing, the NMM has only been 'defined'; an expression that leaves its formal establishment dubious.[154] It is also unclear whether a NMM would be linked with the NAMAs mechanism. Therefore, and in a similar fashion to the linkages between the IET and the CDM, a UNFCCC-based NMM would also require one or more emissions trading schemes where NNM credits could be used for regulatory compliance. A new UNFCCC-based IET would likely be the most likely scheme, but it might be the case that also existing and future regional schemes, like the European Emissions Trading Scheme, might become additional markets of NMM credits.

Overall, it is too early to appraise the relevance and institutional fitting of the NMM in the international climate regime. Only when defined structures and operational modalities will be agreed upon, it will be possible to provide a significant understanding. Yet, the NMM is worth of inclusion in this mapping due to its potential to scale-up market-based approaches to mitigation finance.

2.3. The Adaptation Fund

The Adaptation Fund (AF) is one of the first international multilateral funds entirely dedicated to financing adaptation projects in developing countries particularly vulnerable to the adverse effects of climate change. It was first established in 2001 by a decision of the UNFCCC COP,[155] yet it took almost ten years to become fully operational, due to political clashes on its governance and management. Differently from the SCCF and the LDCF, which are rooted in the UNFCCC regime and managed by the GEF, the AF is an international institution with legal capacity, under the authority and guidance of the Kyoto

[153] Decision 1/CP.18, Un Doc. FCCC/CP/2012/8/Add.1, 28 February 2013, para 51(d) and (f).
[154] Decision 1/CP.17, *supra* note 151, para 83.
[155] Decision 10/CP.7, UN Doc. FCCC/CP/2001/13/Add.1, 21 January 2002, para 1.

Protocol's CMP, and operated by an independent Board. Currently the AF shares the 'global arena' of international adaptation finance with the GEF and the GCF, as well as other institutions acting outside the UNFCCC/KP umbrella, and especially with the Climate Investment Funds with their Pilot Program for Climate Resilience.

The AF was established with the aim of implementing both the general climate finance obligations on adaptation in the climate treaties, as well as a specific provision under the Kyoto Protocol's CDM, which reads:

> "The [CMP] shall ensure that a share of the proceeds from certified project activities is used […] to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation."[156]

The Protocol thus imposes an obligatory contribution from project developers amounting to two percent of CERs issued for each project,[157] which are transferred into a dedicated account of the CDM registry.[158] These CERs are later monetized after being sold in the carbon market.[159] In 2001 the COP decided initially that an independent fund should manage the resources stemming from the monetization of CERs, yet at the time the prevailing view on the institutional governance was to vest the GEF with the management of the AF, in the same fashion as the SCCF and LDCF.[160] At later meetings this solution spurred fierce opposition from developing countries, which view adaptation finance and the share of proceeds from the CDM as fundamentally different from mitigation finance: their moral and political argument was that those resources should be owned at start by developing countries, being adaptation needs mainly caused by previous decades of unfettered GHGs emissions from industrialized states. Accordingly, it would have been

[156] Kyoto Protocol, Article 12(8).
[157] Decision 17/CP.7, UN Doc UN Doc. FCCC/CP/2001/13/Add.2, 21 January 2002, para 15.
[158] Decision 3/CMP.1, *supra* note 116, para 66(a). Share of proceeds are not deducted at issuance when the CDM project takes place in a least developed country: Decision 2/CMP.3, UN Doc. FCCC/KP/CMP/2007/9/Add.1, 14 March 2008, para 31.
[159] The World Bank, acting as trustee of the AF, is also the managing entity of CERs monetization.
[160] Both decisions establishing the SCCF, LDCF, and the AF call for the funds to be "[…] operated by an entity entrusted with the operation of the financial mechanism", which as seen at the time was only the GEF. Compare Decision 7/CP.7, *supra* note 51, para 6 and Decision 10/CP.7, *supra* note 155, para 4.

unacceptable to subject AF resources to the conditionalities and governance of the GEF, which leaves little decisional weight to the countries most exposed to the adverse effects of climate change.[161]

It took six years to achieve a compromise, when in 2007 the CMP decided that the AF should be operated by an independent Board where developing countries would have the major role in decision making. The AF Board would thus act outside the UNFCCC Financial Mechanism and under "the authority and guidance" of the CMP.[162] While the Board's functions are typical of a multilateral trust fund's executive body, such as the GCF Council or the GCF Board, the same CMP decision for the first time expressly provided for means of 'direct access' to funding from eligible developing countries, without the need to resort to international implementing agencies, which act as intermediary entities.[163]

This 'institutional shift', while favoring developing countries not only resulted in the creation of yet another international climate finance institution, but also considerably prolonged the time for actually operationalizing the AF. While the whole process was completed in 2011, the first AF Board decision on approval of individual projects dates 2010.[164] Aside from internal matters, new legal agreements had to be set up between i) the CMP and the GEF Council for the provision of secretariat services to the Board; ii) the interim trustee agreement between the CMP and the World Bank; and iii) the constitution of the AF Board as an entity with legal capacity.[165]

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[161] M Grasso, 'The Role of Justice in the North–South Conflict in Climate Change: the Case of Negotiations on the Adaptation Fund' (2011) 11 *International Environmental Agreements: Politics, Law and Economics* 361.
[162] Decision 1/CMP.3, UN Doc. FCCC/KP/CMP/2007/9/Add.1, 14 March 2008.
[163] Ibid., paras 29-30.
[164] AF, Decision B.10/5, UN Doc. AFB/B.10/7/Rev.1, 11 August 2010.
[165] Decision 1/CMP.4, FCCC/KP/CMP/2008/11/Add.2, 19 March 2009. The latter issue was eventually solved only in 2011 –ten years since the AF establishment– when the German government adopted an act granting legal capacity to the AF Board and extending *mutatis mutandis* existing headquarter agreements between the UN and Germany. The German act is
<https://www.adaptation-fund.org/sites/default/files/2011_03_08_Act%20to%20establish%20the%20legal%20capacity%20of%20the%20AFB_February2011_0.pdf>.

The fall demand for CERs in the carbon markets since the second half of 2011 made the winding road to the AF creation even more tortuous, as this implied a reduction of the revenue stream from CERs monetization. The CMP attempted to alleviate the problem in 2012 by extending the 2 percent share of proceeds also to transfers under the IET and Joint Implementation during Kyoto Protocol's second commitment period.[166] Concurrently the Board has solicited direct donations and pledges by Kyoto Protocol parties.

Despite all efforts and the increased number of national implementing entities eligible to apply for fund, the AF remains unsustainably funded[167] having pooled just USD 400 million[168] since its establishment. Certainly, the competing presence of the Pilot Program for Climate Resilience, a climate finance initiative under the Climate Investment Funds, which has triple the resources of the AF, has contributed to this.

3. OUTSIDE THE UNFCCC/KP UMBRELLA

The institutional realities under the UNFCCC and the Kyoto Protocol describe but a portion of the climate finance landscape. Many other institutions, in fact, participate in the global arena of climate finance as institutional intermediaries, similarly to those entities already explored. As seen, the international legal regime allows for this institutional proliferation in climate finance: Article 11(5) of the UNFCCC allows industrialized states to opt for other means than the UNFCCC/KP-based funds and mechanisms to channel their financial support. As a consequence, also those institutions acting *outside* the authority and guidance of the international climate change regime, *de facto* have been not only implementing the

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[166] Decision 1/CMP.8, UN. Doc. FCCC/KP/CMP/2012/13/Add.1, 28 February 2013, paras 20-22.

[167] Such is the concern of the latest CMP: Decision 1/CMP.9, 31 January 2014 , UN Doc. FCCC/KP/CMP/2013/9/Add.1, para 5.

[168] *Trustee Presentation: Update on Status on Resources and CER Monetization*, 15 March 2014, AFB/B.23/Inf.4. Highlighting how donations have actually surpassed CER proceeds.

international financial obligations, but also exerting pivotal regulatory functions related to the building blocks of climate finance addressed in the first chapter.

The purpose of this final section is to provide a non-exhaustive, yet meaningful outline of the multifarious institutions acting outside the UNFCCC/KP umbrella. Rather than addressing individual institutions as done above, here the approach will be based on the individuation and legal clarification of four typologies: i) Multilateral Development Banks (MDBs); ii) 'bilateral' institutions; iii) inter-institutional or private-public partnerships; and iv) implementing agencies.

A methodological premise is here needed. Despite the fact that many of these institutions are only partially involved in climate finance, they are nonetheless a crucial part of this international institutional complex: it is, therefore, necessary to take them into account, in order understand the legal implications of a fragmented institutional landscape. This is corroborated by numbers: recent but only broadly indicative estimates of global climate finance flows found that while dedicated climate funds collectively channeled USD 1.6 billion in 2012, the total amount of climate finance channeled by development finance institutions, including MDBs and bilateral entities, reached USD 121 billion for the same year.[169] Therefore, the fact climate finance might constitute only a small portion of the finance portfolio and of the functional scopes of an institution will be disregarded. Moreover, only the most relevant institutions in terms of effort and presence in the climate finance arena will be taken into account.

3.1. Multilateral development banks

MDBs, often named international financial institutions or multilateral financial institutions, are intergovernmental organizations established with the general purpose of providing

[169] Buchner *et al.*, 'The Global Landscape of Climate Finance 2013', Climate Policy Initiative report, October 2013, at 17-22 <http://climatepolicyinitiative.org/publication/global-landscape-of-climate-finance-2013>.

financial resources for the economic development of their members.[170] In contrast to the institutions acting within the international climate change regime, MDBs are legally established by international treaties thus belonging to the traditional institutional category of international organizations.[171] Nevertheless their activity is somehow particular in the international sphere[172] as they are dedicated to the specific scope of fostering economic and social development of 'client countries' mainly via capital leverage and loans, either at market or concessional rates. Thus, their distinguishing features are that state members – including recipients– participate through capital shares and take collective decisions according to a corporate governance model. Interestingly, although none of the MDB's constituting agreements expressly assigns to these institutions the task of financing climate-related activities, an extensive interpretation of their mandates nevertheless allowed them to enter the climate finance arena.

Because of their peculiar nature and multiple activities, it is difficult to square the MDBs institutional role in international climate finance. Rather, they seem to hold simultaneously a horizontal and vertical relationship vis-à-vis the UNFCCC-based institutions already introduced. On one hand, MDBs finance climate-related projects contextually to the GEF, the GCF and the AF, with the difference that they also leverage financial sources in international markets, therefore attracting both public- and private-sourced finance. On the other, the World Bank –the first MDB created after the Second World War–[173] serves as administrative trustee of all UNFCCC/KP funds. Furthermore, MDBs provide technical services to developing countries applying for funding, and act as implementing agencies of the UNFCCC/KP climate funds and for single climate projects.

[170] DD Bradlow and DB Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010), at 9-16.

[171] HG Schermers and NM Blokker, *International Institutional Law* (5 Revised. Brill 2011), at 27-39.

[172] Rodrik argues that MDBs hold two advantages: i) they suffer less from information distortion related to the countries they deal with; and ii) their interactions with recipient countries is less politicized than 'intergovernmental links'. See D Rodrik, 'Why is There Multilateral Lending?', 1995, NBER Working Paper N.5160, 2.

[173] The institutions today part of the World Bank Group are the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation; the Multilateral Investment Guarantee Agency; and the International Center for Settlement of Investment Disputes. Hereinafter for 'World Bank' is meant only the IBRD and the IDA, unless differently stated.

The World Bank, which has extensively interpreted its mandate of international reconstruction and development in order to set up a wide-ranging climate finance portfolio, was in fact a first mover into sustainable development financing.[174] Not only it was one of the constitutive entities of the GEF Pilot in 1991, but has later increasingly expanded its climate-related finance, especially in the area of carbon offsets once the Kyoto Protocol's market-based mechanisms started functioning. The Bank set up a Prototype Carbon Fund; other specialized funds, such as the BioCarbon Fund and the Forest Carbon Partnership Facility; and other donor country-based carbon funds with the task of investing on projects or purchasing CERs from eligible CDM projects.[175]

With the increasing need of scaling up development finance, other MDBs were created with their constitutive agreements broadly replicating the World Bank's features and pursuing the same general scope of economic development.[176] Following the World Bank example, these MDBs have also extensively interpreted their mandates in order to develop climate-related strategies and portfolios. A traditional division between MDBs regards their global or regional geographical reach: broadly, the World Bank and the European Investment Bank are considered global MDBs while the remaining have their functions geographically confined to certain macro-regional areas.

[174] *International Bank for Reconstruction and Development Articles of Agreement*, as lately amended in 27 June 2012, Article I(i), <http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/IBRDArticlesOfAgreement_English.pdf>; and D Freestone, *The World Bank and Sustainable Development* (Martinus Nijhoff 2012), at 7-14.

[175] For the list of funds see <https://wbcarbonfinance.org/Router.cfm?Page=Funds&ItemID=24670>.

[176] DD Bradlow and DB Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010).

The following table illustrates the main MDBs currently engaged in climate-related finance with a non-exhaustive list of their climate programmes and partnerships based on a desktop review:[177]

Table 1: non-exhaustive list of multilateral development banks active in climate finance and their related climate programmes

MDBs	Climate finance initiatives
World Bank Group	Carbon Partnership Facility Forest Carbon Partnership Facility MIGA Guarantees Specialised carbon funds
African Development Bank	Congo Basin Forest Fund Climate Dev-Africa Programme Africa Carbon Support Programme
Asian Development Bank	Clean Energy Financing Partnership Facility Climate Change Fund Water Financing Partnership Facility
Caribbean Development Bank	Basic Needs Trust Fund Special Development Fund
Central American Bank for Economic Integration	Green MSME Initiative
Inter-American Development Bank	Sustainable Energy and Climate Change Initiative
European Investment Bank	Post-2012 Carbon Fund Global Energy Efficiency and Renewable Energy Fund
European Bank for Reconstruction and Development	Sustainable Energy Initiative Post-2012 Carbon Fund Multilateral Carbon Credit Fund
Nordic Development Fund	Nordic Climate Facility
Nordic Environment Finance Corporation	NEFCO Carbon Fund Nordic Partnership Initiative
Nordic Investment Bank	Climate Bonds Initiative

Each MDB not only holds its own climate finance portfolio, but it is also engaged in partnership with other MDBs, bilateral agencies and the private sector. To complicate the scenario, MDBs often also act as implementing agencies or trustees of UNFCCC funds given their comparative advantage, regional expertise and capacity. All these features make extremely difficult to assign a clear-cut role of MDBs in climate finance because they can act

[177] Another non-exhaustive list of MDBs activities can be found in the official UNFCCC website at <http://unfccc.int/cooperation_and_support/financial_mechanism/bilateral_and_multilateral_funding/items/2822.php>.

as i) capital-leveraging entities; ii) catalyzers of public climate funding; iii) promoters of market-based mechanisms; iv) public funds' trustees; v) direct implementing agencies in developing countries; vi) and providers of technical expertise.

At the 2005 G8 meeting in Gleneagles, top donor countries developed a Climate Action Plan inviting the World Bank and other MDBs to put forward a Clean Energy Investment Framework towards scaled-up lending to developing countries.[178] The following meeting in Hokkaido ended in a joint plan of implementation of the framework calling for increased lending to borrowers, access to concessional funds and grants and cooperation between MDBs.[179] The following period has been characterized by a constant expansion of MDBs efforts in climate related activities, with the Climate Investment Funds representing the most concrete outcome of MDB's interaction.[180] On the other hand, an independent study found that, as of 2008, over 60% of financing in the energy sector by the major MDBs did not contain any climate change implications.[181]

Among the MDBs, the World Bank has been the first to act in the field of international environmental finance.[182] One of its early activities can be traced during the establishment of the Multilateral Fund under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, when it was appointed as an implementing agency.[183] However, in the aftermath of the 1992 Rio UN Conference on Environment and Development and of its

[178] See 'The Gleneagles Communiqué', 2005, Plan of Action, <http://www.g8.utoronto.ca/summit/2005gleneagles/climatechangeplan.pdf>, para 25.

[179] See 'Joint Report to the G8 on the Implementation of the Clean Energy Investment Framework and Their Climate Change Agenda: Going Forward' June 2008, <http://www.mofa.go.jp/policy/economy/summit/2008/doc/pdf/0708_07_en.pdf>.

[180] See the contributing paper to the UN Secretary General High Level Advisory Group on Climate Change Financing: 'Work Stream 4: Contributions from International Financial Institutions', < http://www.un.org/wcm/content/site/climatechange/pages/financeadvisorygroup>, para 3.6.

[181] S Nakhooda, 'Correcting the World's Greatest Market Failure: Climate Change and the Multilateral Development Banks', 2008, WRI Issue Brief, at 2, <http://www.wri.org>.

[182] Freestone, *The World Bank and Sustainable Development*, *supra* note 117.

[183] See MOP Decision II/8, 1990, UNEP/OzL.Pro.2/3, para 6. On the contentious relationship during the early experience of the Multilateral Fund see R Falkner, 'The Multilateral Ozone Fund of the Montreal Protocol - Institutions for global environmental change' (1998) 8 *Global Environmental Change* 171.

resulting MEAs[184] clearer roles for the World Bank and other MDBs emerged. The lack of sufficient public funding from industrialized states has left a vacuum that the World Bank and other MDBs could fill through their financial leverage and capacity.[185] The World Bank has been appointed and constantly confirmed by the UNFCCC and CBD's COPs as the interim trustee,[186] while its piloted initiative, the GEF, has been selected as the only operational entity of their financial mechanisms.

After the adoption of the Kyoto Protocol in 1997 and before the effective start of its market based mechanisms in 2005[187] the World Bank acted as a crucial catalyzer of investments in offsets through its numerous carbon funds, so that currently the Carbon Finance Unit of the World Bank manages fifteen carbon funds or facilities.[188]

Aside from its role as implementing agency, administrator and carbon market promoter, the most relevant role of World Bank in climate finance is its lending activity.[189] Throughout the years, the lending and crediting activity of the World Bank in climate related projects has resulted in a conspicuous pipeline,[190] where the World Bank often acts as lender in co-financing with the GEF and other actors. These activities consist mostly of blending concessional and grant finance.[191] Within the World Bank Group's lending activities a

[184] The UNFCCC and the CBD.
[185] A Steer and J Mason, 'The Role of Multilateral Finance and the Environment: A View from the World Bank' (1995) 3 *Indiana Journal of Global Legal Studies* 35, 36.
[186] Respectively, UNFCCC, Article 21(3); and CBD, Article 39.
[187] After the 2005 CMP in Montreal.
[188] See http://wbcarbonfinance.org/.
[189] World Bank loans are divided into three types: i) investment operations; ii) development policy operations; and iii) program-for-results operations. For each category different internal policies applies and different financial instruments and solutions are offered. See the World Bank Group Operational Policies, OP8.60-10.00, <http://web.worldbank.org>.
[190] For a list of active and closed climate related projects see <http://climatechange.worldbank.org/financing/all-projects>.
[191] See, for instance, the project in Mexico: 'Efficient lighting and appliances' (Project ID: P106424). The total cost of almost USD 715 sees the contribution by the IBRD (USD 250 million), GEF (USD 7 million), and the Climate Technology Fund (USD 50 million), with the remaining finance sustained by the Mexican Government and private investors. While the GEF contribution consists of a grant, CTF and IBRD's are loans and, therefore, their principals are repaid according to the respective loan agreements. The project's IBRD-Mexico loan agreement foresees the payment of a low interest rate on the principal: see the Loan Agreement between United Mexican States and the IBRD No. 7996-MX, <http://web.worldbank.org>, section 2.04.

distinction is drawn between IBRD loans and IDA crediting activity, where in the latter no interest fees are requested for principal repayments.[192]

Overall, MDBs are crucial actors in climate finance. The rationale of their intervention relies on the fact that climate change enters within the broad scopes of their mandates, as enshrined in their respective constitutive agreements. In addition, their high rate status as borrowers in the global financial market creates the possibility to leverage private capital for their lending and investments, with the positive effect of lowering interest rates below market levels.[193] Their manifold activities (public and private) make difficult – if not impossible - any clear positioning in the international governance of climate finance.

3.2. Bilateral finance and national institutions

As noted above, Article 11(5) of the UNFCCC allows industrialized states to make use of their bilateral channels to comply with their financial commitments, rather than being compelled to channel their public sources through the Financial Mechanism. Bilateral climate finance today constitutes the biggest share stemming from public resources, amounting to an estimated amount of USD 21.5 billion average per year in the period 2010-2012.[194] Therefore, despite the developments in multilateral finance within and outwith the UNFCCC, industrialized states still appear to prefer their own administrations and to directly manage domestic budgets earmarked for international climate finance.[195]

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[192] An example of IDA credited project is the 'Mozambique Climate Change Development Policy Operation', consisting in a USD 50 million IDA credit Development Policy Lending (Project ID: P128434). According to the World Bank Group Operational Policies (OP 3.10, Annex D, < http://web.worldbank.org>), Mozambique is not eligible to IDA grants. This entails that the USD 50 million credit shall be repaid after a forty years' maturity period without interest, with the payment of a small 'service charge of 0.75% on the principal (see OP 3.10 37). The specific grant agreement is not publicly available.

[193] Steer and Mason, 'Role of Multilateral Finance and the Environment'

[194] OECD-DAC, 'Climate-related Aid', May 2014, <http://www.oecd.org/dac/environment-development/Climate-related%20aid%20Flyer%20-%20May%202014%20final.pdf>.

[195] Exemption made for the Government of UK. An independent study shows how a tiny portion of UK public spending in climate finance passes through bilateral means: see S Nakhooda, et al, 'The UK. Fast-Start Finance Contribution.', 2012, WRI and ODI Working Paper, <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7662.pdf>, at 11-12. On another direction, the US Government seeks to increase the level of leveraged private capitals in its ODA climate finance flows. See T Fransen, et al, 'The U.S. Fast-Start Finance Contribution', 2012, WRI and ODI Working Paper, <http://www.odi.org/publications/6560-usa-america-fast-start-finance-unfccc-pledge>, at 11-12.

As the name suggests, bilateral climate finance is enacted between two countries, the contributor and the recipient, according to international foreign aid agreements[196] and through the regulatory and executive role of national institutions. These are often Foreign Affairs Ministries, or specialized international development agencies. In some cases, national ministries work in conjunction with national development banks or technical agencies.[197]

For the purposes of this chapter, the institutional role of bilateral entities in climate finance is straightforward. Indeed they represent a typical means of direct implementation of the financial obligations under the UNFCCC by industrialized states. In fact, under an international law, it is irrelevant how a state frames its internal bureaucracy and law to implement international obligations, unless those internal measures directly violate such international obligations.[198] Nonetheless an emerging literature is evidencing the 'donor-bias' characterizing the law of international development cooperation, stemming both from the powerful contractual position of contributors, and from the complex linkages between the national, transnational and international laws, which have historically limited the control and management of cooperation finance by recipient countries.[199] Yet recent trends at international level, from the Monterrey Consensus to the likely establishment of the Third UN Conference on Financing for Development, are pointing towards new concepts and

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[196] P Dann and M Riegner, 'Foreign Aid Agreements', Max Planck Encyclopedia of Public International Law, May 2011, online edition <http://opil.ouplaw.com>. Foreign aid agreements are typically executive agreements under public international law, which enter into force without need of ratification or other formal expression of states consent.

[197] For an overview of national approaches in climate finance see J Pickering, D Rossati *et al.*, 'Acting on Climate Finance Pledges: Inter-Agency Dynamics and Relationships with Aid in Contributor States' Centre for Climate Economics & Policy, Australian National University, 2013 CCEP Working Paper No 1306. For instance, the German Development Bank, Kreditanstalt Für Wiederaufbau (KfW) is a relevant player both in climate and carbon finance. Similarly the French Caisse des Dépôts has an ad hoc subsidiary, CDC Climat, which deals exclusively with climate and carbon finance. An example of technical agency is the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), which provides technical assistance to the German government also in its climate finance activities.

[198] This can be deduced *a negativo* from the principle stated by the PCJI that no state can adduce motives of domestic laws with a view of evading international obligations: in *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion [1932] Series A/B No 44, at 24.

[199] By way of illustration, P Dann, *The Law of Development Cooperation: a Comparative Analysis of the World Bank, the EU and Germany* (CUP 2013) at 216-218. The author individuates three normative layers made of foreign aid agreements, internal rules of donors on the modalities and finalities of financial transfers, and standards applicable to all the actors involved.

principles aiming at levelling the playfield between states.[200] As will be seen in the following chapters, these crucial themes also shape the overhauling institutional structure of climate finance, as well as the internal regulations of international institutions.

To provide but an explicatory overview, table 2 below –again based on a desktop review– lists the most relevant agencies and public entities from Annex I countries engaged in bilateral climate finance:

Table 2: non-exhaustive list of Annex-I countries ministries agencies engaged in climate finance

Country	National institutions
Australia	AusAid
Austria	Austrian Development Agency Federal Ministry of EU and Int'l Affairs
Belgium	Federal Public Service Foreign Affairs
	Federal Trade and Development Cooperation
Canada	Canadian International Development Agency
Denmark	Danish Development Agency
European Union	EU Commission – Development and cooperation – EuropeAid Global Climate Change Alliance
Finland	Department of International Development Cooperation
France	Agence Francaise de developpement
	Department for International Cooperation
	CDC Climat
Germany	Federal Ministry of the Environment, Natural Resource Protection and Consumer Protection (BMZ) Kreditanstalt Für Wiederaufbau (KfW) Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)
Greece	Ministry for Foreign Affairs
Ireland	Irish Aid
Italy	Directorate General for Development Cooperation, Ministry of Foreign Affairs Ministry for International Cooperation and Integration
Japan	Ministry of Foreign Affairs

[200] Ibid., at 139-54.

	Japan International Cooperation Agency Japan Bank for International Cooperation Nippon Export and Investment Insurance New Energy Development Organisation
Luxembourg	Luxembourg Agency for Development Cooperation
Netherlands	Ministry of Foreign Affairs Minister for Development Cooperation
New Zealand	New Zealand Aid Programme - Ministry of Foreign Affairs and Trade
Norway	Ministry for Foreign Affairs Norwegian Agency for Development Cooperation Norwegian Investment Fund for Developing Countries
Portugal	Portuguese Cooperation Institute
Spain	Spanish Agency of International Cooperation for Development
Sweden	Swedish International Development Cooperation Agency Ministry of Foreign Affairs
Switzerland	Swiss Agency for Development and Cooperation
United Kingdom	Foreign and Commonwealth Office Department of Energy and Climate Change Department for International Development
USA	US Agency for International Development Millennium Challenge Corporation Overseas Private Investment Corporation

3.3. Multilateral trust funds, public-private and inter-institutional partnerships

The arena of non-UNFCCC institutions implementing international climate finance obligations is further populated by a wide array of entities of different nature. The flexibility in choosing the means for implementing UNFCCC obligations led countries, MDBs, UN agencies, and private corporations to set up flexible institutions and initiatives, often targeted to sectoral (e.g. deforestation or renewable energy) and specific regional areas. Again, these institutions appear to act contextually and horizontally to MDBs, bilateral entities, and UNFCCC funds.

A prominent model of international institution is the multilateral trust fund. The term describes different kinds of financial arrangements with specific aims (e.g. climate change mitigation or adaptation), adopted either in binding and non-binding form under international law. The financial agreement often takes place between a group of contributor countries and a trustee; the latter being an entity tasked with the ownership of resources and the administration of the fund, according to a trust fund agreement, often covered under international law. As seen, all UNFCCC-based climate funds are multilateral trust funds, although they differ on many aspects, including the supervisory role of the COP/CMP and their internal governance.

The multilateral trust fund model is the most recurrent also under other climate finance initiatives outside the UNFCCC, including those international partnerships comprising non-state members. From the purview of international institutional law it is noteworthy that not all multilateral trust funds can be interpreted as independent entities, and therefore as international institutions,[201] especially when the constitutive document does not establish a separate executive organ for the fund's management.[202] Interestingly, however, virtually all climate-related multilateral trust funds envision some form of independent governance from its members, as well as administration facilities of the trustee in a way that often their independence and constitution as an international institution can hardly be doubted.[203]

Often multilateral trust funds are created contextually to a dedicated climate finance institution, which executes the fund via its internal governance and regulations. By way of illustration, the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) is an inter-agency UN partnership (between UNEP, UNDP and the Food and Agriculture Organization - FAO)

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[201] HG Schermers and NM Blokker, *International Institutional Law* (5 Revised. Brill 2011).

[202] See I Bantekas, *Trust funds under International Law: Trustee Obligations of the United Nations and International Development Banks* (Cambridge Univ. Press 2009) at 32, noticing that multilateral trust funds can range from separate bank accounts to international legal subjects.

[203] See Ibid, at 30 taking as example the Prototype Carbon Fund managed by the World Bank.

aimed at financing 'readiness' programmes and remunerate avoided deforestation in developing countries.[204] The UNDP acts as trustee of its Multi-donor Trust Fund, which is operated by a Policy Board comprising both state and non-state entities.[205] This case is explicatory in that the constitutive agreement of the UN-REDD programme is legally distinct from the trustee agreement stipulated between the UN-REDD creating agencies and the UNDP,[206] as well as from the international agreements between the UNDP and individual donors. Hence the UN-REDD programme hinges on a triple layer of inter-institutional agreements: the first is between the constituting UN agencies, the second between the UNDP and the UN-REDD programme as a separate entity for trustee services, and the third between donors and the trustee.

The case of the UN-REDD programme is significant also for highlighting inter-institutional or public-private partnerships as other types of climate finance institution. Such partnerships are prompted by the need of states, international institutions and private actors to set up dedicated institutions with flexible governance structures or act on behalf of some contributor states lacking bilateral aid capacity.

The most remarkable case in this category are the Climate Investment Funds (CIFs), created in 2008 as a response by MDBs to the 2005 G8 call for increased intervention in climate-related activities by multilateral financial institutions. Similarly to the UN-REDD programme, the CIFs display an international institutional structure hinging on an inter-institutional agreement between MDBs, together with two separate multilateral trust funds, operated by participants committees and under the trustee services of the World Bank. While the CIFs were initially envisioned to work as a pilot programme to demonstrate climate

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[204] *FAO, UNDP, UNEP Framework Document*, 20 June 2008, <http://www.un-redd.org/Portals/15/documents/publications/UN-REDD_FrameworkDocument.pdf>.

[205] Ibid, Annex 2.

[206] *Memorandum of Understanding between the FAO, the UNDP and the UNEP, and the UNDP regarding the Operational Aspects of the Multi Donor Trust Fund*, 26 June 2008, <http://mptf.undp.org/document/download/7248>.

resilient development in selected recipient countries,[207] they have been successful in sourcing USD 8 billion from contributing countries in less than five years of activity,[208] thus surpassing by far the GEF's dedicated combined finance in mitigation, adaptation and sustainable forest management.[209] The relative success of the CIFs in mobilizing such a considerable amount of finance will be contextualized in the next chapter, when addressing the legal significance of the institutional structure of climate finance. Furthermore the internal governance and regulations of this partnership will be analyzed in depth in the second part of this work.

While the CIFs are the fruit of agreement between public international entities, other climate finance institutions comprise also non-state actors either in their membership or in their executive organs. Such public-private partnerships have spawned in response to increased investment opportunities in mitigation due lower technology costs and to the demand of emissions reductions in carbon markets. Concurrently, the same type of institutions opened membership also to civil society and indigenous organizations, given that their areas of intervention would have high impact on local livelihoods. While the UN-REDD programme exemplifies the latter model of partnerships –because non-state representatives are members of its Policy Board– the Prototype Carbon Fund, established in 1999 under the aegis of the World Bank, is one of the first public-private partnerships active in climate finance with the aim of proving the viability of offset emission reduction projects

[207] World Bank, *Climate Investment Funds: The Clean Technology Fund and the Strategic Climate Fund*, 9 June 2008, Doc. No 44168.
[208] CIFs, 'Learning by Doing: the CIF's Contribution to Climate Finance', June 2014, at ix, <https://www.climateinvestmentfunds.org/cif/content/cif-retrospective-full-report>.
[209] For the GEF fifth replenishment, the indicative allocation for climate mitigation amounted to USD 1.25 billion for sustainable forest management to USD 250 million: see GEF Evaluation Office, *Evaluation of the GEF Focal Area Strategies*, GEF/ME/C.43/Inf. 01, 17 October 2012, table 1 at 18. The level of pledges under the SCCF and LDFC stands to USD 227.5 and 420.8 million respectively: World Bank, 'Status Report on the Least Developed Country Fund and the Special Climate Change Fund', GEF/LDCF.SCCF.11/Inf.04, 28 October 2011.

in compliance with the UNFCCC and the KP.[210] The Participants Committee of this trust fund comprises both government and multinational corporation representatives.

As done with the other institutional types, the following table provides a non-exhaustive list of multilateral trust funds and partnerships dedicated to climate finance based on a desk review:

Table 3: non-exhaustive list of inter-institutional and public-private partnerships engaged in climate finance, and their constituencies

Partnership institution (Managing/trustee entity)	Members of executive bodies
Forest Carbon Partnership Facility (World Bank)	States and private sector entities
UN-REDD Programme	States, UNDP, FAO, UNEP, Civil Society Organisations, and Indigenous People Organisations
Climate Investment Funds (World Bank)	MDBs and states
Prototype Carbon Fund (World Bank)	States and private sector entities
Community Development Carbon Fund (World Bank)	States and private sector entities
Climate Public-private Partnership Fund – CP3 (Asian Development Bank)	States, private sector entities, and the International Finance Corporation
Congo Basin Forest Partnership and Fund (Africa Development Bank)	States, Civil Society Organization, Economic Community of Central Africa States, African Development Bank, and COMIFAC
Sustainable Energy for All (UNDP)	MDBs, countries, and private sector entities
Energy for All (Asian Development Bank)	MDBs, NGOs, and private sector entities

3.4. International implementing agencies

To complete the overview of this chapter it is worth highlighting the role of international implementing agencies as a crucial sub-structure for the channeling of finance and implementation of climate-related projects. Their rationale stems from the fact that virtually all the multilateral climate funds addressed do not have the legal capacity or nor the mandate to design and directly implement projects in host countries. It would be virtually impossible

[210] IBRD, *Amended and Restated Instrument Establishing the Prototype Carbon Fund*, Board of Executive Directors Resolution No 99-1, 6 September 2008, Annex I, Section 2.1.

for one global institution to identify, design and implement projects in different national or regional realities. Furthermore, project implementation requires extensive capacity in contracting out numerous activities, often via procurement with multinational or national private entities. Hence, international implementing agencies aim at covering this capacity gap.[211]

Interestingly, the same international implementing agencies are often either MDBs or UN agencies, which are themselves climate finance institutions under the meaning given in this work. Thus, while they work as intermediaries of the finance at a horizontal governance level to other multilateral climate funds, at the same time they are accredited implementing entities under the funds' regulatory frameworks.

From a legal perspective, this double role of MDBs and other entities is relevant on two aspects whose implications will be further explored in the following chapters. First it adds regulatory complexity and generates both horizontal and vertical inter-institutional interaction given that for each project two regulatory frameworks apply: the one of the climate fund and the one of the implementing agency. Second and as noted in the case of the GEF, the application of two regulatory layers has been object of frustration by recipient countries and has led to alternative means of finance implementation via direct access, whereby it is the national administration of a recipient country that covers all the tasks traditionally assigned to the international implementing agency.

In regards to the legal linkages between the multilateral climate funds and their implementing agencies, often the former display a complex accreditation process, based on specific requirements such as fiduciary standards or environmental and social safeguards that the implementing agency must already implement within its regulatory sphere. This has the effect of not only aligning the two regulatory layers, but also of forging an accountability relationship between the fund and the agency. Other normative linkages are also established

[211] Dann, *The Law of Development Cooperation*, *supra* note 199, at 356-8.

whenever the multilateral climate fund stipulates financial agreements with the implementing agency for a given project: this is indeed another point of contention between financing and recipient countries in that, for though channeled resources eventually end up in implementing a national project, nonetheless in such cases recipient governments do not legally own the sums.

The conclusive table below lists the international implementing agencies currently accredited under multilateral climate funds.

Table 4: multilateral climate funds and their accredited international implementing agencies.

Climate finance institution / climate fund	International implementing agencies
GEF	Asian Development Bank
	African Development Bank
	European Bank for Reconstruction and Development
	FAO
	Inter-American Development Bank
	International Fund for Agricultural Development
	UNDP
	UNEP
	UN Industrial Development Organization
	World Bank
GCF	[not yet accredited]
AF	Asian Development Bank
	African Development Bank
	European Bank for Reconstruction and Development
	FAO
	Inter-American Development Bank
	International Fund for Agricultural Development
	UNDP
	UNEP
	UN Educational, Scientific, and Cultural Organization
	World Bank
	World Food Programme
	World Meteorological Organization
CIFs	African Development Bank
	Asian Development Bank

	European Bank for Reconstruction and Development
	Inter-American Development Bank
	World Bank
UN-REDD Programme	FAO
	UNDP
	UNEP

CONCLUSIONS

Twenty years after the UNFCCC entered into force, the institutional structure of climate finance has developed into a complex architecture, which reflects the shifting political balances between industrialized and developing countries, as well as a response to the need of scaling up the level of finance via alternative institutional means to those under the international climate change regime. This chapter provided a systematic overview of the institutions, their rationales and setting within the global governance of climate finance, which prompts three general remarks.

First, one must notice the dynamicity and institutional innovativeness within the UNFCCC/KP framework as a result of the shifting political balances between developed and developing countries. Not only have new funds and institutions been created in response to the specific needs and political uneasiness of developing countries with the GEF's regulations and practice, but innovative means of environmental finance have been experimented. On one side, the CDM proved a successful means to facilitate public and private investment in mitigation projects in developing countries, despite depending on the volatile price levels of carbon markets. On the other, the Adaptation Fund was the first environmental fund to set up direct access modalities for accredited developing countries administrations, thus enhancing their 'ownership' of the funds compared to the more traditional intervention of international implementing agencies.

Secondly and perhaps unexpectedly from a mere reading of the climate Conventions and their subsequent instruments, the overall picture is that the operational entities of the UNFCCC Financial Mechanisms not only act contextually to other bilateral and multilateral

institutions, but they also mobilize considerably less resources. Non-UNFCCC institutions, therefore, not only act as key players in the implementation of UNFCCC financial obligations, but through their practice contribute *de facto* to the implementation and regulation of crucial aspects of climate finance, such as conditionalities, access and disbursement modalities, accountability and redress, and so on.

Third, the multiplicity of institutions goes hand in hand with the mixed roles of MDBs and other international institutions acting both as climate finance institutions and implementing agencies of multilateral trust funds. While multiplicity and complexity are recurrent features in global environmental governance, such contextual and mixed roles of some institutions appears to be a peculiarity of climate finance governance.

As will be seen in the next chapter, these specific features of its institutional governance make climate finance an area of institutional complexity, characterized by overlaps and strong competition among institutions.

CHAPTER III
THE INSTITUTIONAL GOVERNANCE OF CLIMATE FINANCE AND THE LAW

INTRODUCTION

Da mihi factum, dabo tibi jus (‘give me the fact, I will give you the law’).

This Latin maxim[1] succinctly summarizes the purpose of this chapter, which is of legal clarification and discovery. While the previous chapter provided a systematic overview of the institutional structure of climate finance, the present will delve into a legal analysis, motivated by the normative consequences arising from the spontaneous proliferation of institutions engaged in climate finance.

The first two sections will propose a thorough interpretative and conceptual analysis of the current institutional structure. As the argument goes, before questioning whether actual legal practices are springing from this area of governance, two conceptualizations are necessary: first, a ‘heterodox’ approach, which resorts to ideas and conceptions *outside* international law, and which interprets climate finance institutions as entities exercising public authority, will be preferred to ‘orthodox’ view of states consent-based international law. Second, in order to overcome the problem of generality and contestability of ‘heterodox’ theories, it will be argued that two specific dynamics take place across the governance of climate finance: on one hand climate finance institutions seek to promote *complementarity* with other overlapping institutions, on the other they *compete* in order to catalyze and channel finance in a context of scarce public financial resources.

[1] Even if applies to judicial practice and the role of the judge in adversary proceedings, it can also be valid for the activity of jurists in general. See *Western Sahara*, [1975] ICJ Rep. 12, at 138 (separate opinion of Judge De Castro): “In the words of the traditional axiom of procedure, the court says to the Party: *da mihi factum, dabo tibi jus*. The parties put forward facts and submit the evidence that they consider favourable to their claims, and the court takes them into consideration when making its decision (*secundum allegata et probata*).”

Both the heterodox approach and the two dynamics will underpin the legal analysis of the third section, which will attempt answering the question of whether some *legal* practices ('intimations') promoting complementarity are present in the inter-institutional dynamics between climate finance institutions.

1. INSTITUTIONAL COMPLEXITY: CLIMATE FINANCE GOVERNANCE AS INTERNATIONAL COMPOSITE ADMINISTRATION

What emerged from the outline of the previous chapter is that the institutional landscape of climate finance is *multiple*, *multilevel*, and *heterarchical*. Its multiplicity refers to the different nature of the entities involved.[2] This is particularly challenging under the purview of international law, as it is unclear whether some of them can be regarded international organizations (IOs) with their ensued functional legal personality and, therefore, international legal subjects: it will be argued below that this is one of the 'cognitive' limits of international institutional law in encompassing certain institutional and inter-institutional phenomena, which justifies looking beyond the boundaries of international law.

Climate finance governance is multilevel, because its institutions belong to international, national legal systems and to transnational regulatory spheres alike. Furthermore, this feature is inherently linked with the lack of any hierarchical relationships among institutions. This is a common characteristic across many areas of global governance[3] and in international law,[4] meaning that there is no central authority to delegate coherently the executive powers and functions between the various entities.

[2] Stewart, Rudyk, and Mattes, 'Governing a Fragmented Climate Finance Regime', in H Cisse, DD Bradlow and B Kingsbury (eds), *The World Bank Legal Review: 3* (World Bank Publications 2011) 363-88, at 371-5.
[3] *See* S Cassese, "Administrative Law without the State - The Challenge of Global Regulation" (2004) 37 *New York University Journal of International Law and Politics* 663, at.670-3. From an accountability perspective *see* N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247, at 249-50.
[4] J Klabbers, 'Setting the Scene' in J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 1-44.

Three critical points can be made. Firstly, *geographical and functional overlaps* among institutions in relation to both mitigation and adaptation activities are increasingly relevant as the delivered amount of finance from Annex II countries should increase. Such intersection of institutional activities had already negative repercussions on the disbursement of funds and caused frustrations among developing countries and other recipient entities. To give some examples, in the field of adaptation finance the Adaptation Fund, the UNFCCC Special Climate Change Fund, the Green Climate Fund (GCF), and the Strategic Programmes for Climate Resilience of the Climate Investment Funds (CIFs) are alternative finance channels that developing countries can resort to for adaptation purposes. As for mitigation initiatives, the panorama is made more complex due to the high number of thematic funds (e.g. renewable energy, energy efficiency, and avoided deforestation), funds investing on Clean Development Mechanism (CDM) activities,[5] and the prominent role of traditional development finance by multilateral and bilateral financial institutions. Referring to just the main global climate funds, the GCF, the Global Environment Facility (GEF) Trust Fund and Earth Fund, and the Clean Technology Fund of the CIFs share the same broad mandates in mitigation financing. The Reducing Emissions from Deforestation and forest Degradation (REDD+) from developing countries mechanism, an emerging mechanism[6] aimed at avoiding carbon emissions from deforestation and unsustainable management, is also a common field of intervention by different institutions, including the Forest Investment Programme of the CIFs, the Forest Carbon Partnership Facility of the World Bank, the UN-REDD Programme and the GEF Trust Fund.

Secondly, the institutional landscape comprises other actors involved in the process of disbursement acting as 'final managers' of resources: these actors comprise private entities,

[5] They generate tradable carbon credits according to Article 12 of the Kyoto Protocol.
[6] The UNFCCC COP has not yet established it as a fully-fledged mechanism. It is however an agenda item under UNFCCC negotiations for a new agreement on the climate: Decision 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1, 15 March 2011, paras 68-79.

national administrations and, in particular, international implementing agencies.[7] Their role has often proved contentious because at times such agencies act as climate finance institutions proper, thus covering a double (and sometimes conflicting) role along climate finance flows.

In particular the World Bank, other regional financial institutions, the UNEP and UNDP are often eligible implementing agencies of various trust funds.[8] In addition, the World Bank offers administrative capacity and trustee services to several funds, including the GCF, the CIFs and the GEF Trust Fund. While such a mixed model can offer integration and flexibility among entities, at the same time it can generate conflicts of interests and frustrate the process of disbursement by disempowering recipient administrations from the management of funds.[9]

This feature and the institutional complexity stemming from the first point above entail the further overlapping of potentially applicable *regulations* for each programme or project. Such regulations can be found in the 'secondary law' of climate finance institutions,[10] such as the Operational Policies of the World Bank and other multilateral development banks, access and disbursement modalities of multilateral trust funds, environmental and social safeguards of multilateral trust funds and international implementing agencies alike. This high level of regulatory complexity has been often questioned both in terms of overall efficiency in disbursement[11] and of *fairness* of the

[7] See Chapter II above.
[8] Ibid..
[9] A Ghosh and N Woods, 'Developing Country Concerns about Climate Finance Proposals Priorities, Trust, and the Credible Donor Problem' in RB Stewart, B Kingsbury and B Rudyk (eds), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009). For the specific case of the GEF *see* J. Werksman, "Consolidating Global Environmental Governance: New Lessons from the GEF?" in N. Kanie and P.M. Haas (eds), *Emerging Forces in Environmental Governance* (United Nations University 2004) 35.
[10] M Benzing, 'International Organizations or Institutions, Secondary Law', *Max Planck Encyclopedia of Public International Law*, online edition, 2007.
[11] Hutala, A and Ambrosi, P, 'Making the Most of Public Finance for Climate Action', World Bank issue brief, No.2, May 2010, at 8.

process vis-à-vis the often limited capacities of least developing countries in understanding and navigating climate finance opportunities.[12]

Finally, it was noted that the majority of finance delivery takes place through institutions that are not 'climate-specific', and do not present any direct legal delegation from the climate treaties, but instead incorporate independently mitigation and adaptation finance in their broad development agenda.

Overall, the current institutional structure of climate finance appears to be rooted in a pluralist model,[13] where *leges speciales* of public international law –stemming from climate treaties and treaties establishing IOs– intersect with other normative systems, including the 'secondary laws' of international institutions,[14] national administrative laws and transnational regulations. While the core normative basis of action can be found in the climate treaties, the implementation of financial obligations is *de facto* delegated to international institutions of different kind and to national entities acting by international or transnational means.

1.1. From fragmentation to regime complex

1.1.1. Fragmentation and 'management'

For international lawyers the recent developments in many areas of global and transnational governance have been "exciting, but also destabilizing".[15]

In our context and in analogy with the artistic revolutions at the beginning of the twentieth century, the picture coming out from the outline in the previous chapter resembles more a Picasso than a Raphael. Contrary to the harmonious canons of the Renaissance artist, here shapes are abstract, deformed, and springing from multiple perspectives. As in the early

[12] See Chapter IV below, at 170.
[13] N Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (OUP 2012).
[14] Benzing, 'International Organizations or Institutions, Secondary Law', *supra* note 10 .
[15] J Lin and J Scott, 'Looking Beyond the International: Key Themes and Approaches of Transnational Environmental Law' (2012) 1 *Transnational Environmental Law* 23, at 24.

twentieth century cubist artworks have shocked their contemporary viewers, the same seems to have happened in the last two decades, when international lawyers have been (and still are) reacting before the canvas of the complex governance in an increasingly globalized world.

Against this background, international lawyers have initially reacted by recognizing a 'threat' in the fragmentation of international law and jurisdiction.[16] The International Law Commission (ILC), prompted by a report by Hafner,[17] spent several years on identifying and rationalizing the "difficulties arising from the diversification and expansion" of international law, and concluded its work with a conspicuous report about the possible conflicts and interpretative techniques.[18] Interestingly, the report reflected the major preoccupation by the doctrine on the issues stemming from the contemporary existence of international legal *norms*, on their conflicts, and the legal techniques available to solve them: importantly, the *institutional dimension* of fragmentation was willingly left out.[19]

Apart from some exceptions,[20] the ILC approach reflects the general neglect by international lawyers about the *institutional* problems of fragmentation, while concentrating

[16] G. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1998) 31 *NYUJ Int'l L. & Pol*. 919; and AE Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 *International & Comparative Law Quarterly* 37.
[17] G Hafner, 'Risks Ensuing from Fragmentation of International Law, ILC Report of Its Fifty-Second Session, Supplement No 10, Annex', UN International Law Commission UN Doc. A/55/10, 18 August 2000, at 143.
[18] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006.
[19] Ibid., at paras 489.
[20] For early works, see CW Jenks, 'Co-ordination: A New Problem of International Organization: A Preliminary Survey if the Law and Practice of Inter-organizational Relationships' (1950) 84 *Recueil des Cours* 151; and A Loveday, *Reflections on International Administration* (OUP 1956)at 265-289 addressing the 'parcellation' of international administration. See for instance G Ulfstein, 'Institutions and Competences' in J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 45-80; M Prost and P Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' (2006) 5 *Chinese Journal of International Law* 341; N Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) 6 *Max Planck Yearbook of United Nations Law* 473; KN Scott, 'International Environmental Governance: Managing Fragmentation through Institutional Connection' (2011) 12 *Melbourne Journal of International Law* 177; K Raustiala, 'Institutional Proliferation and the International Legal Order' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 293-320; and CR Kelly, 'Institutional Alliances and Derivative Legitimacy' (2007) 29 *Michigan Journal of International Law* 605.

on either the normative and jurisdictional dimensions.[21] Some recent scholarship on the issue seems to have embraced the ILC's final view that, overall, normative fragmentation is a structural feature of an expanded international legal system and that it actually does not and should not subvert the way international lawyers make use of their interpretative techniques.[22] In particular, recent attention has shifted on how to *manage*[23] or *control*[24] fragmentation towards desirable ends.

The approach here departs from this latter trend. While sharing the idea of a structural fragmentation of international law, it is posited that its institutional dimension necessitates further conceptualization and discovery of extant laws rather than concentrating on how institutional complexity ought to be 'managed'. The latter, in fact, is an object of political contestation more than legal enquiry.[25] Therefore, in the following sub-paragraph a step back into the interpretation of the 'facts' of climate finance will be proposed.

1.1.2. The regime complex of climate finance

Looking again at the scattered picture of climate finance the problem of its geographical, functional and regulatory overlaps, the question of what kind of *institutional* fragmentation is taking place arises. The finding here is that it is more correct to use the concepts of 'institutional complexity' and 'regime complex' than 'fragmentation'. Fragmentation, in fact, presupposes a certain degree of original unity in a given issue area. However, as the two previous chapters have demonstrated, the substantive and institutional developments of

[21] R Wolfrum and N Matz, *Conflicts in International Environmental Law* (Springer 2003); and MA Young, 'Introduction: The Productive Friction between Regimes' in *Regime Interaction in International Law* (CUP 2012) 1-20; JI Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours* 101; and C Piñon Carlarne, 'Good Climate Governance: Only a Fragmented System of International Law Away?' (2008) 30 *Law & Policy* 450.

[22] *Fragmentation of International Law*, *supra* note 18, at paras 486-9.

[23] Scott, 'International Environmental Governance', *supra* note 20; H van Asselt, 'Managing the Fragmentation of International Climate Law' in EJ Hollo, K Kulovesi and M Mehling (eds), *Climate Change and the Law* (Springer 2013) 329-357.

[24] MA Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012). Part III of the book is about 'controlling' fragmentation.

[25] M Koskenniemi, 'Hegemonic Regimes' in Ibid. 305-324.

climate finance have never been legally framed in a unitary form or under an overarching normative umbrella.

'Institutional complexity' and 'regime complex' are concepts stemming from the 'institutionalist' strand of international relations theory,[26] which as the name suggests originally looked at institutions as devices for states to maximize their own gains (i.e. reducing transaction costs) in certain cooperative areas and according to rational behavior.[27] A key anticipation of this scholarship before future developments in global governance was to envision the existence of 'regimes' as arenas where new modes of cooperation could take place. In the words of Krasner:

> "Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice."[28]

While from a legal standpoint this definition of regime is overly broad, as it encompasses also non-legal phenomena, nonetheless it has the merit to provide a framework for understanding some salient facts of the complex governance of climate finance. In particular it is noteworthy that principles, norms, rules and decision-making procedures are also object of international institutional law.

Broadening the perspective, climate finance indeed boils down to a bundle of "recognized patterns of practice around which expectations converge",[29] where such 'patterns of practice' are the regulations and instruments used to source and distribute the

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[26] B Koremenos, 'Institutionalism and International Law' in JL Dunoff and MA Pollak (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2013) 59-82.
[27] RO Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1st ed. Princeton University Press 1984).
[28] SD Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organization* 185, at 186. It must be noted that also the definition of 'regime' in international relations theory is contested.
[29] Such is the definition of international regime by Oran Young: OR Young, 'International Regimes: Problems of Concept Formation' (1980) 32 *World Politics* 331, at 332. In the words of Keohane: The concept of international regime is complex because it is defined in terms of four, distinct components: principle, norms, rules, and decision making procedures. It is tempting to select one of these levels of specificity –particularly, principles and norms or rules and procedures as *the* defining characteristic of regimes: *supra* note 27, at 59.

finance, and the 'expectation' the need to scale-up finance streams, as exemplified by the non-binding pledge under the Copenhagen Accord. Despite the existence of the international legal obligations on finance under the international climate change regime, the previous chapter has unveiled how other international practices, often embedded into other regimes (such as foreign aid via bilateral agencies, concessional loans by multilateral development banks, or equity investment through public-private partnerships) are contextually effective in the same activity.

Under these new lenses climate finance therefore appears to hinge on what has been recently defined a 'regime complex',[30] a concept covering that "[…] continuum between comprehensive international regulatory institutions, which are usually focused on a single integrated legal instrument, at one end of a spectrum and highly fragmented arrangements at the other."[31] As the name suggests, regime complexes "[…] are loosely coupled sets of specific regimes", spontaneously raising as a "[…] result of many choices […] at different times and on different specific issues".[32] Rather than trickling down solely from the UNFCCC, the substantive regulations applicable across different areas of climate finance have been originated also by institutions *other than* those operating the UNFCCC Financial Mechanism. Nonetheless, the same institutions have interacted, cooperated and at times joined their efforts towards similar ends. For instance, the GEF is the result of cooperation of three institutions (UNEP, UNDP and the World Bank), yet working under accountability and guidance of the UNFCCC COP. Similarly, the Climate Investment Funds are the result of the cooperative efforts between multilateral development banks.

In a way, then, regime complexes always imply a certain degree of institutional 'complexity'[33], 'linkages',[34] 'density',[35] or 'architecture',[36] and so does the regime complex

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[30] RO Keohane and DG Victor, 'The Regime Complex for Climate Change' (2011) 9 *Perspectives on Politics* 7.
[31] Ibid., at 7.
[32] Ibid.
[33] S Oberthür and O Schram Stokke (eds), *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (MIT Press 2011).
[34] OR Young, 'Institutional Linkages in International Society: Polar Perspectives' (1996) 2 *Global Governance* 1

of climate finance with the ensuing issues of its geographical, functional and regulatory overlaps.[37] To be sure, political scientists who have first explored this area have categorized different strategies for linkages, and questioned the reasons and the modes for institutions to conflict or cooperate between each other.[38]

Conversely, international lawyers have only recently started grappling with the institutional facts deriving from regime complexes and with different methods and results.

To come with three examples, when dealing with the institutional fragmentation of climate governance, Van Asselt succinctly highlights some cases of cooperation between the multilateral environmental agreements' (MEAs) Secretariats and their decision-making bodies. However, he also recognizes that the area is under-researched and fraught with informality and unclear institutional mandates.[39]

Also Karen Scott's focus is on a similar object.[40] Under the lens of a "governance strategy" of cooperation, she discovers and categorizes three types of formal institutional linkages that MEAs secretariats, as part of an environmental regime complex, have set among each other and with other entities participating to the regimes complex: namely, formal agreements via Memoranda of Understanding (MoUs), cooperative agreements amounting "full legal" or "nested arrangements", and linkages between MEAs compliance mechanisms.[41] The author's approach unveils some neglected types of international environmental instruments, mostly of non-binding nature, which nonetheless contribute substantively to the 'management' of overlapping MEAs, with the coming risks of shifting away such management from states to international entities.[42] Yet, clearly the author's task is

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[35] Raustiala, 'Institutional Proliferation and the International Legal Order', *supra* note 20, para 296-305.
[36] F Biermann, P Pattberg, and F Zelli (eds), *Global Climate Governance Beyond 2012: Architecture, Agency and Adaptation* (CUP 2010), para 16-22.
[37] Overlapping institutional linkages are one of the described types of interaction noted by Oran Young. See Young, 'Institutional Linkages in International Society', *supra* note 29, at 6: "[…] individual regimes that were formed for different purposes and largely without reference to one another intersect on a de facto basis, producing substantial impacts on each other in the process."
[38] See, for instance *supra* notes 32-34.
[39] van Asselt, 'Managing the Fragmentation of International Climate Law', *supra* note 23, at 349-56.
[40] Scott, 'International Environmental Governance', *supra* note 20.
[41] Ibid., at 191-2.
[42] Ibid., at 211-5.

to shed light on how to 'manage' MEAs linkages and conflicts, which, as stated above, it is a 'rushed step' for a legal analysis, which would rather benefit from questioning *what law* is emerging from inter-institutional practices.

A third approach is proposed by Ulfstein, who questions whether the institutional complexity stemming from increased cooperation among states should move towards forms of hierarchic constitutional orderings. Expectedly, given the state of affair in the international legal system, his answer is negative:

> "The most ambitious way of 'constitutionalizing' international governance would be to integrate existing institutions to the extent they *overlap or compete*. One could also imagine a less grand programme by retaining the institutions, but establishing a hierarchy between them. However, states show no inclination to move towards such a comprehensive international institutional system, not even within specialized regimes such as international environmental law"[43]

Nonetheless the author's final suggestions rejoin with Scott's modes of enquiry, by arguing that "[a] *less ambitious strategy* to avoid the difficulties involved in a fragmented international institutional framework is to establish arrangements of complementarity".[44]

1.2. The limits of an orthodox approach

While what Ulfstein defines as a 'less ambitious strategy' will work as basis for an enquiry into inter-institutional arrangements in climate finance, his 'orthodox' approach to international institutions shows several limits in grasping the facts and problems emerging from the regime complex of climate finance. In other words, it is posited that using the prism of orthodoxy in this context exposes some 'cognitive' restrains inherent to international law, which provide little understanding of the emerging normative realities of global governance. The *lex specialis* of international institutional law is indeed limited in grasping the *institutional and regulatory practices and instruments* of regime complexes as relevant *legal facts* under the law, where for the latter it is meant those events which are incapable to wield

[43] Ulfstein, 'Institutions and Competences', *supra* note 20, at 70. [*emphasis* added].
[44] Ibid. [*emphasis* added].

any normative effect unless an existing rule of the international legal system allows for it.[45] To be sure, such limits are to be found on the discipline of legal personality of international institutions, and validity of their regulatory outputs.

While for orthodoxy it is here meant the whole body of scholarly efforts to understand institutional realities *from within* the international legal system, this and the next sub-paragraphs will justify why a *heterodox* approach –thus resorting to concepts and principles *from outside* the international legal toolbox– is better suited to 'imbue with legal significance' the same facts stemming from the regime complex of climate finance. The latter expression means that, while heterodox approaches have the merit of extending the cognitive capacity under the law, nonetheless the realities they try to address do not upgrade their status to fully-fledged legal facts, because there is no established modern legal system buttressing them.

This is the limit of heterodoxy compared to orthodoxy, which will lead to the claim at the end of this chapter that, rather than 'emergence of', it is only possible to speak of 'intimations of' inter-institutional law in global governance.[46]

1.2.1. International legal personality of international institutions

International legal orthodoxy is limited because it addresses the question of regime complexes under the *lex specialis* of international institutional law:[47] namely, that body of public international law disciplining the functioning of International Organizations (IOs).[48]

The first cognitive limit of international law is that only IOs can be bestowed with international personality and capacity under the international legal order,[49] meaning that by

[45] J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *European Journal of International Law* 1075, at 1079; and J Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?, in J Pauwelyn, R Wessels and J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 125-161, at 153. Admittedly, this is a positivist way to understand the issue.

[46] The term and its use are borrowed from Neil Walker, *Intimations of Global Law* (Forthcoming 2014) [on file with the author].

[47] HG Schermers and NM Blokker, *International Institutional Law: Unity within Diversity Fourth Edition* (4 Revised. Brill 2004), at 27.

[48] J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009), at 2.

reverse logic public international law does not have 'cognition' of other institutional entities than IOs. By juxtaposing such a limited extension against the types of institutions engaged in climate finance some entities (e.g. the World Bank) appear to be fully-fledged IOs (and international legal subjects), while others stand on the blurred boundaries between being IOs or other forms of 'soft organization' between states.[50]

Despite the lack of a set definition,[51] the pedigree of an IO is, in fact, generally based on three criteria: namely, that an IO i) must be generated under an international agreement; ii) have an organ with a will of its own; and iii) be established under international law.[52] The openness and indeterminacy of these criteria are quite intuitive, and, arguably, have the effect of *blurring* the cognitive boundaries of international law, so that some scholars have even doubted that international institutional law could work as a sub-discipline or *lex specialis*.[53]

Although the matter is very much debated, suffice here to briefly highlight three core points. Firstly, an international agreement need not be a treaty, but can assume different forms, even oral, which implies that the range of agreements establishing IOs is broader than under a formalist understanding.[54] As a result, the cognitive boundary is blurred by the fact

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[49] The landmark case recognising the international personality of an IO is *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep. 174, at 179.

[50] J Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic J. Int'l L*. 403.

[51] Notice the different definitions in *Draft articles on the Responsibility of International Organizations*, ILC Report of Its Sixty-third Session UN Doc. A/66/10, E, August 2011, Article 2(a); and the 'older' *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, adopted 21 March 1986, 25 ILM 543 not yet in force, Article 1(i). The former has a more expanded definition: "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities." The latter, instead, simply defines an IO as an "intergovernmental organization".

[52] Schermers and Blokker, *International Institutional Law*, *supra* note 47, at 27-39. In slightly different terms, see CF. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2005) 10; and P Sands and P Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell 2009) 15-6.

[53] J Klabbers, 'The Paradox of International Institutional Law' (2008) 5 *International Organizations Law Review* 151. Contra, see Amerasinghe, *Principles of the Institutional Law of International Organizations*, *supra*, 15.

[54] Also Schermers and Blokker, *supra*, at 27 agree on this point and, for instance, argue that despite contrary views from the UN and the World Bank, the GEF is actually an IO. On the broad type of instruments enshrining international agreements, see A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007), at 9, stating that oral treaties are however rare in contemporary legal practice. As to the ICJ practice see: *Aegean Sea Continental Shelf (Greece vs. Turkey)*, Judgment, [1978] ICJ Reps. 3, para 96, admitting that a joint communiqué by the Greek and Turkish Prime Ministers could work as an international agreement on jurisdiction. In *Case Concerning Maritime Delimitation (Qatar vs. Bahrain)*, Jurisdiction and Admissibility, [1994] ICJ Reps. 112, para 22, the

that climate finance institutions not established under a treaty (e.g. the Green Climate Fund) might as well be created under an international agreement, provided that state members have thus consented.[55]

Second, it is difficult to practically establish when a decision by an organ can be expression of its own autonomous will or the one of its members.[56] As will be seen below, this has several implications on the law-making and capacity to create obligations by international institutions, for the reason that some cooperative agreements between states, even establishing decision-making organs, might be interpreted as not constituting a separate entity with its own will. An example in climate finance is the Forest Carbon Partnership Facility, or other multilateral trust funds established by the World Bank, because it is uncertain whether the decisions of its trust fund Committees constitute mere agreements between state members or a separate act by the Facility itself.[57] Particularly in this case, to render the matter more uncertain, the institution does not have any legal capacity and is formally established by an act of the World Bank.

Finally, it is contested whether instruments adopted by international institutions, such as COP decisions, can be interpreted as legally-binding under international law, particularly when they establish multilateral institutions.[58] Therefore, it can be questioned whether some

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Court found that an exchange of letters by the Heirs of the two States was an international agreement. In *Case Concerning the Sovereignty over Pedra Branca/Pulau Batu Puteh*, Judgment, [2008] ICJ Reps. 12, paras 115-7 a letter of donation by the Sultan of Johor in 1825 could have been tantamount to an international unilateral act, if the Sultan would have had title over the land, which he did not. Finally, in *Case Concerning Pulp Mills on the River Uruguay*, Judgment, [2010] ICJ Reps. 14, para 138 [hereafter '*Pulp Mills*'] the Court found that a press release could be expression of a *pacto de negotiando*.

[55] Of course, the ensuing question is *when* do states express consent to be bound. And yet, again, the issue is not settled: see J Klabbers, 'International Courts and Informal International Law' in J Pauwelyn, R Wessels and J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 219-40, at 222-5.

[56] Schermers and Blokker, *International Institutional Law*, *supra* note 47, at 61-3. Interestingly, the ICJ has found in *Pulp Mills* that a bilateral organization had a "permanent existence on its own" because its constitutive treaty endowed it with legal personality. Thus, there seems to be an interpretative shift to conflate or reduce the question of autonomous will to the mere existence of legal personality. See *Pulp Mills*, para 87.

[57] I Bantekas, *Trust funds under International Law: Trustee Obligations of the United Nations and International Development Banks* (Cambridge Univ. Press 2009), at 173.

[58] RR Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623; and J Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1; and AE Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International & Comparative Law Quarterly* 901, 905; and A Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements' (2010) 20 *Michigan Journal of International Law* 231.

constitutive instruments of climate finance institutions (the Adaptation Fund, for instance) are established under international law, as a pre-condition to be international legal subjects.

1.2.2. Institutional regulatory outputs

The second cognitive limit of international law vis-à-vis the realities of regime complexes relates to the regulatory outputs of climate finance institutions.

Such institutions hold a relevant degree of authority, and exert executive and regulatory functions in the international sphere in a manner that can potentially affect the legitimate interests and the legal status of states and other actors. To make some examples, the access and disbursement regulations of multilateral trust funds, such as the Adaptation Fund or the GEF, impose rules on how pledged resources must be split between eligible recipients;[59] the CDM rules on the project cycle –adopted by the Kyoto Protocol's CMP and further regulated by the Executive Board of the CDM– impose a detailed process to be followed both by national administrations and private actors in order to register the project under the CDM and benefit from the issuance of emissions credits;[60] finally, the World Bank's Operational Policies and Bank Procedures, despite being binding only to the staff of the Bank, nonetheless contain 'normative prescriptions' which, when implemented, can affect the interests of borrowing governments and local groups in the proximity of the financed project.[61]

Such exercise of authority and the ensuing normative nature of institutional regulations do not constitute *legal facts* under the purview of general international law, because the latter does not attribute legal validity to the 'secondary law' of international organizations. Of course, under international institutional law and in specific treaties

[59] See Chapter V below.
[60] Ibid.
[61] DD Bradlow and A Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation' (2013) 10 *International Organizations Law Review* 3, at 11.

constituting IOs it is well possible that member states recognize as binding certain regulatory outputs: yet, popular cases aside,[62] this is an exception in international practice.

To be more specific, the 'cognitive' limit of international law in relation to institutional regulatory outputs can be further divided into two issues. The first is the potential *international law-making* role that climate finance institutions might exert when setting standards on and between states. The second relates to their capability of generating legal obligations in international law. Distinguishing between *law-making* by an institution and the possibility of forging *international legal obligations* between such institution and other international entities is crucial to avoid confusion between two very distinct phenomena.

As the very first sentence of a landmark book on the subject states, international law-making:

> "[…] is about the constitutive processes of contemporary international law -how international law is made. It does not give an account of the traditional sources or theories of international law, but identifies the processes, participants and instruments employed in the making of international law. It examines the mechanisms and procedures whereby new rules of law are created or old rules are amended or abrogated."[63]

An important aspect of international law-making is its general character: if not exactly amounting to 'international legislation',[64] international law-making should nevertheless be regarded as a widely participated enterprise, engaged in normative outputs of general character.[65]

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[62] Typically they are the UN Security Council under Chapter IV of the UN Charter; the law-making organs of the EU; and the OECD Council.
[63] AE Boyle and C Chinkin, *The Making of International Law* (OUP 2007), 1. *Contra* see GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers 1993) 5-6, claiming that extending the concept of law-making to other social activities parallel to the ones that directly generate legal rules is a too broad categorization for pure legal analysis. On the same line see A Cassese and JHH Weiler, *Change and Stability in International Law-Making* (Walter de Gruyter 1988), who match the concept of law-making with the formal theory of the sources of international law.
[64] For the various meanings that can be attributed to this expression see J Brunnée, 'International Legislation', Max Planck Encyclopaedia of Public International Law, online ed., 2010.
[65] It is no surprise, for example, that Alvarez' work on the matter focused only on IOs of global character. See JE Alvarez, *International Organizations as Law-makers* (OUP 2005).

Understood in this way, climate finance institutions could in theory act as law-makers via their regulatory activity, by participating in the formation of international legal standards in climate finance. However, as noted in the first chapter, reality shows that the applicable international law on the matter is still very general compared to its implementation via diffused institutional regulation. Furthermore, the practices and regulations of its institutions are so diverse in form and content that a single pattern of collective law-making cannot be found, so that they can hardly support the interpretation of general international obligations or even serve as valuable evidence of emerging *opinion juris* and practice.

As to the second issue, the creation of obligations under international law can be ascribed to a fact or an act that the international legal system recognizes as having legal validity and obligatory force.[66] Differently from the practices of international law-making, international obligations stem from some recognized sources of the international legal system.[67]

In this regard, it is evident that the regulatory instruments of climate finance institutions can hardly contain international obligations, while only a small number of these institutions - recognized as IOs, such as the World Bank and other multilateral development banks- can enter into valid agreements with other international legal subjects.[68]

Some international legal scholars seek to overcome this second 'cognitive' limit of international law by theorizing that the regulatory instruments of international institutions can nevertheless amount to a form of 'soft law'. Yet, by doing so, they end up merely

[66] GG Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' (1958) *Symbolae Verzijl* 153-76, 154.

[67] Perhaps ironically, the very number of these sources is contested. Yet international legal scholars generally agree that such sources do not boil down to those listed in Article 38(1) of the ICJ Statute. J d' Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011), at 149-50; and A Cassese, *International Law* (2nd ed. OUP 2004) at 156.

[68] *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, *supra* note 51. This is for instance the case for loan agreements between multilateral development banks and borrowing countries.

describing the processes of law-making from other angles, and, therefore, fail to extend the boundaries of international law in terms of its 'cognition' of external facts.

Amongst its various meanings,[69] here the term 'soft law' refers only to the nature of the 'secondary law' of an international institution:[70] such as decisions, recommendations, guidelines and policies of an executive body acting within its constituted powers.[71] Those who claim for the existence of 'soft law' as a 'quasi-legal' source of public international law broadly argue that, though the hard sources of international law do not encompass the secondary law of international institutions, secondary instruments can nevertheless hold "some normative significance".[72] One notable case is, for instance, the United Nations General Assembly's resolutions, which can work as evidence or interpretation of existing law,[73] as *opinion juris* of general international law[74] or as a preparatory step to further codification by a future treaty.[75]

If applied to the object of this work, the concept of 'soft law' is useful to understand the complexity of the regulatory processes taking place in climate finance: indeed, the operational policies, access modalities, eligibility criteria, etc., adopted by climate finance institutions are *de facto* complied with by state and non-state actors, and are often converted into contractual obligations between the financing institution and the recipient state.

However, if that is its contribution, the 'soft law' idea in this context eventually boils down to a descriptive effort. As in the case of viewing international institutions from a law-making perspective, 'soft law' does not provide useful cognitive tools under the law to

[69] Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', *supra* note 58.
[70] M Benzing, 'International Organizations or Institutions, Secondary Law' Max Planck Encyclopedia of Public International Law', online ed., 2007.
[71] Usually, a further distinction is traced between acts having 'internal' or 'external' validity of an IO. See A Broches, 'International legal aspects of the operations of the World bank' (1959) 98 *Recueil des Cours* 297, at 302. Contra see Alvarez, *International Organizations as Law-makers*, *supra* note 65, at 63.
[72] Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', *supra* note 58, at 902. See also PM Dupuy, 'Soft Law and the International Law of the Environment' (1990) 12 *Michigan Journal of International Law* 420, at 435; and AT Guzman and TL Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171, at 173.
[73] Boyle and Chinkin, *The Making of International Law*, *supra* note 63, at 226. See also *Legality of the threat of the use of force*, Advisory Opinion, [1996] ICJ Reps, para 70.
[74] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, [1986] ICJ Reps. 14, para 188.
[75] RR Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 *International & Comparative Law Quarterly* 549, 564.

address the issue of the authority and regulatory effects of the activities of climate finance institutions.

1.3. Heterodox propositions

1.3.1. A cursory mapping

If those are the limits of international law under an orthodox view against the realities of the expanding authority and regulatory activities of international institutions, it is also true that international lawyers and legal theorists have seamlessly tried to fill the gaps by resorting to heterodoxy, by integrating or aligning the orthodox view to principles and concepts taken from *outside* the toolbox of public international law.

Admittedly, the swathes of heterodox frameworks are vast even on the more specific questions of this chapter. To provide but an inchoate mapping, heterodox doctrines seek to fill this gap in two main ways. On one hand, they rely on different streams of *international relations*, focusing on states' compliance to multilateral regimes and global regulation;[76] on the relevance of 'government networks' and the 'hard impact for their soft law';[77] or on 'the practice of legality' by all concerned actors, where law-making and compliance are considered as part of a single comprehensive 'jurisgenerative' process.[78] On the other hand, heterodox scholars have adopted innovative theoretical frameworks, transferring discourses of *other legal systems* or branches of the law to global governance. In particular three recent

[76] A Chayes and A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998). For a comprehensive and critical account of compliance theories see Benedict Kingsbury, 'Concept of Compliance as a Function of Competing Conceptions of International Law, The' (1997) 19 *Michigan Journal of International Law* 345.

[77] In other words, efficacy, AM Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283. For a network approach applied to the GEF see C. Streck, 'Global Public Policy Networks as Coalitions for Change', 2002, Yale Environmental Research, <http://environment.research.yale.edu/documents/downloads/o-u/streck.pdf>. In parallel see the transnational law stream: HH Koh, 'Trasnational Legal Process' (1996) 75 *Nebraska Law Review* 181.

[78] J Brunnée and SJ Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010), at 97-100. On the interaction between such view and constructivist theories of international relations see J Brunnée and SJ Toope, 'Constructivism and International Law' in JL Dunoff and MA Pollak (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2013) 119-145.

attempts directly tackle the issue of the expanded authorities of international institutions:[79] the Global Administrative Law (GAL); the Informal International Law-making (IN-LAW); and the International Public Authority (IPA) frameworks.[80]

The GAL strand has been incepted by a seminal article in 2005,[81] generating a wealth of scholarly studies and debates.[82] The starting point of GAL is that "[...] much of global governance (particularly global regulatory governance) can usefully be analysed as administration."[83] Accordingly, the cornerstones of modern domestic administrative laws (legality, reason giving, review of administrative decisions, etc…) find progressive application in a "global administrative space"[84] populated by international, domestic and transnational regulatory actors. Administrative law principles in the global sphere are justified by the practice of global administrative entities and according to the need of securing accountability and efficacy of global administration.[85] A clear consequence of GAL is that it unbundles the action of global administrations from states' sovereignty and their consent,[86] by way of different expressions of 'publicness' that work as monads or micro-administrative regimes.[87] GAL authors do not claim for the existence of a monolithic and

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[79] On this regard the extensive scholarship on 'constitutionalization of international law' and its cognate 'constitutional pluralism' is not relevant here, because they tend to address the matter from democratic legitimacy of international institutions. This topic, which is indeed relevant also in climate finance, will be canvassed in depth below in Chapter V.

[80] Respectively the projects have been incepted by the Institute for International Law and Justice of the New York University and L'Istituto Ricerche sulla Pubblica Amministrazione of the Tuscia University (IT); by the Graduate Institute of International and Development Studies of Geneva; and by the Heidelberg Max Planck Institute of Comparative Public Law and International Law.

[81] B Kingsbury, N Krisch, and RB Stewart, 'The Emergence of Global Administrative Law' (2004) 68 *Law and Contemporary Problems* 15.

[82] For en extensive bibliography visit http://www.iilj.org/gal/bibliography/default.asp.

[83] B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law* 23, at 24.

[84] Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', *supra*, at 18.

[85] See the conspicuous empirical work in the 3rd edition of the GAL casebook: B Carotti and G Dimitropoulos, 'Horizontality as a Global Strategy for Accountability: The OECD Reviewing the EU CAP' in *Global Administrative Law: The Casebook* (IRPA-IILJ 2012), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140384>.

[86] MS Kuo, 'Taming Governance with Legality - Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism' (2011) 44 *New York University Journal of International Law and Politics* 55, 95.

[87] Kingsbury, 'The Concept of "Law" in Global Administrative Law', *supra*, at 55, who defines GAL as 'inter-public' law.

independent legal system, rather they argue that practices of 'publicness' are emerging among different regulatory regimes.

The IN-LAW research project[88] adopts a different approach to the study of regulatory processes in international governance. Pauwelyn[89] remarks that the law-making character of modern governance processes is informal on three stances, when paralleled to international law: namely on i) its outputs, ii) processes and iii) actors. Therefore, IN-LAW aims to go beyond the traditional sources of international law, law-making institutions, and concepts of international legal personality.

With such features, the proponents of IN-LAW frame a peculiar relationship between the informality of governance instruments and international law. In contrast to the idea of 'soft law', they argue that the watershed between the legal and non-legal should be maintained in abstract. However, "[…] since international law is not defined with reference to formalities, the informal nature of IN-LAW should not automatically disqualify it as international law."[90] Rather, two options are on the table: either merger and acquisition by international law of parts of IN-LAW (including some forms of 'secondary law' of IOs), or entrenchment of international law, as a legal system overwhelmingly based on states "thin consent", opposed to the "thick consensus" of contemporary stakeholders and regulators in global governance.[91] Arguably, the first option would entail a theoretical rethinking of the sources of international law, while the second re-proposes *mutatis mutandis* a similar relationship already envisioned by proponents of 'soft law' instruments.[92]

[88] Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J Pauwelyn, R Wessel and J Wouters (eds.), *Informal International Lawmaking*, *supra* note 45, 13-34.
[89] Ibid., at 15-20.
[90] J Pauwelyn, 'Is It International Law or Not and Does it Even Matter?' in J Pauwelyn, R Wessels and J Wouters, *Informal International Lawmaking*, *supra* note 55, 126-160, at 139.
[91] J Pauwelyn, R Wessels and J Wouters 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable' in Ibid., 500-37, at 506-9.
[92] J Pauwelyn, 'Is It International Law or Not and Does it Even Matter?', *supra*, at 155-7. Where such effects are of i) incorporation, when international law instruments recognize IN-LAW as binding; ii) of interpretation and guidance; ii) of factual relevance for estoppel, customary law; and of permissivity.

The third and final approach put forward by some German scholars stresses the need to focus on *the exercise of international public authority* (IPA) in its many forms, which, as seen, constitutes the starting point for exposing the 'cognitive' limits of international law in climate finance governance. It is posited that the IPA approach is extremely helpful to address the normative relevance *as law* of the institutional dynamics occurring in regime complexes, such as the one of climate finance, particularly when they suggest the use 'international composite administration' as a viable concept.

As Von Bogdandy, Dann and Goldmann put it, the gargantuan literature on governance is deficient from a public law perspective, where for public law is meant the law directing and limiting the exercise of power towards individuals and other public or private entities. Public law beyond the state should also include elements of constitutional, administrative, and international institutional principles.[93] Hence, if one interprets the many instruments and decisions adopted by international institutions as a manifestation of public authority –as the power to unilaterally modify the individual freedoms and legal status of groups, and other collective entities–[94] it is possible to vest with legal significance their normative role both *outside* and *inside* the formal sources of international law. More specifically:

> "[…] international institutional law should […] (1) reconstruct the exercise of international public authority by using comparative perspectives on the administrative scholarship; (2) develop a constitutionalist framework and proposing standards for critique concerning the procedures, instruments and accountability of international institutions when engaging in the exercise of public authority; and (3) *reflect systematically on the interrelationships between different legal entities typical of contemporary governance*"[95]

[93] A Bogdandy, P Dann, and M Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 1-32, at 4.
[94] Ibid., at 14.
[95] Ibid., at 26 [*emphasis* added].

The third point on the purposes of an IPA approach to international institutional law well suits the conceptual needs raised in the context of climate finance as regime complex. Indeed this is valid on two levels.

First, the '*publicness*' of the climate finance regime complex is justified not only by its foundational international legal obligations in the UNFCCC, but also –when these obligations do not apply (e.g. multilateral development banks)– by the *public nature* of the institutions sourcing and distributing the finance, where this nature can be deduced from the constitutive instruments and the subjects constituting each institution.

Second, the problem of geographic, functional and regulatory overlaps among climate finance institutions, coupled with the limit of the 'regime complex' idea as merely descriptive from a legal perspective, do call for a 'systematic reflection' on the inter-institutional dynamics occurring in the field with the intent of ascertaining or discovering emerging legal patterns. This 'systematic reflection' will be done in the next section 2 below in this chapter.

Before that, the following sub-paragraph will argue that the concept of 'international composite administration' –as developed by IPA scholars– is better suited to provide an understanding of the legal significance of the governance of climate finance.

1.3.2. International composite administration

Above it has been argued that the *multilevel*, *multiple and heterarchical* nature of the institutional structure of climate finance constitutes what the international relations scholarship defines a 'regime complex'. Here a *legal* conceptual framework will be adopted: namely that the same structure appears to replicate the characteristic features of 'international composite administrations'.[96]

[96] P Dann and A Von Bogdandy, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9 *German Law Journal* 2013.

The concept, which stems from scholarly attempts to frame the complex administrative structures of the EU model, seeks to provide a descriptive framework to "facilitate understanding the operations conducted within and by […] multi-layered structures."[97] As the authors define it:

> "Composite administration takes place when a *plurality of legally independent public authorities pursues aims of public concern as a common task*. These authorities are, in contrast to those of a federal State, not part of a comprehensive body politic. […]The common operation is principally based on the idea of a division of labor. Hence, functional cooperation and organizational separation form structural principles on which a composite administration rests."[98]

The systematic outline of the previous chapter highlighted these very features in climate finance, which, after being incepted under an international convention, is currently a understood as a 'common task' shared by multifarious institutions.

A second trait of international composite administrations is *codependence*:

> "Standards, be they binding legal acts or soft law requirements, are not only developed, but also implemented in a cooperative way. Especially implementation as composite administration is characterized by *manifold forms of interaction* with respect to the exchange of information, *procedural alliances or even forms of institutional combinations* in order to ensure implementation and to avoid the prisoners' dilemma. In effect, while the organizations are legally separate, their exercise of public authority can often not be attributed to one level."[99]

For though the overlapping regulatory frameworks show that there is scarce cooperative development of standards in climate finance, nonetheless the interaction between the institutions has produced 'procedural alliances' and 'institutional combinations'. Two examples are the Global Environment Facility and the Climate Investment Funds, which are the combined efforts of independent UN Agencies and multilateral development banks respectively.

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[97] Ibid., at 2015.
[98] Ibid., at 2016 [*emphasis* added].
[99] Ibid., at 2016.

The vantage point of international composite administration is its legal significance under the idea of the exercise of public authority beyond the state, because:

> "[t]he concept does not focus on powers, organizational structures or the relation of legal norms as such, but rather on bureaucratic cooperation and the *interaction of institutions in the exercise of public authority*. At the same time, one should note that the concept does not focus on processes within one *organization but encompasses the entirety of cooperation between international institutions and member States*."[100]

As argued in the previous chapter,[101] the common goal of scaling up climate finance under the Copenhagen Accord and the openness of the UNFCCC provisions justifies treating institutions of different nature both in their horizontal and vertical relationships as part of one single cooperative effort.

Yet, despite institutional structure of climate finance matches the idea of an international composite administration, there are two shortcomings that, taken together, call for discovering and addressing the *specific dynamics* occurring among these institutions.

First, the idea of 'international composite administration' is too general to represent more than a promising starting point for legal analysis. Indeed, the recognition that an area of governance as an international composite administration necessitates further investigation and *discovery* of the legal instruments and practices under *each identified area* of governance. To be sure, the limit of generalization is present in all the heterodox approaches outlined here: indeed each one aspires to provide an overarching framework able to encompass institutions, regulatory instruments, and governance realities very different from each other. Furthermore, their added value as frameworks to overcome the 'cognitive' limits of international law faces strong limitations: as argued above, if international law does not recognize as legal facts certain institutional realities and events of global governance, to a certain extent the same limit applies to heterodox frameworks, because they are still

[100] Ibid., at 2015 [*emphasis* added]
[101] Chapter II, Conclusions.

incapable to engender fundamental principles able to recognize 'facts with legal significance' as legal facts proper of a modern legal system.

A second shortcoming of this concept is that it is admittedly under-theorized outside the realm of EU law and governance, and that the principles of composite administrations in the EU, such as the one of subsidiarity, cannot be found in other areas of governance, including climate finance.[102] Indeed, the very authors of the IPA framework have not gone further than providing some examples of international composite administrations at the international level, and an initial (and again too broad) taxonomy of instruments used by international institutions in their exercise of public authority.[103]

2. INTER-INSTITUTIONAL DYNAMICS IN CLIMATE FINANCE

With regards to climate finance, the increasing level of complexity and institutional interplay in its composite administration has led to discontent among states, recipient entities and local groups, as well as to dispersal of financial resources between numerous under-funded channels.[104] Whilst on the legal plane this translates into the issue of *geographical, functional* and *regulatory* overlaps described above, there are also practical consequences for the sustainability of this institutional model in delivering ambitious and transformative results.

It is posited that two specific dynamics occur among climate finance institutions at each level of the composite administration: on one side, states, and institutions strive to secure a certain level *complementarity* of their activities, so that, when overlaps occur, a reasonable 'division of labour' is promoted. On the other hand, the limited public financial

[102] See Kumm's proposition on extending such principle at international level in order to enhance the legitimacy of international law: M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907, at 921-4.
[103] M Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865.
[104] A Ballesteros, S Nakhooda, J Werksman, and K Hurlburt, 'Power, Responsibility, and Accountability: Rethinking the Legitimacy of Institutions for Climate Finance' (2010) 1 *Climate Law* 261, at 269.

resources raised by industrialized countries bring the same institutions to *compete*: the ones that prove more legitimate and efficient also catalyse more financial resources to the detriment of parallel institutional realities, which as a consequence tend to become under-funded and marginalized channels of finance. Complementarity and competition constitute a conceptual ground[105] specific for this area and useful to direct and streamline an analysis of emerging legal patterns in the field. The two separate dynamics are constantly pursued by climate finance institutions and interact both in a proactive and conflicting manner.

2.1. Complementarity

The idea that in areas characterised by institutional complexity a certain degree of complementarity should be reached is far from new, even among international lawyers. Inspired by the novel IOs established after the Second World War, in his lectures at the Hague Academy in 1950, Jenks recognized not only that 'co-ordination' between IOs was an emerging problem, but also that international lawyers should increasingly focus on…

> "[…] the law of inter-organizational relationships, which presents problems comparable in difficulty and importance to those which faced constitutional lawyers and political scientists when they were confronted with such new devices in the art of government as representative government and federalism".[106]

While after more than half a century the issue has been overlooked by international lawyers, complementarity is nonetheless an ever-recurring term in international policy instruments. To come with two examples directly relevant to the field of climate finance, the

[105] Expectedly, these terms are not new in the scholarship. An 'institutional complementarity theory' is proposed in the context of vertical dynamics between multi-level administrations and stakeholders' involvement in non-market standard setting. *See* T Büthe and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011), at 42-59. By the same token, Benvenisti has already sketched the idea intra-institutional competition. *See* E Benvenisti, "The Interplay Between Actors as A Determinant of the Evolution of Administrative Law in International Institutions" (2005) 68 *Law and Contemporary Problems* 319, at 328.

[106] Jenks, 'Co-ordination: A New Problem of International Organization: A Preliminary Survey if the Law and Practice of Inter-organizational Relationships', *supra* note 20, at 277.

2005 Paris Declaration on Aid Effectiveness dedicates a whole section to the problem under the rubric 'Complementarity: more effective division of labour'.[107]

Similarly, the final resolution of the 2012 UN Conference on Sustainable Development recognizes that:

"[…] greater *coherence and coordination* among the various funding mechanisms and initiatives related to sustainable development *are crucial*. We [the participant states, DR] reiterate the importance of ensuring that developing countries have steady and predictable access to adequate financing from all sources to promote sustainable development."[108]

In the development of climate finance the term 'complementarity' re-surfaced in 2010, during the rounds of negotiations for the Green Climate Fund, which took place in a separate Transitional Committee. The issue became a specific agenda within the Committee, which recognized that the extant ramification of climate finance initiatives, coupled with the creation of another fund, would require enhancing "[…] clear roles, avoid duplication of efforts, share best practices, and promote synergies."[109] Among the many, a submission by the US delegate to the Transitional Committee is particularly revealing of the importance and the approaches envisioned by the US as a contributor of climate finance:

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[107] *Declaration of Paris on Aid Effectiveness*, OECD Doc. DCD/DAC/EFF(2005)1/FINAL, 3 February 2005: "33. Excessive fragmentation of aid at global, country or sector level impairs aid effectiveness. A pragmatic approach
to the division of labour and burden sharing increases complementarity and can reduce transaction costs.

34. Partner countries commit to:
• Provide clear views on donors' comparative advantage and on how to achieve donor complementarity at country or
sector level.

35. Donors commit to:
• Make full use of their respective comparative advantage at sector or country level by delegating, where appropriate,
authority to lead donors for the execution of programmes, activities and tasks.
• Work together to harmonise separate procedures."

[108] *The Future We Want*, UN Doc. A/CONF.216/16, 22 June 2012, Resolution 1, Annex, para 268. [*emphasis* added].

[109] Transitional Committee, *Workstream II: Governance and Institutional Arrangements: Scoping Paper*, 29 June 2011, UN Doc UNFCCC/WSII/1, para 23, <https://unfccc.int/files/cancun_agreements/green_climate_fund/application/pdf/tc2_ws2_1_290611.pdf>.

"The United States *supports the goal of a coherent and well-coordinated climate finance architecture*. The various channels for climate finance should have clear roles, avoid duplication of efforts, share best practices, and promote synergies. […] Even with the creation of the GCF, other channels for delivering climate finance will continue to be important. The GEF, the multilateral development banks, bilateral agencies, UN agencies, and private sector investment vehicles will all play a role. If we want to improve coordination among these actors, we should focus on doing so from the bottom up. We could explore ways to promote better coordination among major bilateral and multilateral channels, to get these institutions working better together and interacting more frequently. Various models for coordination among finance channels already exist in other development sectors at the operational, national, and programmatic levels."[110]

While, according to a policy perspective, the goal of complementarity boils down to strategies or 'models' of bottom-up, top-down or horizontal coordination, on the legal plane, the same term somehow echoes the well-established legal construct of administrative competence in municipal systems.[111] However, competence is embedded in the rule of law and the principle of legality of domestic systems, and relies on the presence of a central authority and judiciary able to solve possible overlaps among administrations, not to name a constitutional order. Being a composite model, climate finance governance lacks such a centralized structure with the result that complementarity currently represents no more than a dynamic, a desired goal pursued by international institutions and states.

Finally, it is worth distinguishing complementarity from coordination: the latter is just one of the means to achieve the former. In fact, it is not guaranteed that by fostering coordination between institutions, substantial complementarity can be achieved. This is a point that the scant international legal scholarship on the matter seems to have missed[112] and that a parallel with the construct of administrative competence is able to clarify. On one side, co-ordination is a practice of interaction between overlapping entities which can take numerous forms, such as inter-institutional bodies, a set of specific directives given from an

[110] Transitional Committee, *Submission by members of the Transitional Committee*, Internal Reference Doc. No 5, 8 July 2011, at 48, <http://unfccc.int/cancun_agreements/green_climate_fund/items/5868.php>.
[111] Similarly, Schermers and Blokker, *International Institutional Law* , at 1085.
[112] See the brief analysis of van Asselt, Scott and Ulfstein's contributions above in this chapter.

administration of higher hierarchy to lower administrations, etc… Conversely, competence indicates a administrative sphere pre-defined by law, which if manifestly violated by the administration, can even lead to the nullity of the administrative act.[113] Interestingly, the doctrine of *ultra vires* acts of IOs in international law chimes with some features of the competence construct.

2.2. Competition

Competition is the other Janus head of the composite administration of climate finance. Facing a limited amount of resources, inevitably the various institutions acting in the global arena of climate finance compete in order to gain regulatory spheres and administer flows of public finance.

While institutional competition has been intuited and briefly addressed by international lawyers,[114] the same phenomenon is debated among political scientists, particularly in the context of how international institutions seek to promote their legitimacy in horizontal or polycentric models of governance. By way of illustration, Black argues that forms of competition in the sharing of regulatory powers occur between state and non-state regulators at the national and transnational levels: lacking a legitimate basis provided by public laws, non-state regulators "[…] may have to 'compete' with other regulators in other jurisdictions in order to attract business, and they may overlap or otherwise have to coordinate with other regulators in the same jurisdiction […]."[115] Referring to the very realm of international institutions, Buchanan and Keohane adopt 'comparative benefit' as a key determinant of institutional legitimacy at global level:

[113] This is, at least, the practice in several civil law countries such as Italy and France.
[114] See Benvenisti, 'The Interplay Between Actors as A Determinant of the Evolution of Administrative Law in International Institutions', *supra* note 105.
[115] J Black, 'Legitimacy and Competition for Regulatory Share', LSE Law, Society and Economy Working Paper No. 14/2009, at 14-6, <http://www.lse.ac.uk/collections/law/wps/WPS2009-14_Black.pdf>.

> "The legitimacy of an institution is called into question if there is an institutional alternative, providing significantly greater benefits, that is feasible, accessible without excessive transition costs, and meets the minimal moral acceptability criterion."[116]

Arguably, if actors take into account comparative benefits, than this inevitably leads to a certain degree of institutional competition. The experience with the Global Environment Facility and its implementing agencies described in the previous chapter indeed showcases how the rationale of basing the share of implementation on the different 'comparative advantages' between agencies has led to fruitful competition but also to conflicts among agencies.[117]

The quest of asserting legitimacy in a competitive institutional realm is also relevant for the law and will work as basis for the second part of this work, when a legal analysis of regulatory factors affecting legitimacy will be conducted according to a comparative analysis between some climate finance institutions.

On the legal plane, institutional competition is a dynamic that can be explained with reference to the *internal regulatory processes* of each institution and how they relate with national and subnational actors.[118] The multiplicity of institutions brought about different independent processes, in the sense that each institution has developed its own internal regulations related both to its internal governance (decision making process, membership, legal status, etc.), and to external actors, especially recipient entities. The latter category addresses issues such as access and disbursement modalities of multilateral funds, conditionalities, fiduciary standards, redress mechanisms and transparency.

Institutional competition is a conceptual paradigm applicable mostly to these vertical relationships fulfilling the often opposite interests of contributor and recipient countries. The more an institution is able to offer a regulatory process that is clearly framed, transparent and

[116] A Buchanan and RO Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405, at 422.
[117] Werksman, 'Consolidating Global Environmental Governance', *supra* note 9.
[118] This does not exclude that other socio-political factors can spur inter-institutional competition.

participatory, the more a potential recipient country or non-state entity is brought to choose that institution among diverse options. In a similar manner, a contributor would be keener to channel its resources to processes that better suit its interests of securing a result-based and efficient disbursement according to clear fiduciary standards.[119]

Institutional competition not only works as a comparative tool between the different levels of legitimacy among institutions. It also explains how innovative processes are developed and migrate from an institutional experience to another.

Cross-fertilization driven by competition is exemplified, for instance, by the issue of direct access to funds. As seen in the previous chapter, direct access refers to the possibility for a climate finance institution to accredit a national administration as an implementing agency of funded projects. The national administration needs to comply with the institution's fiduciary standards in order to be eligible for direct access. The beneficial aspect of this process –strongly claimed by developing countries during negotiations– is that it avoids the overlapping of institutional intermediaries from the sourcing to the delivery of finance, thus bypassing traditional multilateral implementing agencies such as development banks and UN agencies. Modalities for direct access have been first developed within the regulatory framework of the Kyoto Protocol's Adaptation Fund,[120] but progressively migrated to other institutions, including the recently established Green Climate Fund.[121]

2.3. The interplay between complementarity and competition

Given the absence of a central authority 'governing' the channeling of climate finance, the 'complementarity need' potentially yields increased efforts of coordination between institutions. Coordination can take both formal and informal avenues: for example, in the first case, through inter-institutional agreements or, in the second, relying on the work of

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[119] This is confirmed, for instance, by an independent assessment of GEF's performance: *see* GEF Evaluation Office, 'Fourth Overall Performance Study of the GEF', April 2010, 37-8, <www.thegef.org>.
[120] *See Adaptation* Fund, Decision 5/CMP.2, 2 March 2007, UN Doc. FCCC/KP/CMP/2006/10/Add.1, para 2(b).
[121] *See Launching the Green Climate Fund*, 15 March 2012, Decision 3/CP.17, UN Doc. FCCC/CP/2011/9/Add.1, para 7.

epistemic communities of experts.[122] Coordination can also lead to more substantive solutions, such as the adoption of common rules regulating the areas of competence among institutions, which are akin to administrative models in domestic systems. It is exactly in this latter case that it is possible to spot tensions with the current trend of institutional competition.

Indeed, as a result of institutional competition and broad agreement between states on the dispersed architecture of climate finance,[123] scholars and policy makers do not envision in the short and medium term any centralization of the management of international climate finance.[124] The diversity of processes is likely to work as restraining force for substantive common legal frameworks. In other words, the more an institution is capable of being more competitive through innovative and effective processes satisfying key countries' interests, the more it will be unwilling to see its sphere of competence formally constrained by common rules of coordination, since they would limit its activities for the benefit of a competing institution.

A positive side of institutional competition is that it brings flexibility and innovative dynamics to the system through learning-by-doing and cross-fertilization between parallel institutional processes. A clear example is, again, the one of direct access: started as an access modality of the Adaptation Fund, it has been implemented in the Enabling Activities programme of the GEF, and constitutes a mode of access to the Green Climate Fund.[125] Cross-fertilization might go hand in hand with complementarity, because the creation of

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[122] PM Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1.

[123] Article 11(5) of the UNFCCC is a clear example of such weak agreement, as it allows for initiatives other than the Financial Mechanism to implement climate finance obligations of the Convention.

[124] C Streck and T Chagas, 'Developments in Climate Finance from Rio to Cancun' in H Cisse, DD Bradlow and B Kingsbury (eds), *The World Bank Legal Review*, *supra* note 2, 345-362, at 362; and B. Mueller and L. Gomez-Echeverri, 'The Reformed Financial Mechanism of the UNFCCC: Part I Architecture and Governance', (2009) EV 45, Oxford Institute for Energy Studies, at 6-8, <http://www.oxfordclimatepolicy.org>.

[125] See Chapter V below, at 222.

similar regulatory instruments within institutional processes can increase coherence and harmonize the system.

Overall, it appears that, in the international composite administration of climate finance, complementarity and competition play both together and against each other. On one side, institutional competition limits the creation of a systemic legal framework on competences; on the other, complementarity can be fostered by the flexible dynamics of competition through regulatory cross-fertilization.

3. INTIMATIONS[126] OF LAW

> "To read the debate about fragmentation as if it had to do only with coherence in the abstract is to be mistaken about what is actually at stake. Special regimes and new organs are parts of an attempt to advance beyond the political present that in one way or another has been revealed unsatisfactory."[127]

This critical argument by Koskenniemi and Leino was a reaction to those international lawyers who viewed in the fragmentation of international law a threat to the coherence of the international legal system. Yet it is also an valuable statement in the context of climate finance governance and its institutional complexity.

Overall, the path followed in this chapter led to find that, more than a lack of legal coherence, international law lacks the cognitive tools to usher into its framework certain events of global governance. In addition, both the idea of international composite administration and the discovery of the dynamics of complementarity and competition shed light on how such 'special regime is advancing beyond its political present' under the legal conceptualization that climate finance institutions are exercising public authority.

[126] The term is borrowed in its significance from Neil Walker: Walker, *Intimations of Global Law*, *supra* note 46.
[127] M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, at 578.

Importantly, the concept of international composite administration is also useful to ascertain the existence of 'intimations'[128] of law in the ways climate finance institutions interact by seeking complementarity or competing between each other. The previous sections explained why it is not possible to claim a proper 'emergence'[129] of law under heterodox approaches: namely, because the events of global governance which such approaches recognize as relevant, nonetheless cannot yet amount to fully-fledged *legal facts* under a legal system. The word 'intimation' is more apt in this context, because it expresses just the very initial springing of normative realities transforming into a 'kind of law', whose concept and 'secondary norms'[130] are still very much debated.

This final section analyses some examples of inter-institutional endeavors under the law. Even though some significant patterns are present, nevertheless the broader picture shows an inter-institutional governance still dominated by a high degree of experimentalism and informality. The section will highlight some significant legal developments in terms of instruments and processes, and highlight the residual role of UNFCCC principles in fostering complementarity among institutions.

3.1. The formalization of inter-institutional processes of coordination

The international composite administration of climate finance is engendering some formal means to promote complementarity among the various administrations. Since (at least) the launching of the 2007 UNFCCC Bali Action Plan,[131] states and climate finance institutions alike have been concerned with promoting means of coordination, having in the background years of experience with the inter-institutional competition among GEF agencies and the overlapping role of bilateral agencies and multilateral development banks.[132] There are two methodological criteria useful to discover and address the various means of inter-institutional

[128] Walker, *Intimations of Global Law*, *supra* note 46.
[129] See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', *supra* note 81.
[130] Here secondary norms are intended under the 'Hartian' theory of law and not as 'secondary law' of international institutions. HLA. Hart, *The Concept of Law* (2 ed. Clarendon Press 1997).
[131] *Bali Action Plan*, Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008.
[132] Even the G8 at its meeting in 2005 invited multilateral development banks to come up with a plan of action on energy and climate. *See* "The Gleneagles Communiqué", 2005, Plan of Action, < www.g8.utoronto.ca>, para 25.

coordination: the first is referring to the type of *instrument* adopted by states or institutions, the second, instead, looks at the *'place of origin'* , the substantive provisions for coordination and, potentially, complementarity. By place of origin it is meant the entity or entities which initiate and bring about such formal means within or outside an international composite administration.

This second solution is more promising under the heterodox view adopted here. Indeed, focussing on the type of instrument adopted –such as memoranda of understanding, COP decisions, or 'secondary laws'[133] of an institution– is meaningful only to understand its normative relevance vis-à-vis international law. Conversely, heterodox approaches are less concerned with the type of instrument because their normative –and possibly legal– effects take place regardless the instrument adopted. In particular, the IPA framework is centered on the idea that international institutions do affect the legitimate interests of states and non-state actors via their authority.

With such methodological premise, three main patterns are currently emerging: i) processes that are external to the administrations acting in this composite model; ii) unilateral initiatives by individual climate finance institutions; and iii) direct inter-institutional coordination engendered by the institutions part to the composite administration.

3.1.1. External processes

Given the absence of a central global authority in climate finance, it is perhaps no surprise that bodies and entities, not taking part directly to the management of finance streams, have nonetheless set up formal means to address institutional overlaps.

[133] Benzing, 'International Organizations or Institutions, Secondary Law', *supra* note 10.

A clear example is the Standing Committee on Finance (SCF), established in 2010 by the UNFCCC COP.[134] The Committee is a consultative inter-governmental body with the task of assisting the COP "[…]in exercising its functions with respect to the financial mechanism of the Convention in terms of improving *coherence and coordination* in the delivery of climate change financing".[135] The SCF was set up contextually to the Green Climate Fund, most likely as a reaction to concerns expressed by some COP Parties about the concurrent role of the Global Environment Facility and the Green Climate Fund as operational entities under the UNFCCC Financial Mechanism: as seen in the previous chapter, the two institutions can potentially overlap on all three levels of administration (geographical, functional and regulatory).

While the SCF is competent to prepare the draft guidance –later adopted by the COP– to the operational entities of the Financial Mechanism,[136] it also must carry two tasks relevant for promoting complementarity with institutions acting outside the UNFCCC framework. Because the COP and SCF lack any authority on non-UNFCCC institutions, both the activities are related to information exchange: the first task consists of maintaining "[…] a forum for the communication and continued exchange of information among bodies and entities dealing with climate change finance in order to promote linkages and coherence"; the second is to prepare a biennial assessment and overview of global climate finance flows in order to provide clarity on the state of the art. [137]

Despite being at its first stages, it is possible to notice the 'soft function' of the SCF in providing a platform for discussion and informal peer review between climate finance actions.[138]

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[134] Decision 10/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, para 112.
[135] Decision 1/CP.17, UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012, para 121.
[136] Ibid, para 121(c).
[137] Ibid, at paras 121(a) and (f) respectively.
[138] On a heterodox view on the role of peer reviews, *see* G Dimitropoulos, "Global Administrative Law as "Enabling Law": How to Monitor and Evaluate Indicator-Based Performance of Global Actors", 2012, *IRPA Research Paper* No 7/2012, <papers.ssrn.com/sol3/papers.cfm?abstract_id=2167405&download=yes>.

Other examples of external processes are the activities aimed at promoting transparency and standards in accounting for climate finance flows.

At the beginning of this work it was noted how no legal or accounting definition of 'climate finance' currently exists, with the result that each climate finance institution adopts its own definition and means to report its climate-related activities. This is a case of regulatory overlap in the composite administration, because more regulations on accounting for the same phenomenon exist internally to each institution.

In order to overcome such transparency and information gaps, the Development Co-operation Directorate of the Organisation for Economic Co-operation and Development (OECD-DAC), whose main task is to gather statistics related to foreign aid via its Creditor Reporting System (CRS), has developed a set of 'climate change mitigation and adaptation markers', which donor countries can use for accounting and reporting to the OECD.[139] The markers, as well as reporting, are made on a voluntary basis, but they have been generally complied with by aid donor countries.[140]

A shortcoming of the OECD-DAC CRS and the 'climate markers' is that they are not open to international institutions, but only to donor member countries. Furthermore, they do not report some key elements of aid, such as the types of conditionalities, financial instruments, etc.

In response to these shortcomings, a public-private partnership, the International Aid Transparency Initiative (IATI), has set up a voluntary standard to report aid flows.[141] The IATI standard covers additional aspects of the aid, which are not taken into account by the OECD-DAC CRS and, importantly, are open to any international entity engaged in channelling resources for development. Interestingly, the Adaptation Fund, the Global Environment Facility, and several multilateral development banks are members of IATI and

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[139] OECD-DAC, *Handbook on the OECD-DAC Climate Markers*, September 2011, <http://www.oecd.org/dac/stats/48785310.pdf>.

[140] However, some data appeared to have inconsistencies: see A Michaelowa and K Michaelowa, 'Coding Error or Statistical Embellishment? The Political Economy of Reporting Climate Aid' (2011) 39 *World Development* 2010.

[141] See <http://iatistandard.org>.

make use of the standard.[142] In this way an external entity has promoted via its voluntary standard a means to address regulatory overlaps in the composite administration.

3.1.2. Unilateral initiatives

Unilateral initiatives to enhance complementarity stem primarily from the secondary laws of each climate finance institution.

One common technique is to grant observer status to other competing institutions during the meetings of decisional bodies. When observer status is granted in a reciprocal manner, this creates the potentials for virtuous cooperation and, possibly, complementarity. For instance, the rules of procedure of the GEF Council allow the GEF CEO to 'invite representatives of other organizations and entities […] to attend or observe the Council meetings'.[143] The rules of procedure of the Participants Committee of the Forest Carbon Partnership Facility (FCPF) contain a similar provision, coupled by a list of permanent observers in the FCPF Charter. Being the FCPF a climate finance institution active in the field of forest carbon mitigation, it is expressly stated that relevant international organizations, representatives from the UN-REDD Programme and from the UNFCCC Secretariat should be invited to serve as observers to the Participants Committee meetings.[144] Also the UN-REDD Programme in the rules of procedure of its Policy Board allows for *ex-officio* observers to the meetings of its Policy Board, including representatives from the FCPF, the GEF Secretariat, and the UNFCCC Secretariat.[145]

Other initiatives of complementarity are contained in the programming processes which some multilateral institutions develop in consultation with recipient countries.

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[142] <http://www.aidtransparency.net/governance/steering-committee>.
[143] *Rules of Procedure of the GEF Council*, October 2007, para 22, reprinted in July 2009, <http://www.thegef.org/gef/council_rules_procedure>.
[144] *See* respectively FCPF, *Rules of Procedure for Meetings of the Participants Committee*, as amended on October 2011, paras 8.01-02; and International Bank for Reconstruction and Development (IBRD), *FCPF Charter*, revised on 11 May 2011, Section 10.1(b), both <www.forestcarbonpartnership.org>.
[145] *Rules of Procedure and Operational Guidance*, UN-REDD Programme, March 2009, para 1.2, <www.un-redd.org/PolicyBoard/tabid/102628/Default.aspx>.

A significant case stems from the World Bank's Procedures (BPs) on Country Assistance Strategies (CAS). As will be seen below, these strategies are a key component in the complex access and disbursement modalities of the World Bank. A CAS is a programming process aimed to identify "[…]key areas in which Bank Group support can best assist a country in achieving sustainable development and poverty reduction"[146], where, climate change constitutes a relevant component. The World Bank BPs require that its staff "coordinates closely with relevant Bank Group units, development partners (IMF, regional development banks, bilaterals, etc.), and other sources of expertise to elicit informed views on the key issues to be highlighted in the CAS".[147] In addition "[t]he Bank collaborates with development partners to seek greater coherence across institutions and alignment of programs with the country's development priorities."[148]

Another similar initiative related to the phase of national programming for climate finance is regulated under the Climate Investment Funds (CIFs). Both the establishing documents of the two separately-managed trust funds[149] require that the competent multilateral development bank conducts "[…] a joint mission, *involving other relevant development partners*, to discuss with the government, private industry and other stakeholders"[150]. Interestingly, the regulations of two sub-programmes under the Strategic Climate Fund provide an innovative means to promote complementarity by delegating to the recipient country the coordination of different climate finance institutions in the process of national programming.

[146] World Bank, *Country Assistance Strategies*, BP 2.11 November, 2010, as revised in April 2012, para 1.
[147] Ibid., para 5.
[148] Ibid., para 7.
[149] Respectively the Clean Technology Fund, and the Strategic Climate Fund.
[150] CIFs, *Governance Framework for the Clean Technology Fund*, as amended in December 2011, at para 14, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/CTF%20Governance%20Framework-FINAL.pdf>.

Hence, under the Forest Investment Programme it is envisioned that the competent multilateral development bank should develop the Terms of Reference for the joint mission together with the recipient developing country. In particular:

> "[t]he [recipient] Government will lead and coordinate the mission(s), which should include key government, non-government, including indigenous peoples and local communities; and private sector stakeholders *as well as other development partners, including the Forest Carbon Partnership Facility, UN-REDD (where relevant) and bilateral development agencies/ banks*" […]"Such collaboration should strengthen ownership, serve to identify activities of other development partners that can contribute to the objectives of the Investment Strategy, mobilize co-financing for FIP programs and projects, ensure harmonized policy support and promote *complementarity* with activities of other development partners"[151]

Similarly, the specific guidelines on joint missions under the Pilot Programme for Climate Resilience require that:

> "The joint mission process *will include consultations and collaboration with relevant UN and bilateral donor agencies active in the country*, private sector, national civil society and other stakeholders in the design of a PPCR program to assist the government to enhance the climate resilience of their national development plans, strategies and financing." […] "During the mission it will be explored how to use the PPCR to build a partnership framework for integrating climate resilience into national processes, including those that engage other development partners."[152]

The innovative character of these joint missions is that while one climate finance institution (the CIFs) sets down by regulation the broad framework of their implementation, the detailed process is agreed with and formally managed by the recipient country government. In the context of complementarity, it is noteworthy that also recipient governments take part to the specific legal framing of how coordination should be sought at the national level.

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[151] CIFs, *FIP Operational Guidelines*, 29 June 2010, paras 2 and 15, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/FIP_Operational_Guidelines_final.pdf> [*emphasis* added].

[152] CIFs, *Guidelines for Joint Missions to Design PPCR Pilot Programs (Phase I)*, 18 June 2009, paras 2 and 16, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/PPCR_joint_mission_guidelines_final.pdf> [*emphasis* added].

3.1.3. Inter-institutional initiatives

The third category comprises all those initiatives agreed between climate finance institutions themselves, which are based on either broad inter-institutional frameworks for coordination, or some specific joint programmes, or can even result into the creation of brand-new climate finance institutions.

The latter case is marked by the very establishment of the CIFs. As noted in the previous chapter, the CIFs are the result of a call by the G8 in 2005 to streamline climate finance into the cooperative activities of the most prominent multilateral development banks. Indeed, after years from their establishment, the CIFs are currently a key player in the composite administration of climate finance. Therefore, while they constitute a successful legal mean to secure complementarity *among multilateral development banks*, they nonetheless add up to the number of the participants of the composite administration.

The CIFs also enshrine in their governance structure a case of inter-institutional framework for coordination. In fact, its Multilateral Development Bank Committee holds several functions which facilitate complementarity between the potential overlaps between multilateral development banks. As the name suggests it is a body comprising banks' representatives with the broad aim of facilitating "[…] collaboration, coordination and information exchange".[153] The Committee is responsible *inter* alia for: "[…] identifying specific areas of MDB cooperation to harmonize their climate change programs and actions […]"; "serving as a forum to ensure effective operational coordination, exchange of information and experience among the MDBs;" and "liaising with other development partners, including bilateral development agencies/banks, for purposes of promoting co-

[153] CIFs, *Governance Framework for the Clean Technology Fund*, *supra* note 152, para 34.

financing of activities through an annual consultation between the MDBs and development partners, including bilateral development banks".[154]

From these provisions it emerges how this inter-institutional body facilitates complementarity both within the CIFs (between participant multilateral development banks), and with other climate finance institutions as potential co-financers of projects and programmes.

Other inter-institutional frameworks of cooperation are emerging and arguably represent some initial efforts to set down clearer modalities of coordination. These frameworks are rarely established under formal instruments. Rather, they stem from joint arrangements[155] and mostly from informal meetings between representatives of the interested institutions.[156] These frameworks often generate broad approaches, general areas of cooperation and platforms for coordination, while still leaving an ample margin of discretion to single institutions. Recalling the dynamics occurring in climate finance, it seems that these emerging practices aim to strike a balance, favoring complementarity but still guaranteeing ample institutional competition.

A case where informal coordination eventually led to formalized inter-institutional instruments is the collaboration between the CIFs' Forest Investment Programme, the Forest Carbon Partnership Facility and the UN-REDD Programme in developing finance and capacity building for deforestation activities under the Reducing Emissions from Forest Degradation and Deforestation in developing countries (REDD+) mechanism.

[154] Ibid, respectively para 34(a), (f) and (g).
[155] Stewart defines them as "mutual recognition agreements and cooperative regulatory equivalence determinations." However, in the case at object they take place among global institutions rather than national administrations. See RB Stewart, "US Administrative Law: A Model for Global Administrative Law?" (2005) 68 *Law and Contemporary Problems* 63, at 65.
[156] An example is the International Partnership on Mitigation and MRV. Established after an inter-ministerial meeting of forty governments, it provides a forum for interaction and peer review of climate finance projects in the field of mitigation. *See* <mitigationpartnership.net/>.

Noticing that the three climate finance institutions partially overlap under their functional and geographical scopes, the executive bodies of each institution mandated their respective secretariats to envision joint options for "[…] enhancing systematic cooperation and improving efficiency, and seeking coherence in support of REDD+ countries efforts".[157] The most relevant result of this first joint meeting was to decide to establish REDD+ Common Delivery Platforms in each recipient country seeking finance from multiple sources in the development and building up of REDD+ activities, where representatives of the recipient government would coordinate simultaneously the separate processes with each climate finance institution.[158]

Another example is the MoU between the EU Commission, the European Investment Bank and the International Bank for Reconstruction and Development[159] for the establishment of a strategic partnership in several regions of interest.[160] The MoU aims at streamlining the coordination process among institutions operating on the same programmes and projects. It promotes this on several levels (technical, financial and review); as for institutional coordination, it establishes a High Level Steering Group to give guidance at headquarter and regional level with the clear mandate of avoiding duplication of efforts and competition.[161] In terms of formalized cooperation mechanisms, the process initiated under this MoU applies only to certain activities or to specific regions, rather than covering all the possible overlapping competences between the institutions.

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[157] *Enhancing Cooperation and Coherence among Multilateral REDD+ Institutions to Support REDD+* Activities, Joint Meeting of the Governing Bodies Forest Carbon Partnership Facility, Forest Investment Program and UN-REDD Programme, 6 November 2010, para 1, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/REDD%2B%20Cooperation%20Paper%20FINAL.pdf>.
[158] *Update on REDD+ Collaboration*, CIFs Doc. FIP/SC.7/Inf.2, 26 October 2011, para 2.
[159] As part of the World Bank Group.
[160] *Memorandum of Understanding for a Strategic Partnership between the European Commission, the European Investment Bank (EIB) and the International Bank for Reconstruction and Development (IBRD) in the Middle East and Southern Mediterranean / North Africa Region*, Brussels, 4 May 2004, <http://www.eib.org/attachments/memorandum_of_understanding_040504.pdf>.
[161] Ibid., Section 1.

A similar mechanism in the field of climate finance is the Action Plan on UNEP/GEF complementarity.[162] In October 1998 the GEF Council requested its implementing agencies[163] to ensure complementarity between GEF activities and their regular programmes. As requested, UNEP prepared –and the GEF Council endorsed– a joint Action Plan. Among the various measures, the report lists two tools to achieve complementarity: a strategic partnership with the GEF Secretariat and enhanced collaboration among GEF implementing agencies.[164] Differently from an inter-institutional MoU, this Action Plan appears to be a list of non-binding commitments by UNEP, which has only been endorsed by the GEF.

Finally, Examples of joint programmes among climate finance institutions are plenty and difficult to track in their entirety. It is most likely that they constitute the main mean of cooperation among institutions, depending on the varying capacities and comparative advantages that each institution can offer. The most evident case of complementarity is when two or more climate finance institutions co-finance individual projects,[165] or set up national and regional programmes with broader or sectoral scopes.[166] In these cases, complementarity is sought on the basis of individual institutional strategies, rather than according to more comprehensive sharing agreements among institutions.

3.2. Recognizing UNFCCC principles

If the above cases provide evidence of 'intimations' of legal processes promoting complementarity, some climate finance institutions, acting outside the UNFCCC/KP umbrella have also established some linkages with the international climate change regime

[162] *Action Plan on Complementarity between the activities undertaken by the United Nations Environment Programme under the Global Environment Facility and its Programme of Work*, 30 March 1999, GEF/C.13/5.
[163] At the time the World Bank, the UN Environmental Programme (UNEP), and the UN Development Programme (UNDP).
[164] *Action Plan*, *supra* note 162, paras 23-35.
[165] An example is the project: "Efficient lighting and appliances" (World Bank Project ID: P106424). The total cost of almost USD 715 sees the contribution by the IBRD (USD 250 million), GEF (USD 7 million), and the Climate Technology Fund (USD 50 million), with the remaining finance sustained by the Mexican Government and private investors.
[166] The Regional Climate Change Programme, for instance, is co-financed by the UK Department for International Development and the Swedish International Development Agency and aims to develop transboundary adaptation capacity in Southern Africa regions. *See* <www.oneworldgroup.co.za>.

by formally recognizing its constitutive principles. In the context an international composite administration, these linkages have at times the effect of transplanting legal principles into the activity of an institution. Arguably, rather than exerting direct effects on the substantive regulations of each institution, the recognition of these principles can promote the harmonization of certain rules and practices.

By unpacking the combined provisions of Article 3 of the UNFCCC, five principles emerge: i) a commitment to act for the benefit of present and future generations ii) on the basis of equity, and iii) in accordance with the common but differentiated responsibilities and respective capabilities of states. In addition, the same article recognizes iv) a right to sustainable development by all countries, and v) the obligation for developed states to take the lead in combating global warming.

The legal effect stemming from an acceptance of UNFCCC principles does not translate directly into specific rules enhancing complementarity. Rather, if adopted in a systemic way by all non-UNFCCC institutions involved in channeling climate finance, UNFCCC principles would serve as a basic, but yet significant linkage. Importantly, this linkage would not only take place between institutions, but also between principles grounded under a special international legal regime and the constitutive instruments on one side, and secondary laws of international institutions on the other.

In demonstrating this linkage, the constructivist theory of international law by Brunnée and Toope is significant. As the authors put it, referring also to the complex law-making under the UNFCCC, "[...] international law must be grounded in shared understandings elaborated through communities of practice, and more specifically a practice of legality."[167] This sentence relates to an 'interactional' conception of international law, where its process of formation is iterative and relies on a common understanding and reciprocity among law-makers and the passive subjects of the law. The authors' conception

[167] Brunnée and Toope, *Legitimacy and Legality in International Law*, *supra* note 78, at 82.

of interactional law offers a good understanding of some peculiar legal phenomena at the international level, because it recognizes the presence of law despite the lack of authority, systems of sanctions and formal legal sources.

This approach in our specific realm sheds light on the role that UNFCCC principles can play on framing the activities and regulations of climate finance institutions. Rather than having direct effects on coordination, a practice of legality can be fostered with a common recognition, understanding and application of the UNFCCC principles by all climate finance institutions. In the absence of specific rules of coordination, a practice of legality would, thus, set a common legal ground from which institutions can base their authoritative activities and practices towards increased harmonization.

It is noteworthy that the progressive formation of this shared understanding at times concretizes in a formal adoption of decisions, recommendations or guidance about the acceptance of UNFCCC principles in their activities. Indeed some constituting instruments of climate finance institutions have already acknowledged the central role of the UNFCCC legal principles on different degrees. The CIFs Trust Funds constituting document not only recognize the UNFCCC as the "appropriate forum for policy setting", but also remarks that "The CIF acknowledges in its design the principle of "common but differentiated responsibilities" to addressing climate change"; and that "[t]o prevent any potential undue effect on the UNFCCC negotiations, the advice of Parties and other stakeholders […] will continue to be sought and incorporated."[168] The UN-REDD Programme Framework Document does not refer to UNFCCC principles but highlights its complementary role with the UNFCCC in regards to REDD+ capacity building. It also stresses the collaboration with many institutions working on developing theREDD+ mechanism, including the FCPF, and

[168] IBRD*, Climate Investment Funds: The Clean Technology Fund and the Strategic Climate Fund*, 9 June 2008, Doc. No 44168, para 35.

the GEF.[169] Also the GEF Council recognizes in its first operational strategy the guidance role and its accountability relationship with the UNFCCC COP.[170]

On a lower degree of linkage with the UNFCCC, the FCPF Charter only contains the general goal of "ensur[ing] consistency with the UNFCCC Guidance on REDD",[171] while the Instrument of the IBRD Carbon Partnership Facility reiterates that sentence, but it conditions compliance with any future international agreement on climate only if "deemed appropriate" by Partnership's participants.[172]

Among the entities engaged in channeling climate finance, it generally appears that multilateral development banks and bilateral institutions have not established formal linkages with or recognized UNFCCC principles. Given the difficulty in accessing internal legal documents disciplining their policies, it can be supposed that the lack of linkage might be due to their only partial involvement in climate finance and, as a consequence, those institutions do not see a compelling need to adopt specific legal linkages with the UNFCCC legal framework. As for multilateral development banks, none of their constituting agreements envisions any such kind of linkage. The Asian Development Bank does not incorporate UNFCCC principles in its climate change strategy.[173] The Inter-American Development Bank broadly states its interest in lending resources for activities implementing MEAs obligations and that projects or programmes should abide multilateral obligations, without however stressing that the bank itself should follow those obligations.[174] Also the

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[169] FAO, UNDP, and UNEP, *UN-REDD Framework Document*, 20 June 2008, 6-7: "[…] supporting the development of normative solutions and standardized approaches based on sound science for a REDD instrument linked with the UNFCCC".

[170] See, *Revised Draft GEF Operational Strategy*, 27 October 1995, GEF/C/.6/3, 2.

[171] IBRD, *Charter Establishing the Forest Carbon Partnership Facility*, as amended on 3 August 2013, Section 3.1(c), <https://www.forestcarbonpartnership.org/sites/fcp/files/2013/August2013/FCPF%20Charter%20-%208-8-13%20clean.pdf>.

[172] See IBRD, *Instrument Establishing the Carbon Partnership Facility*, Sec. 3.2(b), 4 October 2011, <http://cpf.wbcarbonfinance.org/system/files/Documents/Amended%20CPF%20Instrument%20May%206%2C%202014.pdf>.

[173] ADB, *Addressing Climate Change in Asia and the Pacific: Priorities for Action*, April 2010, <http://www.adb.org>.

[174] IADB, *Environment and Safeguards Compliance Policy*, 19 January 2006, <http://idbdocs.iadb.org>, directives A.4 and B.2.

European Investment Banks' environmental principles, while devoting an entire sub-section to climate change, do not set linkages with UNFCCC principles.[175]

With regards to bilateral institutions, their lack of express recognition of UNFCCC principles might depend on the fact that, having their respective countries ratified the Convention, their activities are already bound by those principles. It is noteworthy, however, that almost none of the strategies or policies reviewed refers to UNFCCC principles.[176]

In setting express legal ties with the UNFCCC principles, non-UNFCCC climate finance institutions contribute to a process of recognition and, potentially, to a 'practice of legality' across the international composite administration. However, this hardly translates into substantive laws to avoid institutional overlaps.

3.3. Critical remarks

In an international composite administration comprising numerous institutions which compete for the management of scarce public resources, it is remarkable finding increased efforts to set up formal frameworks of inter-institutional complementarity. Climate finance institutions, states and other non-state entities recognize that under the current institutional complexity there is a need to harmonize the linkages and overlaps between institutions. This is true also from a legal standpoint: if climate finance institutions exercise public authority, it is also under their reasonable prerogatives and duties the task of setting up means promoting complementarity.

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[175] EIB, *Statement of Environmental and Social Principles and Standards*, 2009, para 75-82, <http://www.eib.org>.

[176] One noticed exception is the Italian Foreign Ministry Department for Development Cooperation. See DG-CS – Italian Ministry of the Environment, *Linee Guida Ambiente*, September 2011, <http://www.cooperazioneallosviluppo.esteri.it> , 9. The US Agency for International Development (USAID) does not recall UNFCCC principles. See USAID, *Climate Change & Development Strategy*, January 2012, <http://www.usaid.gov>. The same applies for the *Agence Française de Développement* (AFD), and the Japanese International Cooperation Agency (JICA): see respectively, AFD *Cadre d'Intervention Transversal Climat – Développement 2012-2016 Résumé executive*, <http://www.afd.fr>, and JICA *Guidelines for Environmental and Social Consideration*, April 2010, <www.jica.go.jp/english>. No relevant documents could be found for the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) and Federal Ministry for Economic Cooperation and Development (BMZ); as well as for UK Department for International Development (DFID).

As the above cases show, these frameworks are brought about by institutions and entities both outside and within the international composite administration; they are set up via a wide range of instruments, such as, memoranda of understanding, COP decisions, voluntary standards and guidelines, etc.; furthermore, they vary on their substantive contents and 'strategies' to promote complementarity.

Although these frameworks might appear varied and embryonic, they nonetheless constitute 'intimations' of law under the heterodox lens of an international composite administration. While the theoretical underpinnings for recognizing such frameworks as fully-fledged legal facts are still highly contested, such progressive formalization also signals a passage from normative to *legal* engagements with the peculiarity that –in sharp contrast with international law– no formal sources for these 'intimations' exist.

To give some examples, under the 'external processes' typology, the IATI initiative demonstrates how the formal participation and acceptance of external voluntary standards by some climate finance institutions translates into a legal standard within the 'secondary law' of each institution. The World Bank CAS and the CIFs system of joint missions reflect how the 'secondary law' of an international institution unilaterally sets up standards of engagement with other competing institutions on a country basis. Finally, all the inter-institutional initiatives outlined above show how, on different degrees of specificity, climate finance institutions compel themselves to participate and coordinate via inter-institutional bodies, or other functional engagements.

Despite these cases of formalization, one must nonetheless notice the overwhelming level of informality of these engagements, which indeed challenges the capacity to ascertain their legal significance. Informality certainly allows institutions to be flexible and resolve their overlaps on individual cases with a high degree of discretion. Yet, at the same time, this raises questions of accountability and legal certainty about their activities and rule-making.

While the literature has already expressed such concerns in the context of transgovernmental networks of national administrations,[177] here the issue is transposed to the global level, where the inter-institutional dimension comprises both national and international entities. The growing informality of coordinating processes in climate finance is making such institutions unconstrained by any meaningful *legal* check, for how embryonic this might be.

This angle of the accountability issue of international institutions is reflected by a general remark by Goldmann:

> "[…] the tendency of international institutions to increase their autonomy makes the [principle of implied powers] likely to prevail, and international institutions arrogate competencies not explicitly provided for in the founding instrument. This development has serious repercussions for national power balances."[178]

While the principle of states' (and IOs) consent in international law works as a restraining force to shape any comprehensive principle of inter-institutional coordination,[179] under a heterodox perspective the same issue gains more relevance, because of the function and the authority exercised by climate finance institutions. To put it bluntly, being global administrative bodies, climate finance institutions should acknowledge that their informal engagements in cooperation might raise accountability concerns by interested actors, especially in the cases where such engagements frustrate the interests of state and non-state actors to the adequate, predictable, effective and verifiable channelling of climate finance. Accountability from informality does not infer that climate finance institutions should adopt a hard set of inter-institutional regulation under formal agreements: applying what Kingsbury and Casini argued in the context of fragmentation, informality "[…] is not much a problem, a solution, or an analytic idea: it is simply a feature".[180] Hence, as a feature, it should prompt

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[177] AM Slaughter, "The Accountability of Government Networks" (2000) 8 *Indiana Journal of Global Legal Studies* 347; and Pauwelyn, 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable', *supra* note 55, 500-37, at 503.

[178] Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', *supra* note 103, at 1902.

[179] This is unsurprisingly an old issue. *See* Jenks, 'Co-ordination: A New Problem of International Organization: A Preliminary Survey if the Law and Practice of Inter-organizational Relationships', *supra* note 20. .

[180] B Kingsbury and L Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 *International Organizations Law Review* 319.

legal scholars to further explore how such informality relates with the authoritative role of international institutions in complex regimes of governance.

CONCLUSIONS

This chapter sought to provide some evidence and critical arguments to the question of whether *legal* developments are occurring within the international composite administration of climate finance. As often happens, the answer is mixed.

First of all, a conceptual re-framing of these practices under a legal perspective was necessary, because the 'orthodox' approach under international law does not view as legal facts the relevant institutional practices in climate finance. The resulting and more apt framework relied on the combined ideas that, overall, the institutional structure of climate finance constitutes an international composite administration, where numerous and different institutions act in a heterarchical structure. In addition, the same institutions seek to promote complementarity against the background of a competitive realm made of scarce public financial resources.

The analysis of the different practices and instruments adopted by both external entities and climate finance institutions has showed the existence of some 'intimations' of law, difficult to trace due to the high levels of informal engagements and lack of transparency in discovering relevant instruments.

The results of the analysis are further limited by the very approach adopted. Indeed, contrary to viewing the matter from the vantage point of international law, the heterodox

theory adopted is still contested and hardly able to build those principled ideas that shape modern legal systems. This justifies using the expression 'intimations' of law.

In the ample debate of global governance, this chapter has also sought to demonstrate that, in response to the high level of complexity of contemporary global governance, lawyers can indeed apply their traditional methods of discovery, rather than resorting to concepts and ideas of other social sciences. This is not to dismiss the relevance of these sciences in understanding human phenomena; rather, it is a claim to raise attention on how in times of transformation law springs from spontaneous facts of social life.

PART 2

CHAPTER IV
THE LEGITIMACY OF CLIMATE FINANCE INSTITUTIONS

INTRODUCTION

The second part of this work will shift its focus from the governance of the whole regime complex to the *legitimacy* of some selected international climate finance institutions.[181] The reason for this shift stems from a parallel reading of the previous findings, namely that the interplay between institutional competition and complementarity is also a manifestation of the 'different legitimacies' that individual climate finance institutions enjoy.[182] On one side, climate finance institutions benefit of increased collective legitimacy when they seek cooperative arrangements to promote complementarity. On the other, acting in a competitive realm with scarce resources, they engender internal regulations and mechanisms, which promote or lower their individual legitimacies vis-à-vis relevant actors like states, civil society organizations, private enterprises, individuals, and so on.

The legitimacy of climate finance institutions assumes crucial importance for two concurrent reasons. Firstly, legitimacy underlays the effectivity[183] of the climate finance complex as a whole, particularly against the background of the future challenges of long-term finance under the UNFCCC. In order to successfully work as financial intermediaries for development, namely to catalyze money and deliver them towards effective climate activities in developing countries, it is desirable that the whole range of actors engaged or

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[181] They are the Global Environment Facility, the Adaptation Fund, the Green Climate Fund, the Clean Development Mechanism, the World Bank (IBDR and MIGA), and the Climate Investment Funds. The rationale for their selection will be detailed in the next chapter.
[182] See Chapter III above, at 135.
[183] The term here is used in distinction to 'effectiveness'. Effectivity expresses the idea that a certain situation is accepted as real by the various subjects. For, instance, the existence of effective situations is at the core of many constructs of public international law, such as the doctrine of 'effective control' on the territory as a necessary element of territorial jurisdiction by international subjects. By contrast, effectiveness relates to the managerial aspect of governance: whether certain goals are effectively achieved.

affected by these institutions recognizes as legitimate the whole institutional complex of climate finance.

Secondly, the same applies to the 'individual legitimacies' of each climate finance institution as the general and the individual levels are necessarily interlinked. As to be explored in detail below, the connection stands in that the overall legitimacy of an institutional complex comprises the various balances between the different levels of legitimacies of individual institutions.

If the legitimacy of the whole climate finance complex is indeed contested and relevant, by viewing the issue from a historical perspective, the various institutional reshuffles and proliferation throughout twenty years of climate finance appear to find their cause not only in the changing political and geopolitical balances,[184] but also in the legitimacies that not just states but the whole range of involved actors attribute to each institution. Such a view sheds more light on the reasons for the mushrooming of numerous and underfunded mechanisms in climate finance: specifically, the main cause is that the existing institutions have not been properly balancing the political claims of the all the actors engaged and some legitimacy factors.

With the aim of providing an understanding of these individual legitimacies and their interplay, the second part of this thesis is divided in two chapters. This chapter's main task is to provide a solid theoretical and methodological ground for a legal analysis of institutional legitimacy, while the following will delve into a comparative analysis of selected climate finance institutions.

The challenging question of this chapter is how to conceptualize and justify a *legal* analysis of the legitimacy of international institutions in a way that can provide useful and reliable insights. Being a highly-explored area of legal and political philosophy, and other social sciences, rather than proposing yet another theory of legitimacy this chapter will frame

[184] L Gomez-Echeverri, 'The Changing Geopolitics of Climate Change Finance' (2013) 13 *Climate Policy* 632.

its conception of legitimacy based on actual claims stemming from official documents of UNFCCC negotiations and climate finance institutions.

In anticipation to what will be discussed later, this thesis will ground a comparative analysis between various international institutions on the concept of 'process legitimacy' – intended as that legitimacy related to the bundle of regulations and mechanisms which shape institutional inputs and outputs. Four regulatory factors affecting the legitimacy of climate finance institionswill be carved out from empirical contestations: i) *internal governance*; ii) *access and disbursement modalities*; iii) *participatory processes*; iv) and *accountability mechanisms*. The factors also reflect broader principles of democracy and fairness in governance as framed by the legal scholarship.

Furthermore, the final section of this chapter will address some methodological issues questioning the limits of a legal analysis of institutional legitimacy.

Overall, the findings will serve as lynchpin for the following comparative analysis.

1. CONCEPTUALIZING INSTITUTIONAL LEGITIMACY

Legitimacy is an 'essentially contested concept':[185] we acknowledge its existence, but disagree on the ways it applies to our complex social realities. To be sure, virtually all political theorists and lawyers accept the idea that legitimacy consists of the acceptance of authority from its subjects; what is contested is how such acceptance is manifested, and how legitimate authority ought to be exercised.

[185] Such is the formulation in philosophy of language: "[…] concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users". WB Gallie, 'Essentially Contested Concepts' (1955) 56 *Proceedings of the Aristotelian Society* 167, at 169.

Given the fluidity of this concept, here the most fruitful approach is to progress by approximations and differentiations, bearing in mind that the 'themes' of legitimacy can be numerous and of different nature.

Because scholars traditionally distinguish between either social and formal, and output and input legitimacy, the same approach will be proposed here against the background of the contemporary legal scholarship on global governance. Moreover, the analysis will focus primarily on the legitimacy of *institutions*, rather than on the legitimacy of the rules enacted by the same institutions.

1.1. Social and formal legitimacy beyond the state

Contemporary international political and legal writings on legitimacy often adopt Weber's final work, 'Economy and Society' (1922), as a starting point for their analysis, although the entrance of legitimacy into the lexicon of modern political and legal theorists can be traced back at least at the time of the Restoration after the Congress of Vienna in 1815.[186] Weber's account of legitimacy is purposely broad and aimed at covering the many possibilities of social organization. In a nutshell, for Weber legitimacy is a social phenomenon consisting of the acceptance of domination by a given society or group,[187] where the dominating entity can be either an individual, a restricted group of people or the government of modern states. Legitimacy can be based on many reasons: customary, ideal, or of personal advantage. Yet, at the center of Weber's origin of domination stands the *belief* of its legitimacy purported by the subjects to whom such domination is directed.[188] Weber attempts to divide domination (authority) into three types: rational, traditional and charismatic. Of those three he specifically calls the former also "legal authority", which rests "[…] on a *belief* in the

[186] Interestingly, even at that time there was a sheer divide between politicians and philosophers on the formation and use of legitimacy. While the French diplomat Talleyrand –aligned with the ideals of the Holy Alliance– made successfully use of the legitimacy principle in order to restore the 'legitimate' heirs in their seized territories, at the same time legal philosophers like von Rotteck invoked the doctrine of legitimacy to justify the political regimes established by revolutions and the rightfulness of constitutional limitations to power. See WM Plochl, 'The Philosophy of Legitimacy' (1943) 3 *Jurist* 64, at 67.
[187] M Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. I (Guenter Roth and Claus Wittich (eds), Bedminster Press 1968), at 212, defining 'domination' as "[…] the probability that certain specific commands (or all commands) will be obeyed by a given group of persons."
[188] Ibid., at 213.

legality of enacted rules and the right of those elevated to authority under such rules to issue commands".[189] Legal authority thus recognizes legality as a crucial factor, in that it is the set of established *procedures* forming a command that is one pivotal source of belief in modern (state) legitimacy.[190]

The individuation of 'belief' and 'procedure' as the core elements for the formation of legitimacy, although criticized for their 'value-less' content,[191] still underpins contemporary conceptualizations in international legal and political scholarship.[192]

The re-formulation of those two components of legitimacy in international law comes with various labels. Here *social* and *formal* legitimacy can be adopted as two distinguished yet related factors.[193] On one side, formal legitimacy expresses the need that authority shall base its commands on a defined procedure set by the law,[194] while social legitimacy reflects the broad and empirical dimension of general acceptance (belief) by society of a given authority.[195] A different understanding of formal legitimacy in international law –partly shying away from the Weberian dichotomy of 'belief' and 'procedure'– is offered by liberal scholars who, despite re-proposing the social/formal dimensions, also claim that the latter is something *more* than a mere justification of authority via norm-making procedures, but is instead based on objective reasons depending on pre-chosen values such as "[…] fairness, justice, consent and so forth."[196] For instance, the value of 'fairness' is adopted by Franck to

[189] Weber, *Economy and Society: An Outline of Interpretive Sociology* , *supra*, at 215 [*emphasis* added].
[190] Ibid., at 37.
[191] On a critique that finds Weber's theory boiling down legitimacy to a belief in neutral procedures see D. Dyzenhaus, 'Hermann Heller and the Legitimacy of Legality' (1996) 16 *Oxford Journal of Legal Studies* 641.
[192] A Boyle and C Chinkin, *The Making of International Law* (OUP 2007), at 24-35.
[193] JHH Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, at 2468-9.
[194] Ibid., at 2469, arguing that formal legitimacy is akin to the concept of legal validity.
[195] Ibid., at 2470. The same differentiation is proposed by many other scholars. For example, D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *The American Journal of International Law* 596, at 601; A Buchanan and RO Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405; implicitly, Anthony D'Amato, 'On the Legitimacy of International Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer Berlin Heidelberg 2008) 83-92; and J Steffek, 'Sources of Legitimacy Beyond the State: A View from International Relations' in C Joerges, I Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart 2004) 81-101.
[196] Bodansky, 'The Legitimacy of International Governance', *supra* note 15, para 601-2.

justify a liberal and more democratic legitimacy of international law;[197] others, like Petersman, instead point at human rights as a means to foster the legitimacy of the increased authority of international institutions.[198] This understanding of formal legitimacy, which will be further examined below, sheds some light on the linkage between the social and formal dimensions of legitimacy: the existence of good reasons that qualify as 'fair' and 'just' a set *procedures* behind the exercise of authority contribute also to the formation of the *social* belief by affected actors that such authority is legitimate.

Since the early nineties international legal scholars have questioned the basis of legitimate authority at the international level, as a reaction to two concurrent phenomena: the rapid expansion, and fragmentation of international law after the end of the Cold War across many areas of human activities; and the parallel proliferation of global governance institutions bestowed with the authority to take decisions and regulate directly or indirectly states and individuals.[199] Thus, scholarly attention has progressively focused on the legitimacy of international organizations like the World Trade Organization,[200] the Bretton Woods institutions,[201] the UN Security Council,[202] international human rights treaty bodies

[197] TM Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995).
[198] E-U Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621–650; see also in more general terms G Verdirame, 'A Normative Theory of Sovereignty Transfers,' (2013) 49 *Stanford Journal of International Law* 371; and J Crawford, 'Democracy and International Law' (1994) 64 *British Yearbook of International Law* 113–133, at 113-9, again adopting as a starting point the issue of international human rights and their application in international law, as well as arguing how international law is structurally undemocratic.
[199] JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, at 550.
[200] On possible models to recover and enhance WTO legitimacy in the current round of negotiations, R Howse and K Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16 *Governance* 73; for a thorough critique of the legitimacy of the WTO Dispute Settlement system see K Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International 2011).
[201] See, for instance, the conclusive chapter by the editors finding a troubling accountability gap for such institutions: DD Bradlow and DB Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010) 387-397; and C Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011).
[202] DD Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *American Journal of International Law* 552; and I Hurd, 'Myths of Membership: The Politics of Legitimation in UN Security Council Reform' (2008) 14 Global Governance 199

and courts,[203] and many other institutions of contemporary global and transnational governance, including the European Union and the G-20.[204] At the core of the problem stood an alleged misalignment between an international legal system based on states consent and sovereign equality[205] with a new 'geology' of governance, necessitating 'new' sources of legitimacy.[206] As Kumm puts it, the issue is particularly relevant for democratic polities because, while at the international level only states (and other few types of groups or entities, including IOs) can be deemed legal subjects, "[…] in constitutional democracies the state is merely the institutional framework through which citizens govern themselves."[207] The consequence of this finding is that the contemporary international legal system and its institutions need additional sources of legitimation to state consent, which would reflect and enhance a reciprocal relationship between their expanded legal authority on one side, and the numerous 'new' direct or indirect subjects such as individuals, multinational corporations, NGOs, indigenous people on the other.

Already from this quick sketch, it is possible to situate legitimacy theorizations of international law in the context of climate finance institutions. In fact, *both their legal provenance*[208] *and executive role as an international composite administration*[209] *raise question of whether such institutions do actually engage in effective legitimating relationships not just with states, but also with the whole range of actors whose interests are affected by their activity*. In particular, despite they do not all clearly enjoy a 'hard legal

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[203] JK Schaffer, A Føllesdal and G Ulfstein, 'International Human Rights and The Challenge of Legitimacy' in A Føllesdal, JK Schaffer and G Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 1-31.

[204] G de Búrca, 'The Quest for Legitimacy in the European Union' (1996) 59 *The Modern Law Review* 349. For a re-proposition of the EU's legitimacy crisis in the 'post-Lisbon Treaty' era see JHH Weiler, 'European Parliament Elections 2014: Europe's Fateful Choices' (2013) 24 *European Journal of International Law* 747. As to the G-20, see M Zobl, D Thürer, and K Alexander, 'Die Legitimation der G-20' (2013) 51 *Archiv des Völkerrechts* 143.

[205] UN Charter, Article 2.

[206] Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', *supra* note 19, at 550;

[207] M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907, at 908.

[208] International binding or non-binding instruments, and national laws of donor states for bilateral agencies: see Chapter III above, at 107.

[209] Ibid., at 118.

nature' under international law,[210] it can hardly be denied that climate finance institutions enjoy full formal legitimacy. Could such institutions be established by a treaty, a COP decision, or an inter-institutional soft agreement, in any case there is always some legal process leading to their constitution and justifying their activity.

Therefore, the *legitimacy issue of climate finance institutions is rather of social nature*, and related to that complex formation of the *belief* that an institution enjoys legitimacy vis-à-vis its actors: although less clear than the case of formal conceptions, there is indeed a relevant legal dimension also in the understanding of social legitimacy, which the distinction below between output and input legitimacy is able to clarify.

1.2. Input and output legitimacy

Another vantage point to view the complexities of legitimacy is to distinguish between its input and output components. This distinction arose within the political and legal scholarship in the context of the legitimacy of the EU's governance, which was (and still is) criticized for lacking a meaningful democratic engagement with its different polities.[211] Accordingly, in a democratic setting the input side of legitimacy requires citizens to be meaningfully involved in the policy decisions of an authority through institutional and regulatory processes; by the same token, output legitimacy relates to the quality and effectiveness of the authority in achieving the goals set forth by input processes.[212] The added value of this distinction is that it clarifies the *ex ante* and *ex post* moments of legitimacy, where the former take place before a relevant decision or norm is adopted and the latter are verified after the same is enacted.

In addressing the legitimacy of climate finance institutions, this distinction is helpful, because it traces the boundaries between the different stages of legitimation, and also helps to individuate their relevant regulatory factors. For instance, input legitimacy from participant states is sought through the possibility of reviewing project approval decisions,

[210] In contrast to so called 'soft organisations': see Klabbers, 'Institutional Ambivalence by Design' .
[211] FW Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 *Journal of European Public Policy* 18, at 19; and FW Scharpf, *Governing in Europe Effective and Democratic?* (OUP 1999). See also E Fisher, 'The European Union in the Age of Accountability' (2004) 24 *Oxford Journal of Legal Studies* 495.
[212] Scharpf, 'Economic Integration, Democracy and the Welfare State', *supra*, at 19.

often affecting enterprises, groups and individuals. By way of accountability mechanisms such decisions can be reconsidered and in case changed according to more legitimate results; the same legitimacy –but granted by civil society groups, NGOs and individuals– is dependent on participatory processes, such as the granting of observer status during meetings, or active participation in national programming. Output legitimacy can instead vary, for instance, depending on how decision-making is bound by internal regulations to distribute climate finance across eligible activities and countries; or it can be affected by the membership and voting rules of executive organs like the Global Environment Facility Council or the Green Climate Fund Board.

To be sure, the input/output distinction has been further criticized for not being reflective of the whole process of legitimization: for instance, Schmidt notices that the input and output dimensions not only might work one against another, but also do not take into account what she calls the 'throughput' of institutional legitimacy.[213] It might as well be that, by increasing participatory input, output results remain mediocre or may even worsen, therefore lowering the overall level of legitimacy; another possibility is that political balances within an institution might lead to tradeoffs about whether to enhance output legitimacy at the expense of input legitimacy.[214] As to the second claim and with referral to the EU governance, the 'throughput' dimensions therefore describes "[…] what goes on inside the 'black box' […], in the space between the political input and the policy output […]",[215] where the 'black box' consists of all those complex processes of interactions *between all actors* engaged in the EU governance.

Another line of criticism is exemplified by Kratochwil, who argues that despite the utility of separating between input and output components , an analysis based on such

[213] VA Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political Studies* 2, at 8.
[214] This is the case for instance of the European Union technocratic/regulatory model: see G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77, at 94-5.
[215] Schmidt, 'Democracy and Legitimacy in the European Union Revisited', *supra* note 33, at 5.

distinction must face the difficulty "[…] to designate *ex ante* the factors that make a specific outcome 'legitimate'."[216] In particular, the author's skepticism goes to those legal theorists, like Franck, who view in the fairness and reasonableness of the law-making process (thus an input component) a sufficient condition for output legitimacy:[217] according to Kratochwil, that is only true if we *presume* that procedural values actually work as legitimating factors.[218] That is not to say that such presumptions are necessarily wrong, rather they serve to set the different rules of legitimacy's 'grammar' from the one of legality. While this point will be analysed further below, the following Kratochwil's constructivist argument appears convincing in regards to the regulatory factors of legitimacy:

> "[Legitimacy] serves thus as a conversation stopper, by providing reasons for the presumptions of why a decision or a law ought to be supported, but it is also a 'conversation opener', when, for example, the legitimacy based on procedural grounds is subjected to scrutiny and the implied presumption is weakened on factual or normative grounds."[219]

The input/output conception of legitimacy provides useful conceptual boundaries to identify key regulatory factors affecting the social legitimacy of climate finance institutions: rather than focusing on the legitimacy of the *rules* engendered by such institutions,[220] this distinction instead frames the assessment of legitimacy in *institutional* terms. In other words, the focus on the stages and processes of the exercise of authority looks at those rules related to the internal regulatory processes of an institution, regardless of whether those processes have been adopted by the institution (authority) itself or other constituents (e.g. member states). Moreover, the two integrating positions exemplified by Kratochwil and Schmidt allow for further clarifications on the inevitable *limits* of an analysis of social legitimacy

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[216] F Kratochwil, 'On Legitimacy' (2006) 20 *International Relations* 302, at 302.
[217] Franck, *Fairness in International Law and Institutions*, *supra* note 17.
[218] Kratochwil, 'On Legitimacy', *supra*, at 304. A similar criticism to Franck's view of legitimacy is brought by Simpsons, who spots the lack of an "underlying foundational theory" of his view on procedural fairness: GJ Simpson, 'Is International Law Fair?' (1995) 17 *Michigan Journal of International Law* 615, at 623.
[219] Kratochwil, 'On Legitimacy', *supra*, at 304-5.
[220] The legitimacy of the *rules* of international law are the main object of inquiry of numerous international legal scholars, who rather adopt a substantive/formal understanding of legitimacy. See R Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations' in R Wolfrum and V Röben (eds), *Legitimacy in International Law* (Springer Berlin Heidelberg 2008) 1-24; Franck, *Fairness in International Law and Institutions*, *supra* note 17.
and Weiler, 'The Transformation of Europe', *supra* note 13.

according to regulatory factors alone: because they will be object of detailed analysis, the final section of this chapter will delineate these limits.

The input/output distinction allows us to understand the social legitimacy of climate finance institutions as dependent on those internal regulatory processes, which are either aimed to receive external knowledge and express policy and technical views (input), or to frame and re-evaluate institutional decisions (output) throughout the whole decision-making process or project cycle. To be sure, institutional input and output components need not to be formally established by regulation, as they can well be expressed by informal means.[221] Yet the focus on *regulatory processes internal to an institution* finds justification here because of their normative nature: regardless of their 'hard' or 'soft' nature, institutional regulatory processes follow the logic and language of law and, therefore, can be subject to an interpretative and qualitative *legal* analysis geared to understand their impact on the social legitimacy of an institution.[222] As a result, it is possible to adopt some of these regulatory processes as *regulatory factors* for an analysis of social legitimacy.

2. DISCOVERING REGULATORY FACTORS FROM LEGITIMACY CHALLENGES

The regulatory factors of climate finance institutions, potentially affecting input and output legitimacy, are numerous and can span from constitutive issues (e.g., founding principles, membership, legal personality and relationship with external entities, etc.) to issues related to their external engagements. Selectiveness is therefore inevitable, if the purpose here is to provide a meaningful comparative analysis of individual legitimacy of climate finance institutions.

[221] This is the view of international relations approaches to legitimacy. For a definition of 'informal governance' see RW Stone, *Controlling Institutions: International Organizations and the Global Economy* (CUP 2011).
[222] On a similar conception of the normative quality of internal regulations of international financial institutions see DD Bradlow and A Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation' (2013) 10 *International Organizations Law Review* 3, at 5.

In the specific case of climate finance institutions the following factors are the most useful for the purposes of an analysis of social legitimacy:

1– internal governance and decision-making procedures;

2– access and disbursement modalities;

3– participatory processes for external actors; and

4– accountability mechanisms.

The first and third factors reflect the input dimension of legitimacy, because they both contribute to inform the type and quality of institutional activities which will later have external effect. To give a concrete example, individual decisions on projects approvals are inevitably dependent on the inputs received through decision-making powers and decisional processes distributed between organs and within the executive body of a climate finance institution. By the same token, virtually all climate finance institutions have mechanisms which provide fora of engagement with the wide range of its external actors, including groups and individuals directly affected by climate finance projects. Potentially, and to different degrees, such mechanisms of participation allow each institution to meaningfully receive knowledge, data and views on particular topics and, therefore, to perform informed decision making.

The second and fourth factors are instead reflective of output legitimacy. Accountability mechanisms, such as the delegation relationship between climate finance institutions and their delegating entities, as well as mechanisms that allow external subjects to ask reviews of certain decisions, also contribute to input legitimacy, because they are aimed at the revision of decisions or standards *after* their implementation. By the same token, internal regulations on access and disbursement provide quantitative restraints on the shares of funding assigned to each developing country, before these are eventually channeled: therefore, they work as basis for output legitimacy, since they affect or are relevant to the interests of both contributors and recipients of finance.

2.1. The legitimacy challenges for climate finance institutions

If those are the four regulatory factors to be adopted in the next chapter's analysis, there is nevertheless the need to justify how they have been individuated and why they are the most significant in the context of climate finance. Providing a solid basis for this is admittedly difficult, because inevitably linked to the substantive component of institutional legitimacy, which, as seen, stems out from a *belief* in authority from all the involved actors. In other words, *if those regulatory factors are crucial, it must be because their presence and quality within the regulatory sphere of the institution is important for the formation of social legitimacy*.

Despite the practical difficulties to carry on a thorough empirical analysis of actors' perceptions, *the four regulatory factors have clearly stood at the center of discussions, contestations and policy proposals, during the various negotiations, reviews and establishment processes of climate finance institutions*. This implicitly emerges from the analysis of a mix of UNFCCC negotiating documents, reports of independent reviews of climate finance institutions, and personal exchanges and interviews done to experts and practitioners in the field, which, for though they cannot be claimed to have scientific validity for qualitative research purposes, nonetheless can complement the other documental sources.[223]

2.1.1. The relevance of the four regulatory factors at general level…

Perhaps the most significant of these sources are the reports of negotiations for the establishment of the Green Climate Fund under the UNFCCC. Following the formal establishment of the fund by a COP decision,[224] representatives of states, multilateral development banks, multilateral climate funds, and interested NGOs gathered under a

[223] The analysis is based on a desktop review of publicly available i) UNFCCC documents and COP and CMP decisions; ii) internal evaluation reports of the five climate finance institutions under analysis in the next chapter (The World Bank Group, the GEF, the GCF, the Adaptation Fund, the Climate Investment Funds and the Clean Development Mechanism); and iii) reviews from independent think thanks and NGOs. Both the interviews reports and private exchanges are on file with the author.

[224] Decision 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, para 102.

Transitional Committee for the Green Climate Fund, in order to adopt a draft for the funds' Governing Instrument.[225] This Transitional Committee was undoubtedly a unique forum where all actors engaged in climate finance could express their views on the state of the art of institutional aspects of climate finance.

The public submissions by states representatives and the reports of informal consultations during the meetings of the Transitional Committee give a clear picture of the claims and importance of the four regulatory factors. For instance, at the first meeting the US representative stressed the need to set "clear benchmarks for accountability" in the Green Climate Fund; she also highlighted the importance of access and disbursement modalities through robust national programming and rigorous standards and safeguards in the context of direct access.[226]

At the same meeting Argentina raised a crucial issue of internal governance by claiming that "[…] [t]he architecture of the Fund should be equitable and effective to ensure that the financial mechanism governance does not replicate the financial access limitations and under-representation of developing countries in International Financial Agencies."[227] Australia instead stressed the importance of granting more meaningful representation of the private sector within the GCF governance.[228]

Access and disbursement modalities and informal governance again stood at the center of informal negotiations, as it is reported that "[…] a number of representatives called for dedicated funding/fixed percentages to be set aside within the GCF for special category groups such as SIDS [Small Island Developing States, DR]. […] It was noted that such an

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[225] Ibid., para 109, and Appendix III for the Terms of Reference for the Design of the Green Climate Fund. However, only state parties had the right to vote within the Transitional Committee, while non-state actors, including representatives from other climate finance institution could participate through technical consultations under a Technical Unit of the Committee. It is noteworthy that the representative of the Republic of the Philippines lamented the prominent role of the Technical Unit in preparing draft texts jointly with the Co-Chairs of the Committee and without due involvement of the Committee's members. See Transitional Committee, *Submission by members of the Transitional Committee*, Internal Reference Doc. No 4, 7 June 2011, at 8, <http://unfccc.int/cancun_agreements/green_climate_fund/items/5868.php> [hereafter this will be the URL of the Technical Committee's documents].

[226] Transitional Committee, *Submission by members of the Transitional Committee*, Internal Reference Doc. No 1, 25 May 2011, at 16-7.

[227] Ibid., at 19.

[228] Ibid., at 24.

approach could help deal with the problems many SIDS face in accessing finance on an individual basis." Further, contestations against the role of the World Bank in the internal governance of the future GCF took place, because, despite its efficiency in disbursement, many SIDS countries felt that "transaction costs of engaging with the World Bank [were] enormous."[229]

The issue of the role of the World Bank and other implementing agencies in the internal governance and access modalities was taken up in following consultation, where developing states made clear that direct access was necessary to reduce the "[…]transaction cost that was being charged by the Multilateral Implementation Entities in undertaking projects in the developing countries."[230] With reference to the World Bank, India claimed that "[…] a clear separation between the trusteeship functions and the operational functions […] is important to avoid a conflict of interest in these functions."[231]

Calls about the need to establish accountability mechanisms for the GCF appeared only in general form and most likely with the consensus of every participant,[232] as all countries did in the context of participatory processes. France, for instance, recognized that:

> "[r]egarding the other stakeholders (civil society, private sector, indigenous communities) *it will be important for the legitimacy of the Fund to ensure that these actors are properly involved*. But it shouldn't necessarily imply for them to get a permanent seat in the Board. They would rather participate to the Board's council as 'active observers' with the possibility to intervene on main issues and submit their views to the council members".[233]

From the developing countries' side, Samoa stated that "[t]he core democratic principles of transparency and accountability as well as public/stakeholder participation in

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[229] Transitional Committee, *Informal Consultations on Workstream III for representatives from Small Island Developing States*, Internal Reference Doc. No 2, 26 May 2011 at 3-4.
[230] Transitional Committee, *Submission by members of the Transitional Committee*, Internal Reference Doc. No 6, 8 July 2011, at 5.
[231] Transitional Committee, *Submission by members of the Transitional Committee*, Internal Reference Doc. No 5, 8 July 2011, at 40.
[232] Belize and Canada, for instance, respectively recognized accountability as a founding principle of the GCF: see Transitional Committee, *Submission by members of the Transitional Committee*, Internal Reference Doc. No 4, 7 June 2011, at 3-4. So did the UK: see Transitional Committee, Internal Reference Doc. No 5, 8 July 2011, *supra*, at 27.
[233] Ibid. (Doc. No 5), at 36. [*emphasis* added].

decision-making in the GCF need to be considered throughout the funding cycle and the organizational and operational structures of the GCF."[234]

The European Commission followed suit deeming indispensable a set of procedures that would guarantee full transparency to all stakeholders and accountability through "an appeal and redress system".[235]

Further evidence of the general relevance of the factors is given by a recent report of the UNFCCC work programme on long-term finance: an inter-governmental consultative process addressing the more substantive aspect of how to source, scale up, and effectively mobilize the amounts of climate finance needed in the long period. Although the work programme was centered on other policy aspects, its final report recognizes the crucial importance of direct access and disbursement modalities to foster 'country ownership' of the finance, as well as the importance of participation of civil society and private sector stakeholders in national programming under the various climate finance institutions.[236]

If those above are claims from state representatives, scholars and NGOs have also been concerned with issues related to the four factors. Hence, Ghosh and Woods argue that the current institutional landscape of climate finance is dominated by institutions whose internal governance mainly reflects the dominant role of developed states (e.g. the World Bank, the GEF, and other MDBs), and that this hampers the trust of institutional actors, in particular developing states and civil society.[237] Schalatek expresses concern about the lack of inclusive participatory mechanisms in climate finance, voicing out minority groups and

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[234] Ibid, at 18.
[235] Ibid, at 86.
[236] *Report on the outcomes of the extended work programme on long-term finance*, UN Doc. FCCC/CP/2013/7, 1 November 2013, at para 61.
[237] A Ghosh and N Woods, 'Developing Country Concerns about Climate Finance Proposals Priorities, Trust, and the Credible Donor Problem' in RB Stewart *et al* (eds), *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009) 157-64, at 161.

the people most affected by climate change, such as the poor, women, and children.[238] Treating also about the legitimacy of climate finance institutions, but not from a legal perspective, Ballesteros *et al*. adopt accountability as one of the interacting factors of legitimacy.[239] Accountability mechanisms and enhanced transparency are deemed crucial for the future of climate finance by Stewart *et al*.[240]

Moreover, NGOs have also been particularly sensitive to the issue of transparency. The current lack of a harmonized scheme to account for climate finance[241] has spurred calls for more transparent activities by climate finance institutions in order to build trust from both taxpayers in industrialised states, as well as developing countries and civil society organizations.[242]

2.1.2. … and at the individual level

Although the analysis provided very scattered and uneven results, evidence of the relevance of the four regulatory factors can be found from different documents and reports pertaining to single climate finance institutions.

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[238] L Schalatek, 'Democratizing Climate Finance Governance and the Public Funding of Climate Action' (2012) 19 *Democratization* 951.

[239] A Ballesteros, S Nakhooda, J Werksman, and K Hurlburt, 'Power, Responsibility, and Accountability: Rethinking the Legitimacy of Institutions for Climate Finance' (2010) 1 *Climate Law* 261.

[240] RB Stewart, B Rudyk, and K Mattes, 'Governing a Fragmented Climate Finance Regime' in H Cisse, DD Bradlow and B Kingsbury (eds), *The World Bank Legal Review: 3* (World Bank Publications 2011) 363-88, at 386.

[241] Treated in Chapter I above.

[242] WWF, 'Finance and Investment from Developed to Developing Countries: A Global Financial Architecture for Climate Change', Dember 2008, WWF Global Climate Policy Position Paper, <http://awsassets.panda.org/downloads/wwf_finance_paper_web.pdf p.3-4>; and Friends of Earth, 'Friends of the Earth U.S. Recommendations for the Transitional Committee', 29 July 2011, available at <http://libcloud.s3.amazonaws.com/93/6b/d/841/7-29-11_Friends_of_the_Earth_US_submission_Green_Climate_Fund_Transitional_Committee_private_sector_finance.pdf>. The difficulty in understanding and tracking climate finance flows has led several independent think-tanks to attempt overall accounting estimates. See, for instance, B Buchner *et al*., 'The Global Landscape of Climate Finance 2013', 2013, Climate Policy Initiative, <http://climatepolicyinitiative.org/wp-content/uploads/2011/10/The-Landscape-of-Climate-Finance-120120.pdf>; see also the in-depth reports on individual states' fast-start finance (pre-2013) by the World Resource Institute and the Overseas Development Institute, <http://www.wri.org/our-work/project/open-climate-network/publications>. As the transparency problem covers the whole world of international aid, interestingly states and multilateral financial institutions have responded by establishing an International Aid Transparency Initiative, an international institution aimed at promoting transparency in their activities: at the time of writing, only the Global Environment Facility and the GCF are part of the initiative. See <http://www.aidtransparency.net>, also recalled in Chapter III as an inter-institutional instrument of coordination.

To start with the GEF, its Overall Performance Studies (OPSs), prepared every five years by an Internal Evaluation Office, provide many useful elements. The fifth and latest OPS dedicates entire sections and special reports to issues of internal governance, participatory processes and access and disbursement. To report but some of the findings, regulatory gaps have been identified in the decision-making process of the project cycle, so that "[…] the key stakeholders in the GEF partnership perceive the GEF project cycle to be lengthy and bureaucratic."[243] Still regarding internal governance, issues have been raised in regards to the rules on the role of implementing agencies during the early stages of the project cycle.[244]

As to participatory processes, a specific report on the GEF's engagement with civil society organizations found that "the GEF Policy for Public Involvement is outdated, not systematically implemented and largely ineffective […]", and "[e]vidence supports a general lack of CSO engagement in the design phase –going against both the Policy for Public Involvement and good practice in project management."[245]

On access and disbursement modalities the OPS criticizes the GEF's regulations based on reserved allocations for each eligible country, against the alternative of allocation according to national programming.[246]

Other documents related to individual institutions also exemplify the relevance of the factors. For instance, an overall independent evaluation report of the Climate Investment Funds found that at least two of its programmes lack participatory processes of multi-

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[243] GEF Evaluation Office, *OPS5 Technical Document #18: Assessment of the GEF Project Cycle*, 30 October 2013, <http://www.thegef.org/gef/sites/thegef.org/files/EO/TD18_Project%20Cycle%20and%20Performance%20Issues.pdf>, at 3.

[244] National administrations of developing countries have lamented that the current rules do not allow enough control of the project cycle in the early phases as that is fully left under the control of implementing agencies. See GEF Evaluation Office, *Final Report of the Fifth Overall Performance Study of the GEF: At Crossroads for Higher Impact*, 19 November 2013, at 45, <http://www.thegef.org/gef/sites/thegef.org/files/documents/Final%20OPS5%20Report%20-%20At%20Crossroads%20for%20Higher%20Impact%20unedited.pdf>.

[245] GEF Evaluation Office, *OPS5 Technical Document #14: Civil Society Organizations Engagement*, November 2013, at 3, <http://www.thegef.org/gef/sites/thegef.org/files/EO/TD14_CSO%20Engagement.pdf>.

[246] GEF Evaluation Office, *Final Report of the Fifth Overall Performance Study of the GEF*, *supra*, at 26-7.

stakeholder governance involving also civil society organisations at different levels of the project cycle.[247] The internal governance of the same funds has been criticized on several accounts and in particular for the World Bank's multi-functional and pervasive role and the lack of control over funds in the disbursement phase by developing countries.[248]

State parties to the Kyoto Protocol have recently decided to put under review the composition and membership of the Executive Board of the Clean Development Mechanism, thus addressing an issue of internal governance.[249] The CDM has also been criticized for lacking an accountability mechanism available to project proponents for the protection of their legitimate interests against the international regulations.[250]

Finally, in reviewing the effectiveness of the Adaptation Fund, an independent report highlights the importance of the fund's governance unusually balanced towards developing countries, the high level of inclusiveness of its participatory processes, as well as the "symbolic value" of the its direct access modalities.[251]

2.2. Situating the four regulatory factors of legitimacy in the legal scholarship

While the reported material shows the relevance of the four regulatory factors from an empirical account, the same standards find also solid justifications from current theoretical debates in the legal scholarship. In particular, the terrain here is the one –briefly addressed above in conceptualizing substantive and formal legitimacy– of providing a theoretical justification of the legal authority of global governance institutions.[252] As seen, the question

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[247] ICF International, *Independent Evaluation of the Climate Investment Funds*, Final Interim Report, July 2013, at 42, <http://www.cifevaluation.org/cif_interm_report.pdf>.

[248] Bretton Woods Project, 'A Faulty Model? What the Green Climate Fund can Learn from the Climate Investment Funds', July 2011, <http://www.brettonwoodsproject.org/wp-content/uploads/2013/10/afaultymodel.pdf>.

[249] Decision 4/CMP.9, UN Doc. FCCC/KP/CMP/2013/9/Add.1, 31 January 2014, para 1(a).

[250] M von Unger and C Streck, 'An Appellate Body for the Clean Development Mechanism: A Due Process Requirement' (2009) *Carbon and Climate Law Review* 31.

[251] N Canales Trujillo and S Nakhooda, 'The Effectiveness of Climate Finance: a Review of the Adaptation Fund' (Overseas Development Institute March 2013) Working Paper No 373, at 8, and 26.

[252] Walker defines the many literature strands as "contending global metaprinciples of legal authority": N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373, at 386. See also J d'Aspremont and E De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2010) 34 *Fordham International Law Journal* 190, at 216-27.

applies also to climate finance, inasmuch its institutional structure constitutes an 'international composite administration'[253] spanning across different legal regimes and potentially affecting the interests of a wide range of actors.

It is easy to imagine that such a crucial scholarly debate has produced a vast and diversified literature on the topic: that is why the purpose here is just to sketch out how different theories recognize as relevant for legitimization processes the four factors.

2.2.1. Democracy

Two regulatory factors (participatory processes and accountability mechanisms) are generally seen by the legal scholarship as a means to promote *democracy* and democratic values from domestic systems to international and supranational governance.[254] This is particularly the positions of international constitutional law theorists:[255] as they broadly claim that the international legal sphere is engendering some forms of institutional centralization and normative hierarchy, such as the UN, the World Trade Organization (WTO), international human rights regimes, *jus cogens* etc., they also recognize the need to enhance democratic relationships between diverse global polities and those international and supranational institutions managing complex global affairs. Yet there are obvious obstacles for transplanting the traditional forms of representative democracy at the global level, with the result that constitutionalists tend to look at other forms of democratic engagement, among which the diverse participatory processes created by international institutions appear as a promising start for enhanced legitimization. This view is, for instance, articulated by Peters when she envisages the participatory model –opening up the institutions' gates to

[253] P Dann and A Von Bogdandy, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9 *German Law Journal* 2013.

[254] TM. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *The American Journal of International Law* 46; and Boyle and Chinkin, *The Making of International Law*, *supra* note 12, at 57-62.

[255] International constitutionalism identifies normative and institutional hierarchies in the international legal order. It is a scholarly strand that can be divided at least between two positions: i) those already viewing in international organizations, such as the UN or the WTO, the proof of centralised structures; and ii) those arguing that we can currently only find 'bits and pieces' of hierarchical structuring of international law in a fragmented reality. See respectively B Fassbender, 'The United Nations Charter As Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529; and J Klabbers, 'Setting the Scene' in J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2011) 1-44.

NGOs, civil society organizations and other interested constituencies– as potentially transferrable (and in part already implemented) at the global level.[256]

In contrast to the proponents of democracy under constitutionalism, also the pluralist strand accepts democratic standards, yet according to a model that better reflects the realities of climate finance. Pluralists do not see any clear manifestation of constitutionalism in the international sphere, but rather an intertwined mix of different legal systems and constitutional regimes which can either conflict or coexist. As Fischer-Lescano and Teubner, put it:

> "[…] global society is a "society without an apex or a center." [quoting Niklas Luhmann, DR] Following the de-centering of politics, there is no authority in sight in a position to undertake the coordination of societal fragments. […] Following the collapse of legal hierarchies, the only realistic option is to develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law."[257]

As already claimed in the previous chapter,[258] this broad account reflects the specific realities of climate finance, where as previously seen institutions of different legal provenance (international, soft, and national) are engaged into the administrative activity, which find its basis in an international treaty but does not envision any strong hierarchical nor centralized institutional structure. As a consequence, the pluralist view is able to project a clearer image of the role of participatory and accountability processes in legitimizing institutional activities, in the sense that they indeed promote legitimization, *but primarily in favor of the one institution that engenders such mechanisms and not automatically for the whole regime complex of climate finance*.

This point, which will be recast in the next section, is implicit in Krisch, who highlights two crucial aspects in regards to accountability:

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[256] A Peters, 'Dual Democracy' in J Klabbers, A Peters and G Ulfstein., *The Constitutionalization of International Law*, *supra*, 263-352, 268-71: the other models being deliberative and contestatory democracy.

[257] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003) 25 *Michigan Journal of International Law* 999, at 1017.

[258] See Chapter III above, at 118.

> "First, accountability structures typically rely on a clear identification of an institution or actor answerable for a given action. As responsibility is shared among various institutions, this identification becomes increasingly difficult, and the resulting 'problem of many hands' often prevents the imposition of negative consequences for undesired behaviour. Secondly, a plurality of sites typically leads to a dispersal of public attention. Unable to concentrate on a single locus of decision-making, public participation becomes diluted and ever more virtual."[259]

Here accountability is recognized as an important factor of legitimacy, but the disperse models of governance imply that for our purposes the most meaningful way is to test accountability on individual basis for each institution.[260] To be sure, accountability is seen as potential means of democratic legitimacy also by the constitutionalist strand.[261] While accountability, in its abstract form, acts as a meta-principle or a framing concept, the notion of 'accountability mechanisms' rather points at the positive regulatory factor under the authority of an international institution: this notion will be further explored in the next chapter.

2.2.2. Fairness

The concept of *fairness*, as notably framed by Franck in the field of international law,[262] better fits the needs of an overhauling theoretical device than democracy, when we shift to the two remaining factors related to institutional legitimacy in climate finance: international governance, and access and disbursement modalities.

Franck's concept of fairness in international law is double-faceted. On one side, "[…] to be effective, the [legal] system must be *seen* to be effective. To be seen as effective, its

[259] N Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (OUP 2012), at 268-9.
[260] Expectedly, the relevance of accountability mechanisms for legitimacy is a recurring theme of other theoretical strands. For, instance accountability stands at the core of Global Administrative Law: B Kingsbury, N Krisch, and RB Stewart, 'The Emergence of Global Administrative Law' (2004) 68 *Law and Contemporary Problems* 15, at 26; and of other initiatives that cannot be bracketed under the constitutionalist and pluralist label: see J Pauwelyn, 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable' in J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 500-537.
[261] E De Wet, 'The International Constitutional Order' (2006) 55 *International & Comparative Law Quarterly* 51, at 52. Noticing that the relevance of accountability stems from neo-Kantian understandings of the international order. On a more complex relationship between constitutionalism and democracy see N Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39 *Rechtsfilosofie & Rechtstheorie* 206, at 213, who claims that historically the constitutionalist thought as realized, but also limited democracy, which still stands as an incomplete ideal.
[262] Franck, *Fairness in International Law and Institutions*, *supra* note 17.

decisions must be arrived at discursively in accordance with what is accepted by the parties as *right process*."[263] In Franck's view, fairness guarantees legitimacy because of a general acceptance of a process leading to accepted authoritative decisions and law-making. If in this sense it appears as a neutral concept, Franck's fairness nonetheless assumes moral contours, as its second facet is strongly linked with distributive justice considerations. Following his argument, it is insufficient to claim that a law (or an institution in our case) is fair because it represents the outcome of a right process. If a law "[…] *distributes burdens unfairly*, [it] is likely to provoke resistance, even from some of those who benefit."[264] Thus, despite being shaped through right processes, a law must contain some additional elements of moral and political nature to be legitimate.

Under this conceptualization, the two regulatory factors - 'internal governance' and 'disbursement modalities'- can be seen as internal processes which can promote legitimacy if they are perceived as fair by the actors engaged.

Yet, in contrast to the other two input-based factors, no extensive debate exists in the legal scholarship about the relationships between internal governance and decision-making procedures in international institutions and their legitimacy;[265] the same is even more evident for the more specific factor of access and disbursement modalities in international financial institutions.

The importance of internal governance rules and decision-making procedures for the legitimacy of institutions, for instance, is briefly touched upon by Boyle and Chinkin in addressing the role of consensus in multilateral law-making: they point out that the process of law-making, which embraces both issues of membership and decision-making procedures,

[263] Ibid., at 7.

[264] Ibid., at 8 [*emphasis* added]. After the fairness issue, Franck's analytical framework is devoted to legitimacy indicators for *norms*: namely, determinacy, symbolic validation, coherence, and adherence, which together should guarantee a compliance pull of involved actors. (Ibid., at 30-46). Although Franck's work does tackle the role and activity of several international institutions, like the UN Security Council, the UN Secretariat, and international tribunals, nonetheless he applies a norm-based and not an institution-based analytical framework for legitimacy.

[265] This is not the case for the International Relations scholarship: for an overview the literature see Stone, *Controlling Institutions*, *supra* note 41.

is particularly relevant for the legitimation of those international bodies which do not grant universal membership –such as the UN Security Council.[266] They also confirm Franck's fairness-based conception when, with referral to the institutional decision-making procedures of the IMF and the WTO, they stress that "[…] how decisions are taken within the process of law-making and by whom may be one of the more important elements of legitimacy […]."[267] Schermers and Blokker follow suit by recognizing that the equitable representation of interests in non-plenary organs of IOs is of fundamental importance for their legitimacy.[268]

On a similar note, D'Aspremont and Brandebaere notice the increasing challenges of social legitimacy for international financial institutions stemming, amongst other issues, from the departure from the "traditional equality" in voting rights in favor of weighted vote systems in their executive bodies.[269] Finally, and in the very specific realm of environmental financing, Matz provides a clear framework to understand legitimacy in relation to decision-making procedures: first she argues that states equality in international financial institutions should be balanced with the diverging interests between donor and recipient states. Secondly, she questions whether the shift to weighted voting is likely to negatively affect the legitimacy of international financial institutions, especially in the case where the practice of conditionalities makes developing states only marginally participant to the decision-making process.[270]

Shifting to the output factor of access and disbursement modalities, there is no extensive legal scholarship addressing the role of such distributive rules within international

[266] Boyle and Chinkin, *The Making of International Law*, *supra* note 12, at 161. *Contra* a legitimacy deficit of the UN Security Council based on membership claims see Hurd, 'Myths of Membership', *supra* note 22.
[267] Ibid., at 102.
[268] HG Schermers and NM Blokker, *International Institutional Law* (5 Revised. Brill 2011), at 224-32.
[269] d' Aspremont and De Brabandere, 'Complementary Faces of Legitimacy in International Law', *supra* note 72, at 223.
[270] N Matz, 'Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environment Facility and Prototype Carbon Fund' (2005) 5 *International Environmental Agreements: Politics, Law and Economics* 265, at 270.

financial institutions.[271] Nonetheless, this legitimacy standard is adopted by Ballesteros *et al*., when they question the relationships between power, responsibility and accountability in climate finance institutions: in particular they resort to the specific case of the GEF's allocation frameworks to claim how the way they are designed by regulatory processes eventually contribute to the overall legitimacy of the institution.[272]

There is a further element qualifying the two based factors as reflective of fairness needs in institutional processes. As Franck specifies, distributive justice and, therefore, a fairness-based analysis necessitate a "moderate scarcity" of what is at stake.[273]'Power' and 'money' are the respective 'moderately scarce' resources for these two factors in climate finance. In fact, in internal governance processes power is 'moderately scarce', in the sense that for any institutional reality there is always need to distribute power among the competing actors in a way that a 'fair' distribution can bolster institutional legitimacy. Equally, access and disbursement processes relate to the 'moderate scarcity' of the money, which a climate finance institution is tasked to channel in a 'fair' manner. As argued in the next Chapter, this conception will be helpful to determine the quality and therefore the impact of those two regulatory factors on legitimacy.

[271] For a general account of all the Operational Policies of the World Bank see Bradlow and Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation' *supra* note 42. See also F Kamau and M Colaiacomo, 'Financing for Development: Examining the Concept of Resource Mobilization for International Organizations, a Case Study of the International Fund for Agricultural Development (IFAD)' (2012) 9 *International Organizations Law Review* 467, who assert that its historical track of poor resources mobilization is due to the normative restraints contained in the constitutive agreement.

[272] Ballesteros, Nakhooda, Werksman, and Hurlburt, 'Power, responsibility, and accountability', *supra* note 59, at 273-5.

[273] The precondition of 'moderate scarcity' has been firstly elaborated by J Rawls, *A Theory of Justice* (Revised ed. Harvard University Press 1999). In this regard, the Frank proposes a clarifying example with the exploitation of deep seabed resources under the 1982 UN Convention on the Law of the Sea: "If a particular mineral which was essential to a newly discovered cure for cancer were to exist only in one small area of the ocean floor, and in very limited quantities, the discourse of rights to seabed mineral resources would differ significantly from the […] debate about an international regime for management of the resources of the ocean floor" and "In a situation of moderate scarcity, on the other hand, discourse about the legal system's allocational fairness can rise at the top of the agenda.": Franck, *Fairness in International Law and Institutions*, *supra* note 17, at 9.

3. STANDARD OF REVIEW AND LIMITS OF A LEGITIMACY ANALYSIS BASED ON REGULATORY FACTORS

After stating the empirical and theoretical rationales for adopting the four factors as indicative of social institutional legitimacy, this final section attempts to answer three final methodological questions: i) how can we gauge, using those identified factors, the *level of legitimacy* that an institution enjoys for each of them and as a whole?; ii) what are the limits of such legal analysis?; and iii), in particular, how do the four factors interact between each other in the formation of social legitimacy?

3.1. Standard of review

As to the first question, no precise yardstick exists, but the outcomes from the comparative analysis will rather provide a clearer picture of the 'interplay of legitimacies'[274] between institutions acting in the same regime complex. In other words, the legitimacy level of a climate finance institution can be better understood in relation to the legitimacy of other institutions acting in the same field. Hence, in a way this view is a corollary of the concept of institutional competition described in the previous chapter: if climate finance institutions tend to compete against the background of limited financial resources, then, to the extent that one is more competitive than another, this means that it will also enjoy stronger legitimacy from the interested actors.

Conceptually, an assessment of legitimacy operates differently from one based on legality. As Bodansky remarks, "[…] legitimacy is a matter not of all or nothing, but of more or less",[275] meaning that, while a legality assessment is structured on the 'legal/non-legal' binary logic,[276] legitimacy plays instead along a spectrum of many nuanced values. To put it bluntly, an institution can be 'more or less' legitimate in exercising its authority, but such

[274] The expression and concept is taken from L Boisson de Chazournes, 'Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies' (2009) 6 *International Organizations Law Review* 655.
[275] Bodansky, 'The Legitimacy of International Governance' , at 623.
[276] J Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic J. Int'l L.* 167

authority can only be exerted legally or illegally according to a positive normative benchmark.[277] Bringing this general remark to the realm of climate finance, it is virtually uncontested that its institutions enjoy full legality of their authority,[278] as it is empirically evident that none of them is perceived as fully illegitimate.

Hence, this core difference between legality and legitimacy requires a specification of how an analysis based on regulatory factors can offer relevant outcomes to draw conclusions on the legitimacy of selected institutions.

On this matter the literature appears surprisingly scant, yet a seminal piece by Buchanan and Keohane is a promising starting point. The authors attempt to "[…] articulate a global public standard for the normative legitimacy of global governance institutions",[279] by claiming that such standard is needed to provide an additional *moral* reason why an international institution should enjoy normative legitimacy.[280]

Shifting away from the already explored standards of 'states consent' and 'global democracy', the same authors enlist several 'desiderata' characterising legitimacy standards, among which one appears particularly pertinent here:

> "[the standards of legitimacy] must provide *a reasonable public basis for coordinated support* for the institutions in question, *on the basis of moral reasons* that are widely accessible in spite of the persistence of significant moral disagreement—in particular, about the requirements of justice governance institutions."[281]

Following this morality-based argument, the same authors identify three core factors affecting institutional legitimacy at global level. The first, as they call it, is a level of

[277] At institutional level, this issue conflates to the question of detailing the boundaries of power of international institutions. See J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009), at 53-73.
[278] Although, as seen in the previous Chapter, it is unknown under what legal system some international institutions can derive their authority.
[279] Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions', *supra* note 15, at 406.
[280] Ibid., at 409. Such reason is conceived additional to states' self-interests. This moralistic conception of formal legitimacy belongs to a particular strand of liberal thought and tends to blur the boundaries with substantive (sociological) legitimacy: in fact, *moral* reasons can also form a 'reasonable *belief*' that an institution is legitimate, without addressing the question of the normative basis for such legitimacy. A close look at Buchanan and Keohane's work shows such confusion between formal and social legitimacy: see for instance at 412.
[281] Ibid., at 417 (*emphasis* added). The other *desiderata* more or less correspond to the democratic and fairness-based legitimacy claims canvassed above in this chapter.

"minimal moral acceptability" of institutional legitimacy, which should correspond to the avoidance of committing "serious injustice", particularly in violating human rights.[282] The second is "institutional integrity" understood as an institutional activity that does not divert from or go against the institution's original functions.[283] Finally, the third and more important factor here consists of "comparative benefit", which entails that "[t]he legitimacy of an institution is called into question if there is an *institutional alternative*, providing significantly greater benefits, that is feasible, accessible without excessive transition costs, and meets the minimal moral acceptability criterion."[284]

Although the authors do not further specify the nature and implications of this latter *factor*, measuring legitimacy according to comparative benefits well suits the specific case of climate finance, because it leads to a *relational* approach between the different legitimacies of each institution. The aptness of this approach derives from the institutional structure of climate finance at the global level: an international composite administration, where the internal processes of each institution are able to alter the balances of comparative benefits, and lead accordingly to institutional success or proliferation.

Therefore, in answering this first question, in the context of climate finance the best legal method to gauge the legitimacy levels, stemming from an analysis of regulatory factors, is to view the whole matter as interplay among individual legitimacies.[285] In other words, once qualitative elements from the comparative analysis will be expounded from the various factors, the analysis shall focus on how such elements affect the individual legitimacy of an institution in relation to all the others under analysis, in order to provide overall arguments of legitimacy among those institutions.

[282] Ibid., at 419.
[283] Ibid., at 422.
[284] Ibid.. The authors further remark that the concept should not be confused with optimal efficacy and efficiency.
[285] Chazournes, 'Changing Roles of International Organizations', *supra* note 94.

3.2. The limits of a legal analysis

If at this point a clearer picture emerged of how to conduct a legal analysis of institutional legitimacy, there is nonetheless the need to remark some limits concerning the assumptions and the interactions between the four regulatory factors.

To start from the assumptions, the fact of embarking into a normative analysis indeed presupposes the morality and reasonable acceptance of the standards adopted. While the selection of the four factors springs from actual contestations in the various fora, it nonetheless relies on a certain idea of political morality, which is not immune from contestations.[286] This is exemplified by comparing the similar claims from political theorists like Buchanan and Keohane on one side, and legal scholars like Franck. As seen, the former indeed adopt a set of standards which are expression of a minimum and reasonable morality among global actors. Yet their standards are not normative: “serious injustice” violations from the institution, its “institutional integrity”, and the possibility of opting for other institutional alternatives, can take forms not necessarily relevant to the legal sphere. By contrast, Franck’s construction of fairness as a principle of legitimacy, which is primarily normative, sees the synergy between a normative/procedural (‘right process’), and a moral/political (distributive justice) component. While none can dispute the moral nature of distributive justice, it is more difficult but crucial to spot that the reliance on regulatory processes for the formation of the legitimacy component is also based on a moral assumption, namely that the various actors will *believe* as legitimate a given regulatory process, if it is framed according to ‘right’ expectations.[287]

Arguably, the same type of assumptions can be found in the four factors of legitimacy adopted. As seen, being all four expressions of process-based legitimacy, they also hinge on

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[286] This is in essence the criticism that critical legal scholars bring against lawyers engaging with legitimacy. See M Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’ (2009) 15 *European Journal of International Relations* 395, at 409, asserting that the shift to legitimacy does not have any normative content, but instead justifies political choices already taken.

[287] In commenting Franck’s book, also Simpson is of a similar view, labeling such a way of assuming moral standards as “[…] an intuitive, unconvincing, and perhaps contradictory liberal populism.” Simpson, ‘Is International Law Fair?', *supra* note 38, at 623.

political and moral rationales ('fairness', 'promotion of democratic values', and so on). Hence, when addressing the internal governance of each institution, the assumption will be that the more its governance reflects developed or developing countries interests, the more it will be perceived legitimate by one group or another; and the same applies to access and disbursement modalities. By the same token, participatory and accountability mechanisms are presumed to enhance institutional legitimacy from non-state actors, affected groups, NGOs, etc. Although based on reasoned arguments, these assumptions cannot be fully stated or verified under a mere legal analysis of those regulatory factors.[288]

This finding leads to the further question of addressing the relationships between the four factors in their capacity to affect the legitimacy of a climate finance institution. Such relationships are indeed complex, because they eventually depend on the different interests and expectations of all relevant actors. For instance, while we can assume that well-structured participatory and accountability processes enhance the legitimacy vis-à-vis external actors, it may as well be that the same processes can eventually slow-down and affect decision making at a point that actors would perceive the institution as not meeting its goals, with the result of reducing its output legitimacy.[289] Similarly, a set of access and disbursement modalities designed to enhance the 'country ownership' of the funds, while likely to meet the legitimacy expectations of developing countries, might at the same time work against the contributors' interest in the effective management of resources, if sound fiduciary standards are not adopted by the institution and implemented by national administrations.

Eventually, the relationships and balances between the four regulatory factors depend on the importance and prominence of the different actors' interests and can vary according to

[288] See also Kratochwil, 'On Legitimacy', *supra* note 36, at 302, who notes that "[…] we also consider decisions legitimate when we approve of the specific result, even if the latter has a rather defective pedigree of procedural correctness."

[289] On the uneasy balance between input and output factors in legitimacy see: Schmidt, 'Democracy and Legitimacy in the European Union Revisited', *supra* note 33.

each institutional reality. For example, an institution, displaying an internal governance favoring contributor states, will be more likely to enhance its legitimacy, if it also engenders some processes favoring the 'country ownership' of the recipient. Conversely, when the executive organ of the institution grants equal decision-making power between contributing and recipient states, then some processes favoring control of resources, like increasing the management of international implementing agencies, or stricter fiduciary standards, can enhance legitimacy from contributing states.

Because these interconnections are as numerous as the complex political engagements between interests and actors, and because they are essentially of political or moral nature, the following analysis will have to rely on a further assumption –or better a simplification– that such relationships between regulatory factors will be addressed only when the findings will reveal obvious unbalances of interests, the risk being otherwise of entering into political and philosophical speculations not based on data stemming from the analysis.

CONCLUSIONS

Legitimacy is a vital component for the effectivity of the regime complex of climate finance, as well as for individual climate finance institutions. Against the background of an institutional complex where each institution strives to foster its individual legitimacy against other competitors, the authoritative character of climate finance institutions has also led to several contestations and concerns about their legitimacy.

From an analytical point of view, this work will investigate the individual legitimacy of some relevant climate finance institutions with a view of discovering how their legitimacies interrelate. Hence, this chapter has set some methodological and theoretical basis for the following analysis.

As a first step, it claimed that, rather than formal, the contested legitimacy of climate finance institutions is social and, therefore, related to that complex formation of belief in the validity of the authority.

It then relied on the broad distinction between the input and output types of legitimacy which proved useful to focus on the legitimacy of institutional processes, rather than on the legitimacy of the rules enacted by the institutions. The distinction also paved the way for singling out four regulatory factors for the following comparative analysis:

1– internal governance and decision-making procedures;

2– access and disbursement modalities;

3– participatory processes for external actors; and

4– accountability mechanisms.

The discovery of these factors is supported by empirical contestations from different actors (states, NGOs, and international institutions), and in different contexts, such as international negotiations or independent evaluations of single climate finance institutions.

Importantly, these factors also reflect two major strands of international legal scholarship dealing with the issue of legitimacy in international law. On one side the third and fourth factors (participatory processes and accountability mechanisms) are reflection of democratic oppositions brought against global governance architectures; on the other, the two remaining (internal governance and access and disbursement modalities) reflect those claims seeing in procedural fairness a fundamental device for legitimacy.

Finally, even if these regulatory factors reflect both the empirical and theoretical contestations of legitimacy, the chapter also considered the standard of review to be used following analysis, as well as the inherent limits that this analytical approach entails.

On the first aspect, it has been argued that, because of the competing relationships between climate finance institutions, any individual legitimacy should be understood in relation to the others, so to frame a complex ‘interplay of legitimacies’, able to give also evidence of the regime complex of climate finance as a whole.

The limits of this analytical approach relate to the fluid relationship that each standard has with the complex processes of social legitimacy, of which law is admittedly but one component. Therefore, the findings for each standard will rely on the assumption that they indeed are capable to affect the different interests of actors (contributor, recipient country, NGO, etc..), with a view to inform their belief on institutional legitimacy.

CHAPTER V
A COMPARATIVE ANALYSIS OF INSTITUTIONAL PROCESSES

INTRODUCTION

The purpose of this chapter is to ground the previous reflections and concerns about the legitimacy on a comparative analysis of selected climate finance institutions. It will unfold and distill regulatory elements that promote or restrain the legitimacy of an institution from its actors. However, before delving into the comparative analysis some methodological issues should be addressed.

Firstly, the comparative analysis targets six institutions: the Global Environment Facility, the Adaptation Fund, the Clean Development Mechanism, the Green Climate Fund, the Climate Investment Funds, and the World Bank. The rationale of such selection stands on the fact that a thorough investigation of internal processes of all climate finance institutions would require an extraordinary empirical exercise and effort. Selectivity, however, requires methodological reasons for cherry-picking viable institutions. In this study two rationales are used. The first, more practical, relies on the relevance of the selected institution in terms of quantity of managed financial resources; the second, instead, relates to the importance attributed to the institution as to its innovative governance and centrality in climate change negotiations. While the five institutions all fall within the boundaries of these selective rationales, they nevertheless express institutional realities of very diverse legal nature and scope. Hence, the risk falling into a comparison of very different institutions is mitigated by the uniting characteristic that they are engaged into the very same activity of climate financing, by belonging to the same international composite administration.

The different nature of the institutions prompts a second premise: that some regulatory factors might not be present, or expressed by other means depending on the institution. For

instance, access and disbursement modalities regulations, typical of multilateral trust funds, are not present in market-based institutions as the CDM.

Thirdly, the four regulatory factors conceptually overlap. By way of example, participatory processes and accountability mechanisms, in a way can also be part of internal governance and decision-making mechanisms, because of their potential to affect decisions and review of institutional acts.

With such premises, the chapter is divided in four parts, each dedicated to one regulatory factor adopted in the previous chapter. Each part is sub-divided in a detailed analysis of 'secondary laws', and a comparative appraisal of how the regulatory factor is shaped and applied by each institution. The next, concluding, chapter will instead address the overall significance of this comparative analysis in conjunction with the findings in Part I.

1. INTERNAL GOVERNANCE AND DECISION MAKING

As discussed in the previous chapter, except for few general works and several case studies,[1] the legal aspects of internal governance of international institutions and their decision-making has not attracted much attention in the legal scholarship. This might be due to the main focus by international lawyers on the more directly relevant consequences of International Organizations (IOs) as subjects of international law: hence, prominence has

[1] AE Boyle and C Chinkin, *The Making of International Law* (OUP 2007); Alvarez, *International Organizations as Law-makers*; DD Bradlow, 'The Reform of the Governance of the IFIs: a Critical Assessment' in H Cisse and others (eds), *The World Bank Legal Review: 3* (World Bank Publications 2011) 37-58; J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009), 153-65; A Reinisch, 'Governance Without Accountability?' (2002) 44 *German Yearbook of International Law* 270; I Venzke, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law' in A Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010) 67-98; and J von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' (2008) 9 *German Law Journal* 1939. On case studies of individual institutions see, for instance, MA Livermore, 'Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius' (2006) 81 *New York University Law Review* 766; M Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in A Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010), 165-93; and A Lang and J Scott, 'The Hidden World of WTO Governance' (2009) 20 *European Journal of International Law* 575.

been given to more traditional matters like responsibility, treaty-making capacity, privileges and immunities, and membership.

Here the internal governance of an institution is conceptualized both in a broad and a narrow way. It is broad in the sense that the analysis will embrace the composition of organs, scope and structure of each institution, as well as the various decision making rules within each organ. It is narrow, because other elements that might fit within the concept of 'internal governance': *informal* engagements between bodies, constituencies and external actors will be set aside,[2] because they regard dynamics that are not relevant under a legal analysis.

1.1. The Global Environment Facility

The backbone of internal governance rules of the Global Environment Facility (GEF) is its Instrument,[3] adopted in 1994 at the end of a thorough set of reforms that transformed the GEF from a World Bank's pilot to a fully-fledged and more independent entity.[4] The GEF is the operational entity of various Multilateral Environmental Agreements (MEAs)[5] and, with regards to its liaison with the UNFCCC, both the treaty[6] and a bilateral Memorandum of Understanding (MoU) between the COP and the GEF[7] provide that the institution is under the guidance and accountable to the COP. The GEF Instrument sets up the GEF Council and its Chief Executive Officer (CEO), the GEF Assembly, a Secretariat, and a Scientific and Technical Advisory Panel (STAP).[8] These GEF organs have been originally supported by three implementing agencies, which are also founding entities who adopted the instrument. These agencies are the World Bank,[9] the UN Environment Programme (UNEP) and the UN

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[2] For an understanding of formal and informal governance dynamics of an institution see RW Stone, *Controlling institutions: international organizations and the global economy* (CUP 2011), 11-48.

[3] *Instrument Establishing the Global Environment Facility*, Geneva, adopted on 16 March 1994, 33 ILM 1273, as amended [hereinafter the 'Instrument' or the 'GEF Instrument'].

[4] For a historical account, see Chapter II above, at 50.

[5] Ibid.

[6] UNFCCC, Article 11(1).

[7] Decision 12/CP.2, UN Doc. FCCC/CP/1996/15/Add.1, 19 October 1996, Annex.

[8] GEF Instrument, Section III.

[9] For the purposes of this Chapter, the term 'World Bank' refers only to the International Bank for Reconstruction and Development and the International Development Agency. As seen, the World Bank Group also comprises the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the International Center for Settlement of Investment Dispute.

Development Programme (UNDP). In order to make more effective and expand the choice and implementation modalities of its finance, the GEF has enlarged the number of international implementing agencies to a total number of ten, comprising several international organizations.[10]

1.1.1.The GEF Assembly

The GEF Assembly is the representative body of all Participant states, comprising both contributors and recipients of the GEF Funds. It gathers every three years to evaluate operations and decide on the general policy strategies of the Facility.[11] It also approves amendments to the Instrument by consensus, after recommendation of the Council. Aside from this last substantive prerogative, the Assembly primarily works as a forum of discussion and stock-taking of GEF's activities and its reviews are taken into account by the Council when develops its working programmes.[12] Each meeting is structured in a plenary and a series of thematic roundtables where participants can express their views, subsequently summarised by an elected Chair.[13]

1.1.2.The GEF Council

The Council is the GEF's executive body. It is responsible for two crucial activities: i) it approves individual project proposals for funding; and ii) adopts the internal operational policies, regulations, strategies and working programmes, in line with the guidance provided by the various Conferences of the Parties (COPs) of Multilateral Environmental Agreements (MEAs).[14] The Council is an inter-governmental body made of 32 members, elected by Participant States according to constituency groupings: 16 members belong to developing countries, 14 to developed ones and two to states from economies in transition.[15] The election of constituency representatives –whose mandate is for three years– is a staged

[10] See http://www.thegef.org/gef/gef_agencies.
[11] GEF Instrument, para 14.
[12] Ibid., para 15.
[13] See for instance, the latest GEF Assembly's 'Summary of Roundtables', GEF/A.4/CRP.1/Rev.1, 26 May 2010.
[14] GEF Instrument, para 15.
[15] Ibid., para 16.

process based on consultations among participants. While geographical representation and commonality of environmental concerns constitute the criteria upon which developing countries should elect their constituency representatives, the main criterion for selection of contributing representatives is the amount of finance pledged at each GEF's replenishment.[16]

Being the place of actual decisions on finance disbursement, the GEF Council has a peculiar decision-making procedure which in part resembles the Board of the Executive Directors of the World Bank.[17] The consensus rule is the first step to each decision followed by a formal vote at request of one Council member: the peculiarity is that such vote is based on a double weighted majority, as the necessary threshold to be reached for a positive vote is 60% of participants at the Council meeting representing, at least, 60% of GEF Trust Funds' total financial contributions.[18] The same rules of procedure apply for the GEF Council meeting as the decisional body of the Least Developing Countries Fund and the Special Climate Change Fund of the UNFCCC, with only difference that non-participating states' representatives can attend only as observers.[19]

1.1.3.The GEF Agencies

The realization of GEF financed projects and programmes requires extensive capacity at national and sub-national level where activities are implemented. While the GEF bodies have the responsibility to regulate and decide on the disbursement of funds, the actual implementation of projects is delegated to two types of agencies. First, other IOs aside from the original three agencies (UNEP, UNDP and the World Bank) have been appointed through time by the GEF Council as eligible entities to apply for individual projects

[16] Ibid., Annex E. Constituency representatives are elected by consensus, see *Rules of Procedure for the GEF Council*, 3 November 1994, GEF/C.1/3/Rev.1 as amended in November 2006, para 7.
[17] See the relevant section on the World Bank below.
[18] GEF Instrument, para 25(b) and (c). In addition, the GEF Council's rules of procedure envision a decision-making activity without formal meeting. This is a flexible solution that allows the GEF CEO to seek specific approval by the Council on urgent matters. See *Rules of Procedure for the GEF Council*, *supra*, paras 43-7.
[19] See *Rules of Procedure for the LDCF/SCCF Council*, 8 November 2006, GEF/LDCF.SCCF.1/3.

financing.[20] Secondly, and in addition to these international organizations, the GEF has also recently expanded the accreditation of implementing agencies to other international and national entities that demonstrated capacity[21] to support developing countries in applying for GEF finance.[22] Differently to the case of direct access, where developing countries administrations are accredited to apply under specific programmes, in this recent policy it is other non-state entities of national or international nature that are accredited.[23]

1.1.4.The CEO, the Secretariat, the Evaluation Office and the STAP

A peculiar institutional figure of the GEF is its CEO, appointed by the Council for a term of four years.[24] Apart from directing Council meetings together with the Chairperson, the CEO heads the GEF Secretariat and holds a key decisional role in the project cycle.[25] The Secretariat is a 'functionally independent' entity logistically supported by the World Bank: in other words, while its offices are physically located in the World Bank's headquarters, the staff responds to the directives of the CEO and the Council.

Because the GEF relies on a result-based model of management, its Council established an independent Evaluation Office[26] carrying on different types of performance reviews. The more important of these are the Overall Performance Studies, implemented since the pilot phase of the GEF,[27] which are prepared to inform each replenishment process of the GEF Trust Fund.

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[20] Currently they are the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the Food and Agriculture Organization, the Inter-American Development Bank, and the UN Industrial Development Organization. See <http://www.thegef.org/gef/gef_agencies>. These agencies formally entered into Financial Procedures Agreements with the World Bank, which acts as a trustee of the GEF.

[21] This was done according to a specific accreditation process. See GEF Council, *Accreditation Procedure for GEF Project Agencies*, GEF/C.39/8/Rev.2, 18 Novebmer 2010.

[22] See GEF Council, *Report on the Pilot Accreditation of GEF Project Agencies*, GEF/C.44/09, 21 May 2013.

[23] While still passing through the accreditation process, for instance, GEF project agencies include the International Union for Conservation of Nature, the World Wildlife Fund, as well as national entities like the Fundo Brasileiro para a Biodiversidade or the Chinese Foreign Economic Cooperation Office. See *supra*, at 2-3.

[24] GEF Instrument, para 21.

[25] See section 1.1.4 below.

[26] See GEF Council, *Terms of Reference for an Independent Monitoring and Evaluation Unit*, 29 July 2003, <http://www.thegef.org/gef/sites/thegef.org/files/documents/TOR%20ME%20-%2007.29.03.pdf>.

[27] The first evaluation was carried by the three GEF agencies, see *Global Environment Facility: Independent Evaluation of the Pilot Phase*, May 1994, <www.thegef.org/gef/sites/theged.org/files/documents/OPS0..pdf>.

Scientific data and advice to the GEF Council on the various environmental areas of interest is provided by a Scientific and Technical Advisory Panel (STAP)[28] comprising six members appointed by UNEP's Executive Director in consultation with the other GEF's Implementing Agencies. The role of the STAP is to offer strategic advice on global environmental issues and contribute to enhancing environmental soundness of GEF projects.[29]

1.1.5. GEF Replenishments and the Trustee

The GEF Trust Fund pools contributions made by industrialized states, which take place every four years through a separate replenishment process. Despite not explicitly regulated in the GEF Instrument,[30] the cyclical replenishments of the GEF Trust Fund are of special importance for an understanding of the governance of this institution, given that they take formally place outside the GEF constituted bodies,[31] and through a negotiating process that only recently opened its participation to non-contributing States and non-governmental entities. During replenishment negotiations, participant states find agreement on the share of individual pledges to the funds, and on several strategic and policy issues for the following four years. The latter are translated into a programming document that is later approved by the Council.[32]

The existence of a replenishment negotiating process separate from the competence of GEF Assembly is sign of a governance structure still balanced more towards contributing states than recipients. Despite steps towards opening participation to recipient countries during replenishments negotiations, it is unclear how procedurally such participation feeds

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[28] GEF Instrument, para 24.
[29] See the latest Terms of Reference to the STAP in GEF Council Decision, GEF/C.31/4, 14 May 2007, Annex I, paras 11-21.
[30] It is only provided that the Trustee is responsible to gather resources after a decision of the GEF Council. See GEF Instrument, para 10 and 20(e).
[31] But are still regulated by the GEF Council.
[32] See, for instance, the latest in GEF Council, *Summary of Negotiations: Fifth Replenishment of the GEF Trust Fund*, 17 May 2010, GEF/C.37/3, Annex A.

into the strategic programming, since no particular rules of procedure for replenishment negotiations apply.

Another peculiar aspect of the governance of many multilateral climate funds is that administrative and financial management of transactions between the funds and other entities is carried by an external trustee working for the fund. The GEF and all the other funds analyzed in this chapter have appointed the World Bank as a trustee. Although this choice can be interpreted as a sign of the ubiquity of the World Bank in the management of public climate finance, its role is substantially limited by the terms of the trustee agreements with the various funds bodies. For instance the bilateral agreement between the GEF and the World Bank clarifies that any approval of commitment from the GEF Trust Fund to other entities is dependent on the approval by the GEF Council or its CEO,[33] meaning that the World Bank does not have any decision-making power on disbursement.

1.2. The Adaptation Fund

As outlined in Chapter II,[34] the Adaptation Fund finds its legal basis in the Kyoto Protocol. More specifically, it is provided that a share of proceeds from offset activities under the Clean Development Mechanism (CDM)[35] should contribute also to "[…] assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation."[36] Through a series of decisions the Conference of the Parties serving as the Meeting of the Parties to the Protocol (CMP) provided that the Adaptation Fund should work under the guidance and be accountable to the CMP.[37] Two years later it

[33] See the GEF – World Bank's Financial Procedures Agreement, 8 February 2002, <http://www.thegef.org/gef/sites/thegef.org/files/documents/document/IBRD%20FPA%20Feb%202002.pdf>; among other tasks, the CEO has the executive authority to filter initial project funding proposals and to provide the final endorsement at the end of the project cycle, after approval of the GEF Council. See GEF, 'Policies and Procedures for the GEF Cycle', November 2008, paras 3-7, and 15, <http://www.thegef.org/gef/sites/thegef.org/files/documents/GEF%20Policies%20and%20Procedures%20for%20GEF%20Project%20Cycle.pdf>.

[34] See at 79.

[35] On the nature and functioning of this mechanism in the context of climate finance see above, at 67.

[36] Kyoto Protocol, Article 12(8).

[37] See Decision 28/CMP.1,UN Doc. FCCC/KP/CMP/2005/8/Add.4, 20 March 2006, para 2.

established an Adaptation Fund Board (AFB) as the decision-making body of the fund acting under the authority and guidance of the CMP.[38]

Compared to the GEF, the institutional governance of the Adaptation Fund is less articulated and mainly expressed by the activity and design of the AFB. While the functions of a plenary organ are exerted by the CMP, the AFB is responsible *inter alia* for developing strategic priorities policies, guidelines and for deciding on the approval of individual projects.[39] An original task of the AFB is to manage the monetization of CDM credits as allocated by the Executive Board of the CDM.[40] As seen this source of revenues has been virtually replaced by direct contributions after the plummeting of the CERs price in the carbon market.[41] The AFB comprises 16 members representing Kyoto Protocol Parties according to a balanced representation of regional and economic groups,[42] which assigns roughly a 69 percent of representation to developing countries.[43] Consensus is the general decision-making rule, but when this cannot be reached a two-thirds majority of the attendees can pass decisions.[44] Arguably, then, *both the rules on composition and decision-making of the AFB give a prevalent decisional role to developing countries*.

The AFB has its own Secretariat, currently located *ad interim* within the GEF Secretariat.[45] Probably, such a choice is due to secure a coordinated management with the other two UNFCCC-based adaptation funds, the Special Climate Change Fund and the Least Developed Countries Fund.[46] Hence, not only the Adaptation Fund Secretariat is physically

[38] Decision 1/CMP.3, UN Doc. FCCC/KP/CMP/2007/9/Add.1, 14 March 2008.
[39] Ibid., para 3.
[40] The share of proceeds amounts to 2% of Certified Emissions Reduction units (CERs), issued by the Executive Board of the CDM for each registered project.
[41] See above Chapter II, at 80.
[42] Decision 1/CMP.3, *supra* note 38, para 6. Two representatives from each of the five UN regional groups; one representative from small island developing States; one from least developed countries; two from Annex I and two from non-Annex I countries to the convention. UN regional groups comprise the African Group; the Asia-Pacific Group; the Eastern European Group; the Latin American and Caribbean Group; and the Western European and Others Group: see at <http://www.un.org/depts/DGACM/RegionalGroups.shtml>.
[43] See <https://www.adaptation-fund.org/about/the-board>.
[44] Decision 1/CMP.3, *supra* note 38, para 12.
[45] Decision 1/CMP.4, UN Doc. FCCC/KP/CMP/2008/11/Add.2, 19 March 2009, Annex II; this interim provision has been extended until the 2014 CMP: see Dec.4/CMP.8, UN Doc. FCCC/KP/CMP/2012/13/Add.2, 28 February 2013, para 5. The previous agreement was to have a Secretariat functionally independent, yet within the UNFCCC administration (Decision 1/CMP.3, *supra*, para 18).
[46] See Chapter II above, at 55.

located in the World Bank's headquarters, but –as it is for the GEF– the Bank also acts as trustee of the AF.

Given its limited technical capacity and geographical presence, also the Adaptation Fund relies on the work of implementing entities, which file proposals and implement financed projects. Contrary to the GEF and the GCF, no international implementing agency directly participated in the design of the AF. This has likely left the AFB with some margin of discretion as to the modalities of engagement with implementing agencies. The basic choice was to allow both national and international entities to apply through an accreditation process and according to its own fiduciary standards.[47] Currently, accredited implementing entities can be national, regional or multilateral. While the last two include multilateral development banks, other international organizations and funds,[48] the accreditation of national administrations as eligible entities to tap into the Adaptation Fund represents a form of direct access and an innovative mean of resources disbursement in climate finance.

1.3. The Clean Development Mechanism

As the nature and the functioning of the Clean Development Mechanism (CDM) are different from the ones of other climate finance processes, the same stands for its governance which reflects a hybrid character of a mechanism combining public management and private sector's implementation through carbon market incentives.[49] The functioning of the CDM hinges on a central supervisory body, the Executive Board (EB), and on the participation of public and private entities for the approval, implementation and monitoring of carbon mitigation projects in developing countries. The various steps that lead an individual project proponent to realize a mitigation activity and earn verified Certified Emissions Reductions

[47] See AFB, *Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund*, no date, paras 27-39, <https://www.adaptation-fund.org/policies_guidelines>.

[48] The current multilateral agencies are: the Asian Development Bank, the Inter-American Development Bank, UNDP, UNEP, the World Bank, the World Meteorological Organization, the International Fund for Agricultural Development, the UN Food Programme, and the UN Educational Scientific and Cultural Organization. See <https://www.adaptation-fund.org/multilateral-implementing-entities>.

[49] Se Chapter II above, at 67.

(CERs) are determined by detailed regulations on the CDM project cycle,[50] aimed at guaranteeing that the project contributes to the sustainable development of the country and generates actual emissions reductions.[51]

1.3.1.The Executive Board

The EB is the supervisory body of the CDM established by the CMP[52] and covering numerous and crucial functions within the CDM project cycle. Among such functions, the EB approves new methodologies to assess the baselines and additionality[53] of project typologies; decides on the registration of each project in the CDM pipeline and on the issuance of CERs to project participants, once emission reductions are verified; it directly regulates substantive and procedural aspects of the mechanism; and it is competent on deciding about requests for reviews raised for individual projects.[54]

The EB comprises ten states representatives (and ten alternates) from Kyoto Protocol Parties with a mandate of two years and nominated according to a procedure guaranteeing geographical balance in the composition.[55] The decision-making rule is consensus with the supplementary exercise of a three-fourths majority of the EB meeting participants, if consensus on single items cannot be reached. The quorum for the validity of EB meetings is two-thirds of the members, while both a majority of Annex I and non-Annex I country

[50] For a comprehensive overview of the CDM project cycle see M Netto and K Barani Schmidt, 'The CDM Project Cycle and the Role of the UNCCC Secretariat' in D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (OUP 2009) 213-30.
[51] These are the two core principles of the CDM. See Kyoto Protocol, Article 12(2).
[52] Decision 3/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, para 5.
[53] A CDM baseline represents the business-as-usual emissions occurring for a given activity in the absence of a CDM project, while the concept of additionality consists of the requirement that emissions reductions would not take place without a CDM project. The concept of additionality as historically applied by the EB has been contested in several aspects. See A Michaelowa, 'Interpreting the Additionality of CDM Projects' in D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (OUP 2009) 248-271, at 249; and C Streck, 'Ensuring New Finance and Real Emission Reduction: A Critical Review of the Additionality Concept' (2011) 2 *Carbon and Climate Law Review* 158.
[54] Decision 3/CMP.1, *supra* note 52, para 5. On the role of requests for reviews as an accountability mechanism, see below section 4.2.
[55] More specifically, "[…] One member from each of the five United Nations regional groups, two other members from the Parties included in Annex I, two other members from the Parties not included in Annex I, and one representative of the small island developing States […]". Ibid., para 7.

representatives must be present.[56] EB members must hold sufficient technical expertise, take an oath of service and declare their conflict of interests for individual decisions.[57]

Given the different functions and role of this body in respect to the executive bodies of other climate funds, the CMP has bestowed the EB with peculiar regulatory powers that affect both states and private actors, as independent auditors, projects proponents and investors.[58] As a consequence, through years of practice the EB has generated a conspicuous amount of regulation specifying the standards laid down in CMP decision and addressing several substantive aspects. Importantly, it also adopted an internal rule clarifying the hierarchy of its classes of decisions and regulatory instruments.[59]

1.3.1. Designated National Authorities and Designated Operational Entities

A unique feature of the CDM is the inclusion of national authorities and private entities in the governance structure. Because the CDM is a voluntary mechanism seeking to promote sustainable development in developing countries, the modalities and procedures adopted by the CMP require that participating countries nominate a Designated National Authority (DNA) to confirm the national sustainable development requirements for each project and to issue letters of approval of proposed projects before the EB decides on their registration.[60] Thus, DNAs can potentially apply a preliminary filter as to the viability and compliance of proposed projects with national environmental and sustainable development laws of the host country. Contrary to the case of the national implementing entities in the Adaptation Fund, DNAs do not need to comply with any fiduciary or environmental and social standards, because they do not manage the financial resources mobilized for CDM projects.

[56] Respectively, Ibid., paras 15 and 14.
[57] See Ibid., para 8(e) and (f).
[58] C Streck and J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) 19 *European Journal of International Law* 409, at 416.
[59] See *CDM Executive Board Decision and Documentation Framework*, EB Rep. 67, Annex 4. Decision classes divide in i) Regulatory decisions; ii) Operational decisions; iii) and Rulings. Instead, the different types of instruments adopted are a) standards; b) procedures; c) guidelines; d) clarifications; e) ruling notes; f) information notes; and g) forms.
[60] Dec. 3/CMP.1, *supra* note 52, para 29.

Designated Operational Entities (DOEs) are private audit companies, which are accredited by the CMP under recommendation of the EB and are delegated with the task of securing that certain requirements are fulfilled by project developers during various phases of the project cycle. Differently from DNAs, DOEs need to fulfill special accreditation standards that promote independence and integrity of such entities.[61] The EB is responsible to monitor whether compliance with such requirements is maintained by each DOE and in case it can recommend the CMP to suspend or withdraw DOEs from accreditation. Finally, CDM regulations state that DOEs are accountable to the CMP and that in their activity they must comply with the national law of the country hosting CDM projects.[62]

1.4. The Green Climate Fund

As a brand new institution of the UNFCCC COP, the GCF has been set up to become a key player in long-term climate finance under the umbrella of the pledge made by industrialised countries to deliver a significant share of the 'Copenhagen pledge'.[63] At the time of writing the GCF is yet to become operational, although its Board has been adopting several decisions on key aspects for the future functioning of this institution. This means that any appraisal of the components and indicators of legitimacy of the GCF here is inevitably partial and might become outdated after future decisions and practice. Yet from the basic documents founding and framing the work of the GCF it is possible to grasp some defining features. In fact, the general structure of the GCF governance somehow replicates the one of other multilateral climate funds, by bestowing core executive functions on a Board, while administrative, financial management and implementing functions are respectively carried by an independent Secretariat, a trustee, and various implementing entities.

[61] Ibid., Appendix A. The standards are specified by an EB decision: see *CDM Accreditation Standard for Operational Entities*, EB Rep. 67, Annex 5.
[62] Ibid, at paras 26 and 27(c).
[63] See Chapter II above, at 57.

1.4.1. The GCF Board

The COP decision establishing the GCF sets up a Board comprising 24 states representatives (and 24 alternates) shared in equal number between developing and developed countries.[64] The Governing Instrument of the GCF[65] specifies that the 12 Board's seats for developing countries shall be distributed according to geographical constituencies.[66] The Board is accountable to and shall follow the guidance of the COP. It also has "full responsibility" for funding decisions.[67] GCF Board members are elected for a three years term and should match minimum expertise and technical skills in the area of climate change and development finance.[68] The affairs and meetings of the Board are directed by two co-Chairs, respectively nominated by the two developed and developing countries' constituencies.

Decision-making procedures are only broadly defined in the Governing Instrument: while the basic rule of decision-making is consensus, the same document leaves to the Board the definition of further procedures in case of lack of consensus on individual items. Being crucial for the functioning of the GCF, the matter is still under negotiations within the GCF, with the options being either a weighted and qualified majority vote according to states contributions, or simple qualified majority of the participants.[69]

The COP assigned an ample set of functions to the Board, which are found also in other multilateral funds, such as approving the necessary regulatory tools for operationalizing the fund, including access modalities, funding structures, project cycle procedures, and social safeguards and fiduciary principles. A particular task, however, is the possibility for the Board to establish additional 'thematic windows' of finance apart from adaptation and mitigation, in this way leaving the Board with some discretion on how to

[64] Decision 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, para 102.
[65] Adopted by the COP in Decision 3/CP.17, UN Doc. FCCC/CP/2011/9/Add.1, Annex. [hereinafter the GCF Governing Instrument].
[66] Three members from Asia-Pacific states; three from African; three from Latin American and Caribbean; one from Small Island Developing states; one from Least Developed Countries; and one from developing countries not belonging to any of those constituencies. See Ibid., para 11.
[67] Ibid., para 5.
[68] Ibid., para 11. An important innovation is the adoption of the principle of gender balance in the composition of the Board.
[69] See L Schalatek, *Setting the Course: the Third Meeting of the Green Climate Fund Board*, Heinrich Böll Stiftung, April 2013, at XI-XII, <http://www.boell.org/downloads/Boell_GCF_BM3_Setting_the_Course.pdf>.

structure its disbursement channels,[70] and to enter into inter-institutional arrangements with the aim of promoting complementarity with other parallel funds and financing mechanisms.[71]

1.4.2.The GCF Secretariat

The GCF is seconded by an independent Secretariat headed by an Executive Director elected by the Board. While resembling the figure of the GEF CEO, the Governing Instrument does not expressly assign to the Director any role in decision making on funding issues. Differently to the case of the GEF and the Adaptation Fund, the future GCF Secretariat will be based in the headquarters of the fund in Songdo in the Republic of Korea. However, in view of its full establishment, currently the GEF Secretariat is providing *ad interim* secretarial services. The GCF Secretariat is vested with administrative, legal, and financial management functions:[72] differently from the GEF, the GCF is conferred with legal personality and legal capacity limited to the exercise of its functions.[73]

1.4.3.The Private Sector Facility

As the pledge on long-term finance made by industrialized states envisions that part of the yearly USD 100 billion should come both from public and private sources,[74] the UNFCCC Parties have been careful in including in the governance structure of the GCF a Private Sector Facility.[75] While it is provided that the facility "[…] will promote the participation of private sector actors in developing countries, in particular local actors, including small- and medium-sized enterprises and local financial intermediaries […]",[76] it is still uncertain whether it will constitute just an additional access modality or if some level of participation

[70] GCF Governing Instrument, para, 18.
[71] Ibid., para 34.
[72] Ibid., paras 19-23.
[73] Ibid., para 17.
[74] Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 11 March 2011, para 99. The COP "[…] *agrees* that, in accordance with para 1(e) of the Bali Action Plan, funds provided to developing country Parties may come from a wide variety of sources, public and *private*, bilateral and multilateral, including alternative sources." [emphasis added[75] GCF Governing Instrument], paras 41-44.
[75] GCF Governing Instrument], paras 41-44.
[76] Ibid., para 43.

and decision making will be granted to the private sector within the governance of the GCF.[77]

1.4.4. The trustee and the evaluation unit

In the same fashion to other multilateral funds, the GCF will rely on the World Bank to provide administrative services as a trustee of the Fund. In this regard, the Governing Instrument also states that the trustee services shall be subject to review on a three year basis.[78] In addition and in similar fashion to the GEF, the Instrument also establishes an independent evaluation unit to carry periodical reviews on the performance of the fund.[79]

1.5. The Climate Investment Funds

The Climate Investment Funds (CIFs), forged in 2008 in the aftermath of the Bali Action Plan, represent a unique collaborative effort by the major Multilateral Development Banks (MDBs) to pilot concerted climate finance under a peculiar governance structure.[80]

The CIFs have been established by a recommendation of the Board of Executive Directors of the World Bank[81] and follow a bi-headed structure with the presence of two parallel Committees governing two separate funds, the Climate Technology Fund (CTF) and the Strategic Climate Fund (SCF). The rationale for this dichotomy is due to the different aims and administrative and governance requirements.[82] The CTF's scope is to "provide scaled-up financing to contribute to demonstration, deployment and transfer of low-carbon technologies with a significant potential for long-term greenhouse gas emissions savings."[83] On the other hand, the SCF supports the piloting of "new development approaches or to scale-up activities aimed at specific climate change challenge or sectoral response through

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[77] The recent options brought to the Board do yet not address this issue. See GCF, *Business Model Framework: Structure and Organization*, GCF/B.04/08, 10 June 2013, paras 11-21.
[78] See GCF Governing Instrument, paras 24-7. After the *interim* period, the new trustee will be appointed according to a bidding process.
[79] Ibid., paras 59-62.
[80] See also Chapter II, at 95.
[81] See *Minutes of Meeting of the Executive Directors of the Bank and IDA*, 19 August 2008, M2008-0052, para 3.
[82] See World Bank, *Climate Investment Funds: The Clean Technology Fund and the Strategic Climate Fund*, 9 June 2008, Doc. No 44168, para 21.
[83] Ibid., para 35.

targeted programs."[84] In other words, while the CTF targets long-term emissions reductions programmes in middle income countries, the SCF is envisioned as a flexible 'umbrella fund' to finance specific programmes. Currently the SCF branches off into a Forest Investment Programme, a Pilot Programme for Climate Resilience and a Programme for Scaling-Up Renewable Energy in Low Income Countries.[85]

1.5.1.The CIFs Committees

Both the CTF and SCF are governed by their own Trust Fund Committees (TFCs) comprising 18 members: eight representatives from contributor countries,[86] eight from recipient countries, a senior representative from the World Bank, and a representative of the other partnering MDBs as identified by the MDBs Committee.[87] Committee participants – elected for a period of 18 months– are divided between decision making and non-decision making members: accordingly, only states representatives can express consent or dissent on specific agenda items.[88] The decision-making rule is consensus, while there is no provision on majority vote with the consequence that, when objection is expressed by a Committee member, the matter is either rejected or postponed. [89] Both the Committees are chaired by two members, one from the contributor and one from the eligible recipient countries' groups.

The CIFs Committees are vested with functions similar to the other funds under analysis in this chapter. While they are responsible for approving general portfolio decisions and for deciding on the finance of individual projects and programmes,[90] a distinguishing

[84] Ibid., para 6.
[85] See <https://www.climateinvestmentfunds.org/cif/node/3>.
[86] To become a donor country Committee member a minimum contribution to the Trust Fund is needed.
[87] See respectively the *Governance Framework for the Clean Technology Fund*, November 2008, as amended in December 2011, para 19, <https://www.climateinvestmentfunds.org/cif/keydocuments/CTF>; and *Governance Framework for the Strategic Climate Fund*, November 2008, as amended in December 2011, para 14, <https://www.climateinvestmentfunds.org/cif/keydocuments/SCF> [hereinafter 'CIF Governance Framework Documents']. Interestingly, the membership of the CTF-TFC is also given to representative of recipient countries, when the Committee decides on projects proposed for that country.
[88] Ibid., respectively para 20, and 15.
[89] Ibid., respectively para 27 and 22. The quorum of the meeting is two-thirds of the decision making members. There is also the option of adopting decisions without physical meetings, based on a non-objection procedure. See *Rules of Procedure of the Meetings of the Trust Fund Committee of the Climate Technology Fund* and the parallel for the Strategic Climate Fund, November 2008, as amended in December 2011, <https://www.climateinvestmentfunds.org>.
[90] See CIF Governance Framework Documents, *supra* note 87, respectively at para 25 and 20.

feature is that specific access modalities procedures, fiduciary standards and environmental and social safeguards are applied by each MDB competent on the project.[91]

Given that the SCF is divided in sub-programmes, three additional sub-Committees have been created to match the different participation of contributing and recipient countries. Yet, whenever matters with relevance to both the CTF-TFC and the SCT-TFC are proposed, joint meetings of the two committees are convened.[92]

1.5.2. The MDBs Committee

The MDB Committee of the CIFs was recalled in a previous part of this work as an example of an inter-institutional effort to promote complementarity.[93] As the name tells, the MDB Committee is the body within the CIF governance where representatives of participating MDBs meet to promote general coordination, information exchange and monitoring of specific programmes and projects.[94] In particular, the MDB Committee is responsible *inter alia* for the identification of specific areas of cooperation among MDBs and the alignment of their programmes with the ones of the CIFs.[95] The MDB Committee does not have any decisional role in the governance framework, but, given that the specific policies and operational modalities of each MDB *de facto* apply to CIFs programmes, its existence is crucial in guaranteeing coordination and compatibility of those regulations with the CIF's aims. Another particular feature of the MDBs Committee is that it is responsible for reviewing recommendations prepared by the Administrative Unit:[96] arguably, this prerogative allows the MDBs Committee to substantially inform the work and decisions of the Trust Fund Committees.

[91] World Bank, *Climate Investment Funds*, *supra* note 82, para 26.
[92] This is not envisioned in the founding documents but done in practice.
[93] See Chapter III above, at 136.
[94] CIF Governance Framework Documents, *supra* note 87, para 34.
[95] Ibid.
[96] Ibid., 34(c).

1.5.3.The Administrative Unit, the Partnership Forum and the Trustee

Both administrative and trustee services of the CIFs are provided by the World Bank. Aside from typical administrative services, the CIFs Administrative Unit can also make recommendations on "programme criteria and priorities" to the two CIFs Committees.[97] The Governance Framework documents do not specify the level of legal independence of the Administrative Unit from the rest of the World Bank, hence it can be questioned whether *de facto* it is the World Bank to recommend the CIFs Committees on substantive issues.

A peculiar body of the CIFs is the Partnerships Forum, which works as a periodic stakeholder meeting open to different kind of governmental and non-governmental entities. Its significance in terms of opening to participation will be addressed below in the relevant part of this chapter.

1.6. The World Bank

In terms of personnel number, mobilised finance and pervasiveness in different regions of the world, the World Bank dwarfs all the other institutions in this comparative analysis. As seen in the first part of this work,[98] the World Bank Group, a group of five different legal entities,[99] was the IO created in the aftermath of World War II with the task of assisting the reconstruction, development and stabilization of states economies in difficulty. Originally, the idea at the Bretton Woods conference was to create a bank to support countries that at that time were severely affected by the devastation of the war. Through the years, the Bank – also through the legal opinions of its General Counsel– extended its mandate so as to cover

[97] Ibid., para 37(b).
[98] See Chapter II, at 84.
[99] The International Bank for Reconstruction and Development (IBRD), the International Development Agency (IDA), the Multilateral Investment Guarantee Agency (MIGA), the International Finance Corporation (IFC), and the International Centre for the Settlement of Investment Disputes (ICSID). A reminder is that throughout this work the term World Bank stands only for the IBRD and IDA, unless differently stated.

other areas of intervention for the purposes of international development.[100] The mandate extended to the promotion and protection of the environment.[101]

In sharp distinction with the other institutions addressed above, the World Bank is not a fund or a mechanism of hybrid finance. Like the other MDBs active in climate finance, it is a financial institution that leverages capitals by different means, including (and especially) by borrowing in global financial markets through its highly rated bonds.[102] From what it is emerging in this section, the World Bank is also the trustee and promoter of virtually all trust funds for climate financing under scrutiny here, including funds dedicated to carbon finance.[103] Moreover, it also provides logistical support to the AF and personnel administrative support to the Secretariats of the GEF and the CIFs, with the only difference that the latter are not formally independent from the World Bank's administration.

As a consequence, both for its size and its nature of an international financial institution this results in a different and complex governance structure which hinges on three main bodies: the Board of Governors, the Board of the Executive Directors and the President of the World Bank.

1.6.1. The Board of Governors and the Board of Executive Directors

The Articles of Agreement of the World Bank state that "all the powers of the Bank shall be vested in the Board of Governors".[104] The body comprises a member and an alternate for each of the Bank's members to serve for a period of five years, meeting at least once a year.

[100] IFI Shihata (ed), *The World Bank Legal Papers* (Brill 2000), 160-73.
[101] D Freestone, *The World Bank and Sustainable Development* (Martinus Nijhoff 2012), 9-10, who notices that this was done by interpreting an environmental mandate of the Bank according to the aim of mobilising capital for "productive purposes", according to Article I(i) of the Bank's Articles of Agreement.
[102] For general information, see <http://go.worldbank.org/LAG4BZ1VD1>.
[103] For the structure and list of the World Bank's funds see Chapter II above, at 81.
[104] *Articles of Agreement of the International Bank for Reconstruction and Development*, Washington DC, adopted on 27 December 1945, entered in force on 27 December 1945, 2 UNTS 39 [hereinafter 'the Articles of Agreement'], Section 2(a). The amended and updated version is <http://go.worldbank.org/WAUZA5KF90>. See also the *Articles of Agreement of the International Development Association*, approved for submission to Governments by the Executive Directors of the International Bank for Reconstruction and Development on 26 January 1960, 439 UNTS 249. The amended and updated version is <http://www.worldbank.org/ida/articles-agreement/IDA-articles-of-agreement.pdf>. The IBRD and IDA share the same governance and body composition although being two different entities. Boards' membership and Presidency of the IBRD is extended *ex officio* to the IDA to the extent the IBRD member is also a party to the IDA. In addition, the IDA shall not borrow or lend to the IBRD. See IDA Articles of Agreement, Section 6(a).

Given that currently the IBRD's membership counts 188 states and the IDA 172, in order to guarantee a more effective governance, almost the totality of the powers of the Governors has been delegated to the Bank's Board of Executive Directors.[105]

The latter is the organ that meets on a continuous basis to conduct the general operations of the Bank.[106] Currently, the Board counts 25 Executive Directors and alternates in charge for a term of two years,[107] five are appointed by each of the members with the largest number of capital shares, and the other 20 are elected by the remaining members divided in 20 constituencies,[108] according to voting procedures adopted by the Board of Governors during its annual meetings.

Being a capital-based institution, a crucial aspect of the World Bank's governance is its regulation on voting both for the Board of Governors and for the Board of Executive Directors. While the general rule of decision making is the majority of the votes,[109] the quantity of votes that can be cast by a member are equal to the sum of 'basic votes' equally distributed among all members, plus the 'share votes' which amount to the sum of the capital stock shares owned by each member.[110] If that is so for the Board of Governors, the Articles of Agreement specify that Executive Directors can instead cast a number of votes equal to the sum of basic and share votes related to their constituency.[111] Such a sophisticated weighted majority vote assigns different levels of voting powers to Governors and Executive

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[105] The crucial prerogatives that cannot be delegated by the Board of Governors are to: i) admit new members and determine the conditions of their admission; ii) increase the capital stock; iii) suspend a member; iv) decide appeals from interpretations given by the Board of Executive Directors; v) make arrangements to cooperate with other international organizations; vi) decide to suspend permanently the operations of the Bank; and vii) determine the distribution of the net income of the Bank. See the Articles of Agreement, Section 2(b).

[106] Ibid., Article V, Section 4(a).

[107] Originally the Articles of Agreement provided for a total number of 12 members with the possibility of increasing the composition with the 80 percent of the votes of the Board of Governors. See the Articles of Agreement, Article V, Section 4(b). On the current number of Executive Directors see <http://go.worldbank.org/N3GU9N02W0>.

[108] The five states with the largest capital shares are US, UK, France, Germany and Japan. There are also one-country constituencies for China, Saudi Arabia and Russia (sharing the constituency with Syria). For the list of current IBRD Executive Directors and their constituencies see <http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/BankExecutiveDirectors.pdf>.

[109] See the Articles of Agreement, Article V, Section 3(b). Exemptions are made for several circumstances like, for instance, the increase of number of the Executive Directors.

[110] Ibid. Section 3(a).

[111] See Ibid., Article V, Section 4(g). For the current list of voting powers see <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf>.

Directors, with the consequence that prominence is given to countries that hold high capital shares.

The Board of Executive Directors retains crucial duties and responsibilities including the ones of deciding on individual projects' finance and adopting or amending internal regulations.[112] These comprise a complex set of Operational Policies (OPs) and Bank's Procedures (BPs) directed to the Bank's staff and management.[113] Among other matters, these regulations lay down several social and environmental safeguards in relation to projects and set rules on the establishment and management of trust funds.[114] As to be treated below, the relationship between World Bank's internal regulations on trust funds and the structure of the other institutions treated here is relevant for a comparative understanding of different governance choices.[115]

1.6.2. The President, the administrative structure, and the Independent Evaluation Group

The third key figure of the World Bank's governance is its President which is elected by the Board of Executive Directors and stays in charge until the Board decides so.[116] The President is responsible for the conduct of general affairs of the bank and is the chief of staff of the Bank. The President does not have any voting power unless his vote is required to define a majority.

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[112] The IBRD By-laws, <http://go.worldbank.org/3PMBT6T7E0> state in Section 15 that: "The Executive Directors are authorized by the Board of Governors to adopt such rules and regulations, including financial regulations, as may be necessary or appropriate to conduct the business of the Bank."

[113] DD Bradlow and DB Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010), at 26, who speak of a 'soft *lex specialis*' enacted by the Bank. The World Bank Operational Policies and Bank's Procedures (OPs and BPs) are <http://go.worldbank.org/4D2JSWFIW0>.

[114] See, respectively, OP series 4, and OP 14.40.

[115] See the sub-section 1.7 below.

[116] Articles of Agreements, Article V, Section 5(a). The seat is traditionally reserved to a US representative while the presidency of the International Monetary Fund to a European.

A complex and distributed administration underpins the operations of the Bank and is divided in several departmental units with more than 9.000 employees and 100 national and regional offices around the world.[117]

Finally, and in line with the experience of the GEF, the Bank has an Independent Evaluation Group with 30 years of experience in independent assessments of the Bank's performance both at project and country level. The group is a unit internal to the administration which reports directly to the Board of Directors.[118]

1.7. Analysis of internal governance and decision making

There are already some outcomes, which are worth carving out from the analysis of this the first regulatory factor as adopted in the previous chapter.[119] There are two different angles, both relevant under a legal perspective, from which it is possible to make a comparative appraisal of the internal governance and decision making. The first one relates to the composition and decision-making rules within the various executive bodies of those institutions, because they assign different weight to industrialized and developing countries respectively. The second relates to how and to what extent governance structures have developed and informed the governance of other institutions.

There are many similarities and some discrepancies between the various organs' compositions and their decision-making rules. In general and to different degrees, however more decisional power is granted to developed states contributing to the various funds. Such finding does not come as surprise, since its rationale can be explained by the interest of donor countries in ensuring control on the sound and efficient disbursement of finance. Nevertheless, it can still be questioned whether this model of governance still reflects not

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[117] See <http://go.worldbank.org/B6U4HPNDS0>

[118] See World Bank, *Operations Evaluation Department: the First 30 years*, 2003, <http://lnweb90.worldbank.org/oed/oeddoclib.nsf/24cc3bb1f94ae11c85256808006a0046/5c22e38fcca5c9e285256d1f0071dc19/$FILE/OED_30yrs.pdf>.

[119] See Chapter IV above.

only the political balances in UNFCCC negotiations,[120] but also whether it complies with the requirement of "equitable and balanced representation of all Parties" stressed in the UNFCCC[121] as well as with the principle of country ownership set forth in the Paris Declaration on Aid Effectiveness.[122] More importantly, it might be questioned whether the model accurately reflects a reasonable fairness threshold of this regulatory factors in relation to the particular nature of climate finance, which does not and should not boil down to mere official development assistance.

On the other side, it must be noticed also a recent shift towards enhanced developing countries representation and voting weight as marked by the AF and the GCF, although for the latter it will much depend on the not yet defined voting rules of the GCF Board.

Proposing, then, a division of decision-making processes between those that favor contributing states and those that instead assign a stronger role to the recipients of finance, the following distribution emerges:

Table 1: Contributing and recipient countries' prevalence in executive organ's membership and decision making rules of selected climate finance institutions

Contributing countries' prevalence	**Neutral**	**Recipient countries' prevalence**
World Bank	CIFs	AF
GEF's Funds	CDM	
	GCF	

[120] On the changed political dynamics in climate negotiations see Chapter I, at 22.
[121] UNFCCC, Article 11(2). It might be argued however that the provision refers exclusively to the Financial Mechanism of the Convention and not to entities external to the UNFCCC, it therefore would be of relevance only for the GEF and the GCF as appointed operational entities.
[122] OECD, *Paris Declaration on Aid Effectiveness and the Accra Plan of Action*, done respectively on 2 March 2005 and 4 September 2008, para 14, <http://www.oecd.org/development/effectiveness/34428351.pdf>. Although not binding under international law, the principle of country ownership applies at all the levels of international aid. As to other institutions and other multilateral fora, para 14 of the Paris Declaration might be relevant inasmuch it states that recipient countries will "Take the lead in co-ordinating aid *at all levels* in conjunction with other development resources in dialogue with donors and encouraging the participation of civil society and the private sector." [*emphasis* added].

Both the World Bank and the GEF grant ample representation in their 'political bodies' to all participant states. Yet when it comes to their executive organs, weighted majority rules take into account the economic effort of each state in the capital base or in the trust funds, and as a consequence, this results in a stronger influence of industrialised states in the decision making processes. Certainly, the core differences as to the governance of the two institutions must be taken into account, especially for the reason that the World Bank is an international financial institution based on a corporate model, while the GEF is primarily a trust fund managing entity, whose corporate governance nature is only partial.[123]

On a more neutral position, the Green Climate Fund, the CIFs and the CDM hold a balanced decision making structure between industrialized and developing countries. However, such balancing takes place by different means, as the institutions act according to very dissimilar climate finance modalities, whereby the GCF and the CIFs operate under a multilateral, trust fund-based finance model, and the CDM being a hybrid mechanism rather works according to the logics of the carbon markets. As described above, the Board of the GCF counts an even share of members between developed and developing countries,[124] while voting rules are yet to be defined. Similarly, the two CIFs' Committees guarantee an even membership between contributing and recipient countries and decide exclusively under consensus. In the case of the CIFs (but also of the GCF if no further rules are adopted), the lack of any weighted or simple majority vote is significant to the extent that decisions can be blocked by express objections from at least one Committee member, representing either a contributing or a recipient country.

Conversely, a balance between Annex I and non-Annex I countries in the EB is maintained by the wide geographical representation of the ten EB members and through a qualified majority vote that takes into account both countries blocks. Furthermore, the

[123] The two elements that suggest a corporate model of governance are: i) the weighted majority vote depending on the positive representation of at least 60% of the total financial contributions; and ii) the existence of a CEO with some crucial decision making powers, especially in regards to final approvals in the project cycle.
[124] Interestingly, the constituency divide is between developed and developing countries, rather than Annex I and non-Annex I countries, or between contributing and recipient countries.

peculiar nature and governance structure of the CDM eventually assigns even more control on individual projects to developing countries, given the role of DNAs in granting the legal viability of each project in the approval cycle. Differently from multilateral finance, this however does not ensue that developing states can decide on the actual disbursement of finance through the CDM, as that depends on numerous external factors, including, for instance, the demand of CERs in the carbon market and the diverse investment environments in developing countries.[125]

The only institution that adopts a decision making model clearly favoring developing countries is the AF with more than half of its Board members representing non-Annex I countries. This is coupled with a qualified majority, in case of lack of consensus, according to a one-head-one-vote rule. If the Adaptation Fund, then, constitutes a unique model among the most important climate finance institutions,[126] the nature and scale of resources channeled under the supervision of the AFB are instead quite modest,[127] because stemming from a previous arrangement in the Kyoto Protocol and the COP that a small percentage of the proceeds from CDM activities would have been set aside for adaptation. These two factors can be interpreted as to reduce the actual impact of developing countries in the governance of climate finance, as they exert a major role in an institution that channels modest amounts of finance.

In regards to the influence and migration of governance structures among parallel institutional experiences, it emerges that two main models prevail: namely, the model of multilateral trust funds on one side and, on the other, the one of MDBs. In fact, with the exception of the CDM, all UNFCCC institutions and the CIFs are based on a multilateral

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[125] Arguably, the latter factor explains why only 2 percent of CDM registered projects are located in African countries. See the official statistics at <http://cdm.unfccc.int/Statistics/Public/files/201305/proj_reg_byRegion.pdf>.

[126] Especially in terms of access modalities as will be seen below.

[127] By June 2012 the total funds available to the AFB were USD 112.8 million. See Decision 3/CMP.8, UN Doc. FCCC/KP/CMP/2012/13/Add.2, 28 February 2013 para 3. By contrast as of June 2013, the Pilot Programme for Climate Resilience under the CIFs' Strategic Climate Fund has attracted USD 1.3 billion in pledges and allocated USD 399 million in co-financing projects. See <https://www.climateinvestmentfunds.org/cif/ppcr>.

trust fund model, broadly construed on the interaction of two bodies, one (plenary) of general policy making[128] and the other of executive nature (a Council, a Board or a Committee), seconded by an independent Secretariat. The provenance of such model might either come from the UNDP experience with its Multi-Partner Trust Funds or from the World Bank practice. In particular the World Bank influence in the governance structure is signaled by its role as a trustee of all the climate funds here object. An OP of the World Bank sets the characteristic and modalities for the establishment of its trust funds[129] and provides by principle that "[…] the Bank encourages trust funds that draw on its operational role".[130] However, among the provision of this policy there are no direct conditions on the governance that the World Bank should impose when creating with participant entities a multilateral trust fund.[131] The specific features are instead left to the particular arrangements made on each case.[132] Nonetheless, a remarkable influence by the World Bank emerges, if one puts the various climate funds in a historical context. Accordingly, the Bank was the creator of the GEF pilot, and was among the constituting entities of the restructured GEF. Subsequently, it established the CIFs in agreement with other MDBs and participating states and, finally, it actively participated to the negotiations for the GCF during the work of its Transitional Committee.[133] Understanding the strength of the World Bank's political pull falls outside the object of this work, but –staying within the boundaries of a legal enquiry– it can be argued that the World Bank has influenced the governance models of the various UNFCCC funds. There are two other elements to support this finding: one is the presence in the GEF and the GCF of independent evaluation units within the governance structure,

[128] The UNFCCC COP is the general policy making body for the Adaptation Fund and the GCF. That is partially true for the GEF, which has its own annual Assembly.
[129] World Bank, *Trust Funds*, OP 14.40, adopted on 1 July 2008 and amending the previous Operational Memorandum dated 16 June 1998, <http://go.worldbank.org/R0724M1S40>.
[130] Ibid., para 1.
[131] The same OPs specify that the Bank recognizes three different types of trust funds: i) Recipient Executed Trust Funds; ii) Bank Executed Trust Funds; iii) and Financial Intermediary Funds. The climate funds at object belong to the third category as they are "[…] funds that involve financial engineering or complex finance schemes, or where the Bank provides a specified set of administrative, financial or operational services." See Id., para 4(iii).
[132] I Bantekas, *Trust funds under International Law: Trustee Obligations of the United Nations and International Development Banks* (Cambridge Univ. Press 2009), at 69-77.
[133] See Chapter II above.

which replicate the World Bank's Independent Evaluation Group; the second, is the fact that the secretariats of these funds are either located in the World Bank's headquarters or directly managed by it.

The second prevailing model of governance is not the one of multilateral trust funds as promoted by the World Bank, but the World Bank itself. This finding partially shies away from the comparative analysis above and instead recalls the overview proposed in the first part of this work, where it was noticed an active involvement in climate finance not only by the World Bank, but from all the major MDBs. Given that these institutions mirror the World Bank's corporate governance model,[134] this confirms the finding above that the internal governance architecture of climate finance institutions is designed to assign a prominent role to contributing states.

2. ACCESS AND DISBURSMENT MODALITIES

As the second regulatory factor for the analysis, access and disbursement modalities constitute a key element in the internal processes of climate finance institutions and can reasonably provide meaningful insights as to the legitimacy of an institution in relating with its stakeholders. As the name suggests, this regulatory area addresses several key matters of resources allocation and project cycle management, such as the division of financial resources among different focal areas (e.g. mitigation, adaptation, capacity building, etc.), eligibility and priority criteria for beneficiary states, and role division between entities implementing the projects. In other words, access and disbursement modalities determine some significant conditions for tapping into financial resources.[135]

[134] Bradlow and Hunter, *International Financial Institutions and International Law*, *supra* note 113.
[135] Other types of conditions for financing are the so called 'conditionalities' in financial agreements. They have been treated above in Chapter I, at 43.

Because different levels of institutional complexity and regulatory overlaps can be traced in this context, this can also be taken as a factor affecting process-based legitimacy; more specifically as an articulation of the dynamics occurring among all interested actors, in particular states and implementing agencies. In the same vein of the previous discussion on the internal governance, for the factor of access modalities a fruitful means of comparison is to address the whether the way the process is construed fulfills more the interests of contributing or recipient countries.

This assertion does not entail that the structural differences between processes are the only determinant of legitimacy. For instance, it was recalled in the first part of this work[136] that other key substantive issues also shape the way recipient countries access climate finance: namely, the limit of incremental costs in mitigation, additionality as a condition for finance, other contractual conditionalities imposed on recipient states by climate funds and implementing agencies, and the type of financial instrument used. Nonetheless, as this part of the chapter will clarify, the secondary laws of climate finance institutions attribute relevant roles to implementing agencies, national administrations and private actors at such different levels, that they satisfy on different levels the various interests of developed, recipient countries and other institutional actors. Complexity of access and disbursement modalities can be necessary, beneficial, but also detrimental to the level of legitimation of an institution. It is necessary, because it is widely recognized that the channeling of development finance should promote integrity, in a way that resources are spent in an efficient manner and wield measurable results;[137] thus, complexity can be beneficial to the legitimating process, because it can enhance the robustness and effectiveness of financing through detailed regulations and participation of different entities in implementation

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[136] See Chapter I above.

[137] See, for instance, the 2008 OECD Accra Plan of Action adopted in the aftermath of the Paris Declaration of Aid Effectiveness, *supra* note 122, at para 10, stating that: "*Achieving development results – and openly accounting for them – must be at the heart of all we do.* More than ever, citizens and taxpayers of all countries expect to see the tangible results of development efforts. We will demonstrate that our actions translate into positive impacts on people's lives. We will be accountable to each other and to our respective parliaments and governing bodies for these outcomes."

phase.[138] Conversely, complexity can also lead to misalignments between the same entities and recipient states' development strategies, to sluggish and ineffective procedures, and can eventually frustrate recipient states and other finance beneficiaries.[139] This second aspect has been also addressed in the previous Part under the issue of regulatory overlaps.[140]

Finally, two methodological issues should be clarified. First, it must be stressed how the following areas of analysis are strictly related to –if now even undistinguishable from– the factor of 'internal governance' addressed above. Given the indeterminacy at start of the term 'governance', access modalities, accountability, and participation to the institutional life can also be understood as components of the internal governance of an institution. Therefore, although perhaps appearing artificial, the distinction here is only instrumental to a structured discourse. Secondly, in regards to structure, the following analysis throughout the whole chapter will not divide between each institutional experience, but will rather gather and address jointly common elements and differences, for the reason that the matter can adequately be treated with less detail of description.

2.1. Countries eligibility requirements, resources allocations and project cycles

2.1.1. The GEF and the CIFs

As emerged in the context of their internal governance, both the GEF and the CIFs constitute a cooperative initiative of multilateral institutions. The GEF Instrument is an agreement adopted between the World Bank, UNDP and UNEP, and only subsequently, participated by states, whereas the CIFs have been established via a resolution of the Board of the Executive Directors of the World Bank and operationalized through so called Financial Procedures

[138] In broader terms, as seen in the previous chapter complexity might work in this way as 'procedural fairness' according to the framework proposed by Frank. See TM Franck, *Fairness in International Law and Institutions* (Clarendon Press 1997) at 7-9. Another way of viewing this side of regulatory complexity is from the perspective of output legitimacy: see the related discussion in Chapter IV above, at 156.

[139] Such a negative view of complexity emerged in regards to the previous GEF's access modalities and in particular with its Resource Allocation Framework (RAF).

[140] See Chapter III above, at 118.

Agreements (FPAs) between the World Bank, acting as a trustee of the CIFs, and the other participating MDBs.[141]

Eligibility requirements for recipient countries differ between the two institutions, with the GEF potentially including a broader array of countries. As regards the climate change focal areas managed by the GEF, its Instrument provides that criteria of eligibility shall be the ones individuated by the UNFCCC and its COP's decisions.[142] In implementation of the relevant UNFCCC provision,[143] the COP clarified that non-Annex I countries are all eligible to receive finance, as representatives of the developing countries group.[144] The general governance framework documents of the CIFs instead provide that country access to the funds is conditioned by eligibility to i) Official Development Assistance according to the OECD-DAC guidelines;[145] and to ii) the existence of an active MDB lending programme or policy dialogue in the candidate country.[146] These two are however only the first requirements for eligibility, given that additional requirements are established for each fund or pilot programme.[147]

Parallel to the criteria of country eligibility, the issues of resources allocation and project approval process are also of key importance to understand and compare different

[141] The FPAs are not disclosed by the MDBs, although their existence is confirmed by related documents or agency presses. See, for instance, the African Development Bank communiqué at <http://www.afdb.org/en/news-and-events/article/afdb-approves-climate-investment-funds-implementation-7198/>.
[142] GEF Instrument, *supra* note 3, Article I, para 9(a) and (c).
[143] UNFCCC, Article 11 endows the COP with the duty to identify eligibility criteria.
[144] On such rule development see F Yamin and J Depledge, *The International Climate Change Regime* (CUP 2004), at 272-3. In addition it should be noted that the GEF has adopted additional criteria of eligibility according to its resource allocation frameworks. The last of these, the System for a Transparent Allocation of Resources (STAR) adds the following eligibility requirements for potential recipient countries: i) Not to be a member of the EU as of July 2010; ii) and to have had at least one national project in the past 5 years. See *System for Transparent Allocation of Resources*, GEF/P.3, 24 June 2010, para 10, <http://www.thegef.org/gef/sites/thegef.org/files/documents/document/GEF.P.3.2010-1.pdf>.
[145] The list, updated every three years, is accessible at <http://www.oecd.org/dac/stats/DAC%20List%20used%20for%202012%20and%202013%20flows.pdf>.
[146] CIFs, *Governance Framework for the Clean Technology Fund*, *supra* note 82, para 13.
[147] An example is the Forest Investment Programme under the Strategic Climate Fund, it is stated that the FIP Sub-Committee is endowed to make a pre-section of developing states and pilot projects, only after that the potential host state, with the support of the MDB can accept to proceed through the financing procedure. See CIFs, *FIP Operational Guidelines*, 29 June 2010, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/FIP_Operational_Guidelines_final.pdf>.

access and disbursement modalities. As to the first matter, the GEF, after completing each replenishment cycle, usually adopts or modifies its indicators and criteria for allocation of resources among its various focal areas and countries. Interestingly, it does not carry out the process under the aegis of the GEF Assembly, but according to separate GEF replenishments, where no specific rules on contribution to decision-making by recipient countries are provided.[148] The current System for a Transparent Allocation of Resources, adopted during the fifth replenishment of the GEF, builds up from the previous, and highly criticized, allocation system[149] and identifies, through various environmental and economic indicators, individual countries allocations that work as finance 'envelopes', available for application by recipient countries and implementing agencies.[150] Conversely, the CIFs do not have a clearly defined procedure for resources allocation, especially because of the different nature and aims of the various funds under its umbrella. Thus, there is no formal ranking among potential recipient countries for the CIFs Clean Technology Fund;[151] instead a set of priorities is listed to guide the decision of the CTF Committee to approve finance for country investment plans, prepared by the recipient government together with the relevant MDB.[152] A preliminary individuation of pilot countries and resource allocation has taken place under the three programmes of the Strategic Climate Fund, but –differently from the GEF process which depends on the UNFCCC COP guidance– the criteria and individuation of resources allocation has been delegated by each SCF sub-Committee to different expert groups.[153]

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[148] See above in this chapter.

[149] The Resources Allocation Framework of the fourth GEF replenishment has been both criticized by developing countries and by an independent evaluation. See *Fourth Overall Performance Study of the GEF¸* Full Report, April 2010, at 65-67, <http://www.thegef.org/gef/sites/thegef.org/files/documents/FULL%20REPORT_OPS4%20Progress%20Toward%20Impact_0.pdf>.

[150] The current country allocations can be found at <http://www.thegef.org/gef/STAR/country_allocations>.

[151] See *Climate Investment Funds: the Clean Technology Fund and the Strategic Climate Fund*, *supra* note 82, para 41-3.

[152] Ibid..

[153] See CIFs, *The Selection of Countries to Participate in the Pilot Program for Climate Resilience* (PPCR), January 2009, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/PPCR_Selection_of_Countries_to_Participate_Report_of_the_Expert_Group_final.pdf>; CIFs, *Criteria for Selecting Country and Regional Pilots under the Forest Investment Program*, 29 October 2009,

Despite different rules of eligibility and allocation find application, both the GEF and the CIFs adopt a similar approach to projects approval, which attributes a significant role to the various implementing agencies. The GEF regulation divides between different project types according to the amount of investment and actors involved.[154] Full-sized projects, amounting to at least to USD 2 million of GEF finance, need to pass through a three-tiered project cycle procedure,[155] consisting of an initial application prepared by a GEF implementing agency under the support of the potential recipient country. The application is firstly cleared by the GEF CEO and then reviewed by the relevant Convention Secretariat (in our case the UNFCCC Secretariat) and, importantly, by other GEF Agencies.[156] The second step is aimed to embed the project within a more extensive work programme to be approved by the GEF Council. Finally, in order to align the GEF and agencies' policies in relation to the project, the third step before the actual disbursement sees again the final CEO endorsement of the final project documentation prepared by the implementing agency according to its internal regulations.[157]

The CIFs' process shows a lower number of procedural steps towards project approval and disbursement. This is probably due to the fact that the various CIFs Committees rely significantly on the regulations and policies of each MDB involved as an implementing agency, rather than applying also their own standards, or guidance in connection with the

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<https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/criteria_selecting_country_regional_pilots_key_doc_120909_0.pdf>; and CIFs, *Criteria for Selecting Country and Regional Pilots under the Program for Scaling Up Renewable Energy in Low Income Countries*, 26 March 2010, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/SREP_Criteria_for_Selecting_Country_and_Regional_Pilots_under_SREP_final.pdf>.

[154] Full-sized projects consist of projects requiring GEF finance above USD 2 million. Below that threshold the GEF identifies medium-sized projects, enabling activities and small grants. While enabling activities aim to finance developing countries in the preparation of national communications under UNFCCC Article 12, small grants are aimed financing activities of non-governmental organizations. See GEF Council, *GEF Project Cycle: An Update*, GEF/C.22/Inf.9, 5 November 2003, para 14, <http://www.thegef.org/gef/sites/thegef.org/files/documents/Loc...Update__FINAL__Nov_5_2003.pdf>.

[155] GEF, *Policies and Procedures for the GEF Project Cycle*, GEF Policy Paper, November 2008, <http://www.thegef.org/gef/sites/thegef.org/files/documents/GEF%20Policies%20and%20Procedures%20for%20GEF%20Project%20Cycle.pdf>.

[156] It is at this level of project formulation that GEF agencies address their respective comparative advantages in the specific project. As seen in chapter II, this has led to harsh contrasts among these entities. For the current criteria in assessment of GEF agencies comparative advantage, see GEF Council, *Comparative Advantage of the GEF Agencies*, GEF/C.31/5, 15 May 2007, < http://www.thegef.org/gef/sites/thegef.org/files/documents/C.31.5%20Comparative%20advantages.pdf>.

[157] GEF, *Policies and Procedures for the GEF Project Cycle*, *supra*, para 15.

Convention's financial mechanism it implements.[158] Hence, the operationalization of the CIFs was started with the submission of general investment plans, prepared by an MDB in collaboration with a candidate recipient country.[159] As a framework document specifies, "[…] [investment plans] are the business plans of MDBs, developed under the leadership of the government, to assist a country with CTF co-financing in implementing its national development strategies or programmes that include low carbon objectives."[160] Investment plans, then, pass through the scrutiny of the competent CIF Committee and, only if approved, the requesting MDB can submit individual project proposals for finance within the investment plan framework.[161] Compared to the GEF project cycle, the CIFs process does not envision the preliminary approval of the initial project idea, while both seem structured in a way that favors individual projects or programmes to enter within the broader framework of MDBs and individual countries development strategies.

2.1.2. The Adaptation Fund

An alternative approach in terms of reduced complexity and enhanced access to funds by developing countries has been adopted by the AF. Differently from the GEF and the CIFs, governments of recipient countries can directly apply to the Adaptation Fund Board for the financing of the full costs of concrete adaptation projects or programmes.[162] This approach represents the first experience of direct access by recipient countries in climate finance and its rationale can be found in the aim to by-pass the intermediary role of international implementing agencies. Direct access modalities under the Adaptation Fund require potential

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[158] A general linkage by the CIFs with the UNFCCC is the statement in their founding document that the CIFs shall follow the UNFCCC principles. See World Bank, *Climate Investment Funds: The Clean Technology Fund and the Strategic Climate Fund*, *supra* note 82, para 20.

[159] The document establishing the CIFs states that it is the potential recipient country to express interest to the MDB. Following, the MDB organizes joint missions aimed at liaising with the local government, private sector and other stakeholders, before preparing the investment plan. Country investment plans have been amended through time. See World Bank, *Climate Investment Funds: The Clean Technology Fund and the Strategic Climate Fund*, *supra,* para 18.

[160] CIFs, *Clean Technology Fund: Guidelines for Investment Plans,* 6 August 2009, para 7, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/Guidelines_CTF_Investment_Plan_Revised_After_approval_of_Disclosure_policy_FINAL.pdf>.

[161] See World Bank, *Climate Investment Funds: The Clean Technology Fund and the Strategic Climate Fund*, *supra*.

[162] Decision 1/CMP.3, UN Doc. FCCC/KP/CMP/2007/9/Add.1, 14 March 2008, para 29.

recipients to request accreditation of a national agency as a National Implementing Entity (NIE) for the Fund.[163] Unsurprisingly, accreditation is not an automatic process but requires a compliance check of the candidate entity with minimum, capacity, transparency, and financial integrity standards.[164] At the time of writing there are 15 accredited NIEs.[165] Yet it must be noted that direct access to the AF is just one of the options for potential recipient countries, since they can also resort to the collaboration of accredited multilateral implementing agencies when applying for finance. In regards to eligibility criteria and allocation of resources, a decision by the CMP sets the general principle that targeted countries –apart from being developing country parties to the Kyoto Protocol– should also be the "[…] ones particularly vulnerable to the adverse effects of climate change".[166] In specifying this requirement, the AF Board adopted a series of indicative criteria to inform decision making for individual projects,[167] which also worked as starting ground for the process of division of resources among potential recipients: eventually the AF Board opted to maintain a cap of USD 10 million per eligible country.[168] Thus although on a less sophisticated manner, a similar approach to the GEF's 'country envelopes' has been adopted also for the Adaptation Fund. Finally, the Adaptation Fund's project cycle is divided between small-sized and full-sized projects, with the latter amounting to more than USD 1 million for project funding. Similarly to the GEF, the difference between the two project cycles stands on the lower number of administrative steps leading to final disbursement. In the case of full-sized projects, after express approval of a national administration, accredited entities present to the AF Board an initial project proposal which is screened and commented

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[163] AF, *Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund, supra* note 47, para 27.
[164] Ibid., para 33.
[165] See <https://www.adaptation-fund.org/national-implementing-entities>.
[166] Decision 1/CMP.4, *supra* note 45, para 10.
[167] Namely, (a) Level of vulnerability; (b) Level of urgency and risks arising from delay; (c) Ensuring access to the fund in a balanced and equitable manner; (d) Lessons learned in project and programme design and implementation to be captured; (e) Securing regional co-benefits to the extent possible, where applicable; (f) Maximizing multi-sectoral or cross-sectoral benefits; and (g) Adaptive capacity to the adverse effects of climate change. See AF, *Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund, supra*, para 16.
[168] Decision B.13/23, see *Report of the Thirteenth Meeting of the Adaptation Fund Board*, 18 April 2011, para 67, <https://www.adaptation-fund.org/sites/default/files/AFB13%20Final%20Report_0.pdf>.

by the AF Secretariat and an *ad hoc* technical committee. Following the preliminary approval, the same accredited entity submits a full proposal and, only after the final approval by the AF Board, subsequently receives the agreed finance.[169]

2.1.3. The Green Climate Fund

Despite not yet operational, the GCF is likely to be underpinned by a complex set of rules addressing its access and disbursement modalities. This might be the case not only because of the wide financing ambitions of the fund, which will span from adaptation to mitigation in various sectors of national economies, but also because the founding decisions of the COP already contain initial directions about its regulatory structure. In fact, the Governing Instrument for the GCF states that eligible countries to finance are the developing country Parties to the UNFCCC[170] and not –as it stands for the current GEF funds– non-Annex II countries. Although this might appear a formality,[171] it might assume importance once the GCF begins its activities, given the fact that the expression 'developing country' does not provide an identifiable number of states as it is now the case.

Further, the same document envisions an approach very similar to the one of the AF, with the concurrent presence of direct access by national recipient entities and an 'international access' whereby recipient countries "will also be able to access the Fund through accredited international entities, including United Nations agencies, multilateral development banks, international financial institutions and regional institutions."[172] In terms of resources allocation between founding areas and eligible countries the Governing Instrument only traces some broad principles about the need by the GCF Board to strike a balance between resources mobilized towards mitigation and adaptation, and the focus on

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[169] AF, *Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund, supra* note 47, paras 42-5.

[170] See *Governing Instrument for the Green Climate Fund*, Decision 3/CP.17, *supra* note 65, Annex, para 35.

[171] Yamin and Depledge comment that in the climate regime it is *de facto* assumed that developing countries are non-Annex II countries. However, this might not be maintained anymore in the context of a new international agreement on the climate. See Yamin and Depledge, *The International Climate Change Regime*, *supra* note 147, at 267.

[172] See *Governing Instrument for the Green Climate Fund*, *supra*, paras 47-8.

LDCs on the latter.[173] An innovative feature in terms of access is the establishment of a 'private sector facility' within the GCF which will "[…] directly and indirectly finance private sector mitigation and adaptation activities at the national, regional and international levels". This type of direct access by the private sector has been experimented only at pilot level by the GEF and the CIFs, and because of the early stage of its definition it is uncertain if and how the GCF will build up from those experiences.

2.1.4. The World Bank and the Clean Development Mechanism

A comparison under the access and disbursement modalities standard becomes difficult, when it comes to canvass the World Bank and CDM, for the simple reason that both the entities do not replicate the international trust fund governance model, which typically has as a core component the norms that regulate access to its pooled resources. The World Bank is together with other MDBs a financial institution with a broad mandate to poverty alleviation and finance for sustainable development, which includes climate finance as a part of their wide strategies. Being a development bank, the World Bank raises and distributes resources according to international financial practices of capital leveraging in global financial markets and loan or credit agreements with 'client' countries.[174] Concurrently, the CDM is a hybrid mechanism of climate mitigation finance where capitals (private and public) are sourced and mobilized according to a complex set of investment factors,[175] primarily driven by the level of revenues that investors can accrue by receiving and selling CERs in the carbon market. Despite these differences, there are nevertheless some elements that become relevant to address the regulatory complexities of these institutions in relation to their capacity to mobilize climate-related finance.

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[173] Ibid., paras 50-2.

[174] For more details on the financial practices of the World Bank and MDBs see Chapter II above, at 78.

[175] On the other possible factors influencing CDM projects distribution see SM Rahman, DF Larson, and AI Dinar, 'The Cost Structure of the Clean Development Mechanism', November 2012, World Bank Policy Research Working Paper No 6262, <http://elibrary.worldbank.org/docserver/download/6262.pdf?expires=1373892027&id=id&accname=guest&checksum=5AECA5FC851748C5D289F7FE46380B84>.

Neither the World Bank's Articles of Agreement nor its internal regulations define any procedure through which recipient countries or other entities can actively apply to its finance. Simply put, the World Bank does not provide any rules on access in a strict sense. In addition, being different from a multilateral trust fund model, it does not rely on the work of other implementing agencies to manage and finance climate related projects: that is also because of its high and distributed capacity to act as a technical implementing agency on its own. Nonetheless, there is a complex set of internal procedural steps that guide the World Bank to the definition and offer of its financial products to recipient countries, which *lato sensu* amount to the procedural means according to which the World Bank selects countries and distributes its finance.

Generally speaking, all states members of the World Bank are eligible to receive finance,[176] upon condition that they are potentially able to repay both the principal and interest rate from the project's loan.[177] A distinction is further drawn between countries eligible to either the IBRD, IDA or their joint financing, based on different economic indicators used as proofs of their debt sustainability and ability to repay. Accordingly, only countries with low gross national income per capita are eligible to receive IDA finance at better conditions.[178]

The World Bank's choice to offer finance to a climate-related project or programme is driven by a highly complex internal process. In a nutshell, it must find basis from Country Assistance Strategy (CAS) reports that are prepared every four years for each potential client country by the Bank's regional offices in cooperation with the country administration.[179] A CAS generally takes stock of the previous financing activities of the World Bank and

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[176] Article III, Section 1(a) of the IBRD Articles of Agreement (*supra* note 104) reads: "The resources and the facilities of the Bank shall be used exclusively for the benefit of members with equitable consideration to projects for development and projects for reconstruction alike."
[177] See Ibid., Article III, Section 4. In case of IDA credit no interest-based financial instruments are agreed with the recipient country.
[178] See The World Bank Operational Manual, OP 3.10, Annex D, July 2013, <http://siteresources.worldbank.org/OPSMANUAL/Resources/OP310_AnnexD_June27_2013_Final.pdf>.
[179] See World Bank, *Country Assistance Strategies*, BP 2.11, revised April 2012, <http://go.worldbank.org/79F6YYJWC0>.

outlines the changing economic and political scenarios of a country together with an articulate strategy of intervention, which might include climate related finance.[180] It is within the framework of a CAS that the World Bank offers to the potential client country a set of different financial products related to identified project or programmes, through either the IBRD or the IDA.[181] Therefore, differently from the case of the other climate funds, there are no specific application procedures and project cycles regulations to receive finance. Rather, those internal regulations bind solely the Bank in setting its financing priorities, while the eventual disbursement of finance depends on negotiations between the Bank and its client countries.

The peculiarity of the CDM among the institutions under analysis extends also to the way its finance is sourced and distributed. The main driving factor for a project developer or an investor to participate in the CDM is to raise revenues by selling CERs on the carbon market, obtained after the emissions reductions of its activity are verified. In order to guarantee a high degree of actual emissions reductions, the CDM regulations lay down a complex project cycle, whereby –as seen above in regards to its internal governance– both private and public entities (DOEs and DNAs) participate in the administrative process. Without delving into its details, suffice here to outline the four different stages of the CDM project cycle, which are i) validation; ii) registration; iii) verification of the project activity; and iv) issuance of CERs.[182] Before seeing a project registered in the CDM, a project

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[180] To give but one example, the CAS developed for the Maldives for the financial years 2008-12 included explicitly the provision of finance towards institutional capacity building in adaptation. See World Bank, *International Development Association and International Finance Corporation Country Assistance Strategy for the Republic of Maldives*, 4 December 2007, Annex I, 5, <http://documents.worldbank.org/curated/en/2007/12/8949420/maldives-country-assistance-strategy>.

[181] World Bank Operational Manual, *Financial Terms and Conditions of IBRD Loans, IBRD Hedging Products, and IDA Credits*, BP 3.10, June 2003, <http://go.worldbank.org/SESQPCJXJ0>.

[182] While these are the steps traditionally identified by the relevant CMP decisions, the Executive Board has recently codified a project cycle procedure by adding further procedural steps. See, respectively, Decision 3/CMP.1, UN Doc. FCCC/KP/CMP/2007/9/Add.1, 14 March 2008, Annex, paras 35-66: and CDM, *Clean development mechanism project cycle procedure*, Version 03.2, CDM-EB65-A32-PROC, 25 November 2011, <https://cdm.unfccc.int/filestorage/n/r/extfile-20130402125902557-pc_proc01.pdf/pc_proc01.pdf?t=WTB8bXFjZmp1fDBfM13vizF2A3TrNcc-zEE5> [Hereinafter 'CDM project cycle procedure].

proponent prepares a design document to be made publicly available for comments by stakeholders. The DOE chosen by the proponent validates the proposal by ensuring that all the substantive eligibility requirements for the registration of the project are fulfilled, including an express approval of a host-country's DNA. Following, the same entity submits a formal request to the Executive Board[183] for registration of the project activity into the CDM pipeline. Registration is only a precondition for the final issuance of CERs and it is followed by a stage of monitoring and verification of actual emissions reductions by the DOE. Only after the publication of the resulting monitoring report, the DOE can submit a request for issuance of CERs to the EB for the emissions reductions occurred for the realization of the project activity.

This brief description may be sufficient to provide a glance of the regulatory complexity that allows individual entities (public or private) to eventually raise revenues from their climate mitigation activities under the mechanism. During its first years, the administrative intricateness of the CDM cycle has raised many concerns among states and other stakeholders on various fronts: during the first commitment period of the Kyoto Protocol (2005-2012), both scholars and stakeholders have complained about the sluggish and sometimes inconsistent performance of the EB.[184] This was coupled with the lack of clarity of some of the regulatory instruments of the EB in implementation of the various CMP decisions and of a due process available to stakeholders to review EB decisions vis-à-vis the CDM rules.[185] The responsiveness of the EB to those complaints has resulted in several reforms, including a collation and codification of applicable rules,[186] a clarification

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[183] In practice this is done to the CDM Secretariat which carries a preliminary check that the submission is complete for the EB's approval. See the CDM project cycle procedure, paras 60-71.
[184] Streck and Lin, 'Making Markets Work', *supra* note 58, 422-8. In 2009 the CMP urged the EB in its annual decision on the CDM "[…] to take effective action to ensure compliance with established timelines for each of its procedures as well as with decisions of the [CMP] and, where possible, to reduce the established timelines". See Decision 1/CMP.5, UN Doc. FCCC/KP/CMP/2009/21/Add.1, 30 March 2010, para 3.
[185] M von Unger and C Streck, 'An Appellate Body for the Clean Development Mechanism: A Due Process Requirement' (2009) *Carbon and Climate Law Review* 31.
[186] An extensive body of regulations and codified guidelines is <http://cdm.unfccc.int/Reference/index.html>.

on the normative hierarchy of CDM regulatory instruments,[187] a reform of its request for reviews in the approval process of each project activity.[188] That these reforms have positively affected the social legitimacy of the CDM is confirmed by the stakeholders' support.[189]

While the project cycle regulations determine the process towards CERs issuance, the CDM does not provide any rule on the geographical distribution of capital mobilization towards CDM projects. The choice, in fact, eventually stands on the project developer or the investor and is primarily driven by the investment conditions in a given country and the status of the carbon market. If CDM's access and disbursement rules are not preset by regulation, but rather depend on market forces, it is no surprise that the biggest bulk of CDM projects are placed in emerging economies such as China and India, while the African continent remains almost disregarded.[190]

2.2. 'Country ownership' and the application of implementing agencies regulations.

The issue of enhanced 'country ownership' by recipient countries is somehow related to the one of access and disbursement modalities and constitutes a critical feature of disbursement models not only in climate finance but in international development finance in general.

Contrary to what a lawyer might infer, the term does not refer to the legal ownership by a recipient country over the disbursed finance, but rather expresses the concept that the same country "exercise[s] effective leadership over their development policies, and strategies and co-ordinate development actions."[191] Understood in this way, the different degrees of country ownership that climate finance institutions allow in their access and disbursement modalities can indeed affect the legitimacy and effectiveness of institutional action. This can occur because the potential alignment of a country national strategy with the financing aims

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[187] *CDM Executive Board Decision and Documentation Framework*, Version 04.0, EB 67 Rep., Annex 4, 1.
[188] For an assessment of the requests for reviews see below setion 4.2.1 in this chapter.
[189] See for International Emissions Trading Association, *State of the CDM 2010: Focusing on Efficiency*, undated, <http://www.ieta.org/assets/Reports/ieta-the-state-of-the-cdm-2010.pdf>.
[190] Official CDM statistics show that the percentage of registered project in Africa is less than 5%, compared to other UN regions: see <http://cdm.unfccc.int/Statistics/Public/files/201306/proj_reg_bySubregion.pdf>.
[191] Country-ownership constitutes one of the five principle underpinning the OECD Paris Declaration on Aid Effectiveness. See OECD, *Paris Declaration on Aid Effectiveness and the Accra Plan of Action*, *supra* note 122, para 14.

of a given institution can legitimize the role of the institution both with the recipient country –which enhances its managing role– and with the contributing countries, because of the likelihood that such alignment can prove more effective.

However, the legitimizing effect of country ownership in climate finance can be limited by the internal regulations and programming processes of an institution. This is the case, for instance, when the programming and the implementation phases –as framed by a recipient government– conflict with the social and environmental safeguards and other conditionalities imposed by climate finance institutions.

2.2.1. The Global Environment Facility

This latter case is exemplified by the GEF, whose Instrument states that:

> "the institution shall ensure the cost-effectiveness of its activities in addressing the targeted global environmental issues, shall fund programs and projects which are *country-driven and based on national priorities* designed to support sustainable development and shall maintain sufficient flexibility to respond to changing circumstances in order to achieve its purposes."[192]

Despite such a general provision and recent efforts, due to its internal governance structure the level of country ownership of a recipient country is almost entirely dependent on the programming activities and internal procedures of the GEF's implementing agencies.[193] As noted above, the weighted qualified majority in decision making within the GEF Council assigns a prominent role to contributing countries and, concurrently, the same happens during the various GEF replenishments where the participating countries agree on a set of programming principles that the Council is to follow. Whist being always in the GEF's agenda[194] and treated in every policy recommendation during GEF replenishments, country ownership is ultimately pursued through a Country Support Programme unfolding into

[192] GEF Instrument, *supra* note 3, Article I, para 4. [*emphasis* added].

[193] Such is the implicit finding of the fourth Overall Performance Study of the GEF when it recommends that the GEF should directly promote national programming. See GEF, *Fourth Overall Performance Study of the GEF*, April 2010, 13, <http://www.thegef.org/gef/sites/thegef.org/files/documents/FULL%20REPORT_OPS4%20Progress%20Toward%20Impact_0.pdf>

[194] See, for instance, GEF Council, *Country Ownership of GEF Projects*, GEF/C.12/8, 11 September 1998, <http://www.thegef.org/gef/sites/thegef.org/files/documents/GEF.C.12.8.pdf>.

several activities, of which the most relevant appear to be the National Multi-Stakeholder Dialogues and the National Portfolio Formulation Exercises. The first seeks to build a direct bridge between the GEF bodies and individual recipient countries in order to identify synergies between national and GEF's priorities,[195] while the second consists of a set of small grants to recipient governments with the task of individuating coherent areas of possible GEF's financing.[196] Aside from these two marginal initiatives, the level of control by recipient countries over the various stages of programming, proposal and implementation eventually depends on their relationship with the selected implementing agency.

Moreover, country ownership is inevitably affected by the fact that GEF funds are not directly transferred to the recipient country, but first flow through an implementing agency's account, and only later secondary transfers are done to the various recipients according to the implementing agency's procedures.[197] This emerges from the various Financial Procedures Agreements, stipulated between the IBRD (as trustee of the GEF) and the various international agencies.[198] Interestingly, a standard clause of these contracts provides that ownership of equipment, supplies and other properties shall vest in "[the implementing agency], the recipient of the funds or such other entity *as may be permitted* to retain ownership *under the policies and procedures* of the [implementing agency].[199] This arrangement together with the whole layered process of country programming and disbursement do not seem to guarantee a substantive level of ownership, unless it is the implementing agency itself to promote it.

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[195] See <http://www.thegef.org/gef/CSP_ND>.

[196] These exercises appear to be quite scant in content. To access individual portfolios see <http://www.thegef.org/gef/npfe>.

[197] Only recently the GEF has initiated a pilot programme where it is stipulated that the "GEF Secretariat will enter into a grant agreement directly with a national agency in the recipient country". See *Policies and Procedures for the Execution of Selected GEF Activities [...]*, GEF Doc. GEF/C.38/6/Rev.1, 2 July 2010, para 15 <http://www.thegef.org/gef/node/3221>. However, it can be questioned how the GEF Secretariat itself can enter directly into agreements with another entity, since it does not have legal personality to do so. This provision probably means that it will be the IBRD to do so, after disposition of the GEF Council.

[198] Differently from other climate finance institutions, they are publicly <http://www.thegef.org/gef/financial-procedures-agreements>.

[199] This is an extract of Section 9.1. of the Financial Procedure Agreement between the Asian Development Bank and the IBRD as trustee of the GEF Trust Fund, <http://www.thegef.org/gef/sites/thegef.org/files/documents/document/ADB%20FPA%20-%20Oct%202008%20-%20Fully%20Executed%20Original.pdf > [emphasis added].

2.2.2. The Climate Investment Funds

Although more consistent in terms of alignment of national development programmes and climate finance interventions, also the CIFs follow suit in relying on the intermediary role of their multilateral development banks acting as implementing agencies. Despite being framed in a more open process of national programming, the structure of the overall access modalities inevitably impacts on the level of country ownership over the finance.

Similarly to the GEF, the founding document of the CIFs also contains an explicit referral to country ownership, stating that:

> "[…] Activities financed by the CIF will be grounded in *country-led and owned development strategies*, consistent with the MDBs' own policies and procedures, and in support of the Paris Declaration focus on country ownership. Actions to address climate change mitigation and adaptation considerations will be integrated into the sustainable development process so as to contribute to the basic human needs of the poorest."[200]

Yet, as has been noted above, the procedure towards a country's successful application to the various CIFs requires the filing of a country investment plan "[…] agreed between, and owned by, the Government and the MDBs."[201] Arguably, the level of ownership eventually depends on one side on the fact that recipient countries have a certain discretion on choosing among the various MDBs,[202] and on the other on each MDB's actual practice with its client country. In this regard, a resolution of the Clean Technology Fund's Committee stressed that "[…] the Government, in collaboration with the MDBs, should take the lead in coordinating the preparation of the investment across sectors."[203] This concretized in joint missions of MDBs representatives, authorized by the CIFs Trust Fund Committees, with the task of preparing the plan together with the recipient countries. These missions

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[200] World Bank, *Climate Investment Funds: The Clean Technology Fund and the Strategic Climate Fund*, *supra* note 82, para 26 [*emphasis* added].

[201] CIFs, *Clean Technology Fund: Guidelines for Investment Plans,* 6 August 2009, para 7, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/Guidelines_CTF_Investment_Plan_Revised_After_approval_of_Disclosure_policy_FINAL.pdf>.

[202] Although this choice is conditioned by the presence of an existing MDB programme in the country. Further, since all other participating MDBs have regional character apart from the World Bank, the range of choice is eventually limited to the alternative of either opting for the competent regional MDB or the World Bank.

[203] CIFs, *Measures to Improve the Operations of the Climate Investment Funds,* 19 November 2011, para 14, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/Measures_to_improve_operations_of_CIFs_11.18.11.pdf>.

included a phase of public consultation with different national administration and stakeholders,[204] resulting in an increased involvement of the recipient country and the public in the formulation of investment priorities.

2.2.3. The Adaptation Fund and the Green Climate Fund

On the other side of the spectrum, the configuration of direct access modalities makes the AF the climate finance institution whose regulations currently confer the highest level of recipient countries participation over the whole process. Not only have recipient countries the option of accrediting NIEs to submit financing proposals to the AFB, but it also clearly stated in the AF regulations that NIEs "[…] bear the full responsibility for the overall management of the projects and programmes financed by the Adaptation Fund, and […] bear all financial, monitoring and reporting responsibilities."[205] However, NIEs need to comply with several fiduciary standards before being accredited, which means that administrations lacking adequate capacity, typically the ones of least developed countries, have to resort to the accredited multilateral implementing agencies.

A similar conclusion to the AF can be drawn also in regards to the GCF for the fact that its Governing Instrument clearly envisions the development of direct access modalities.[206] Yet such finding is provisional and dependent of the future operationalization of the Fund.

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[204] This emerges from the various investment plans documents, although some of them do explicitly report joint programming activities. See, for instance, CIFs, *Clean Technology Fund Investment Plan for Chile*, CTF/TFC.9/4, 13 April 2012, Section 11, <http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/CTF_4_Chile_IP_0.pdf>; and CIFs, *Strategic Program for Climate Resilience: Bangladesh*, PPCR/SC.7/5, 25 October 2010, Section 5, <http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/PPCR%205%20SPCR%20Bangladesh%20nov2010.pdf>.

[205] AF, *Operational Policies and Guidelines for Parties to Access Resources of the Adaptation Fund*, *supra* note 47, para 28.

[206] The Governing Instrument provides (para 46): "[…]The Board will consider additional modalities that further *enhance direct access*, including through funding entities with a view to *enhancing country ownership of projects* and programmes." [*emphasis* added].

2.2.4.The World Bank

The World Bank's regulations and policies addressing country ownership should be contextualized in the peculiar positioning of this institution in relation to the multilateral trust funds here under analysis. The Bank exemplifies the MDBs' multifaceted role in climate finance as direct lenders in mitigation and adaptation projects, and implementing technical agencies with operative capacity in developing countries' territories. It should be also recalled that the World Bank acts as trustee of all the major climate multilateral trust funds. This is noteworthy because the GEF and the CIFs –and in part the AF and the GCF– significantly rely on the country ownership practices of their implementing entities: as a consequence, the World Bank's level of country ownership –and by extension the one of all implementing agencies– is indeed relevant also for the main climate multilateral funds.

At the end of the nineties the World Bank expressly included for the first time country ownership as a core element of its approach to poverty reduction with the adoption of a Comprehensive Development Framework:[207] the document adopted an approach to international development underpinned by an opening to recipient countries' administrations and other stakeholders in the programming and implementation of Bank's interventions. The very process of Country Assistance Strategies described above is the result of this broad approach and it is practically carried by engaging the countries administrations in identifying areas of financial intervention, including climate change. Therefore, a certain level of engagement of recipient countries in formulating World Banks financing priorities can be found at the level of the Bank's internal processes. In addition, its Operational Policies address the issue of country programming in the field of the environment by stating that "[…] the Bank encourages and supports the efforts of borrowing governments to prepare and implement an appropriate Environmental Action Plan (EAP) and to revise it periodically as

[207] See the proposal by the at the time president of the Bank, JD Wolfensohn, *A Proposal for a Comprehensive Development Framework*, 21 January 1999, <http://web.worldbank.org/archive/website01013/WEB/IMAGES/CDF.PDF>. However, the framework principles were formally endorsed only in 2001.

necessary. Although the Bank may provide advice, *responsibility for preparing and implementing the EAP rests with the government* […]”.[208] Each EAP, then, feeds into the frame of a Country Assistance Strategy and reasonably constitutes the basis of identification of possible climate-related financial interventions.[209] Hence, it emerges that the internal processes of the World Bank indeed allow a certain degree of involvement, or ‘ownership’, of the recipient country. However, while this can be asserted in relation to its internal regulations, country ownership might be affected by the terms in the financial agreements that the Bank stipulates with the borrowing country each time. It is not possible here to provide concrete examples of such agreements related to a climate project, because the practice is that they are not disclosed by the parties.[210]

2.2.5. The Clean Development Mechanism

For its special nature of a hybrid climate finance mechanism, the CDM promotes ‘country ownership’ by the host country over registered projects in a manner that is hardly comparable to the processes of multilateral institutions. Due to its market-based nature and the pivotal role of private sector entities in mobilizing climate mitigation finance according to different investment drivers, developing countries hosting CDM projects have nevertheless a high level of regulatory control over individual projects and broader national programming in the context of promoting CDM projects investments.

The main difference with the access and modalities of multilateral trust funds is that the recipient state does not receive financial resources directly,[211] but it is only beneficiary of a climate mitigation project that should promote its sustainable development. As a

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[208] World Bank, Operational Policies, OP 4.02, February 2000, para 1 <http://go.worldbank.org/UB9Q27VS90> [*emphasis* added].
[209] Ibid., para 3.
[210] See also *The World Bank Policy on Access to Information*, 1 July 2010, para 17, <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/03/000112742_20100603084843/Rendered/PDF/548730Access0I1y0Statement01Final1.pdf>. In addition, while the World Bank, as a UN Agency, registers bilateral financial agreements to the UN Secretariat according to Article 102 of the Charter, an implementing regulation (UNGA Res. A/RES/97(1), 14 December 1946, as amended, article 12(2)(a)) allows the Secretariat not to publish “Assistance and cooperation agreements of limited scope concerning financial, commercial, administrative or technical matters”.
[211] Unless it is a state-owned entity incorporated in the host country to be the project proponent or investor.

consequence, rather than applying or actively pursuing the finance, the same country is in the position of accepting or rejecting investment projects potentially feasible under the CDM in the project cycle: as described above, a condition for the validation of a CDM project is the formal approval by the DNA of a host country. This preliminary approval of a CDM project by the host country arguably assigns a substantive role on national administrations of supervision and compliance with national policy objectives.

2.3. Analysis of access and disbursement modalities

Like in the case of internal governance, a fruitful criterion to compare different access and disbursement modalities is to refer to the often divergent interests between contributing and recipient states. From the analysis of the various processes it emerges that these particular processes generally strike a balance between two crucial interests: on one side that financial resources are raised and distributed in an efficient and verifiable manner, and on the other that they form sound normative linkages with the final recipient of finance, mostly public and private entities in developing states. It is for the different means according to which this has been implemented, that such situation provides good grounds for analysis.

With such a premise, the broad picture shows that on different degrees the access and disbursement modalities of climate finance institutions still tend to marginalise the interest of recipient countries to a direct, adequate and effective disbursement, while they are construed in a manner that assigns a crucial role and control to the various implementing agencies. If this might go at odds with recipient countries expectations, it must be noted that climate finance institutions are taking efforts to enhance the role of developing states in managing the finance, particularly through direct access modalities, as evidenced by the AF and the GCF.

In regards to general eligibility requirements, the only relevant note is that while the GEF resorts to the UNFCCC distinction between Annex II and non-Annex II parties, the GCF generally makes all 'developing countries' eligible to finance. Since the definition of developing countries is notably contested, this might raise concerns if not disputes, once the GCF becomes operational.

Of more importance are the different means of resources allocation adopted by the various institutions, as they represent the initial step of disbursement. The GEF, the AF and the WB ground their disbursement decisions on clear rules and indicators, although the latter does not set in advance a general amount of finance for each client country. The GEF STAR programme of allocation and the system of 'country envelopes' –replicated by the AF– aims to guarantee that all participating countries are allocated a share of potential finance regardless of whether specific projects or programmes will be subsequently approved. This mode of allocation, however, might lead to unspent resources, if a recipient country does not successfully propose viable projects covering its envelope. Conversely, the Clean Technology Fund (but not the Strategic Climate Fund) of the CIFs lacks any clear set of rules for countries allocations: while this could be justified by the pilot and temporary nature of the CIFs at the time of their establishment, because of its growing relevance, this regulatory gap might become incompatible with the aim of fair disbursement among recipient countries, especially for the large amount of finance that the CIFs have managed to mobilize.[212] Finally, while no substantive rules on resources allocation have yet been adopted for the GCF it is not possible to speak of proper resource allocation in the case of the CDM, since the eventual generation of CERs depends on many investment and market factors.

As regards the various rules on project cycle, a strong reliance on the role of implementing agencies must be noted for the GEF and the CIFs, where both general national

[212] A pledged capital of more than USD 7 billion. See <https://www.climateinvestmentfunds.org/cif/>.

strategies and individual finance proposals are prepared and filed by an agency selected by the recipient government. While this might streamline the means of selection and individuation of potential projects in a given country, at the same time a double regulatory regime applies to the recipient government, namely the regulations and conditions set by the implementing agency and the policies and conditions of the climate finance institution. That this feature is cause of frustration among developing countries is evidenced by the cases of the AF and the GCF, where such countries hold a stronger position in the decisional process. Both the AF and the GCF, in fact, envision the possibility to side-step the intermediary role of implementing agencies through direct-access windows in the project cycle. Potentially, this feature establishes a direct link and responsibility relationship between the climate finance institution and the recipient administration in the developing country, although much concerns rest on the capacity of different developing countries to meet the required fiduciary standards and to work as effective implementers of climate projects. Further, it also must be stressed that in quantitative terms, direct access still constitutes but a tiny fraction of actual disbursement and its efficacy will only be tested in the coming years.

On the issue of project cycles and the role of implementing agencies, both the World Bank and the CDM do not provide meaningful comparative elements for the fact that on one side the World Bank –as the other MDBs involved in climate finance– is an implementing agency itself and does not act on the basis of project cycle procedures comparable to the other multilateral funds. On the other, the CDM project cycle sees as primary actors individual (often private) projects participants, rather than recipient countries, and it is aimed to guarantee the environmental integrity of proposed projects with the numerous CDM standards.

Shifting to how 'country ownership' is achieved among institutions, the very issue of direct access appears to work as main watershed. In fact, and despite the loose meaning of the expression, the most evident mean for a country to be 'owner' of its strategies and

implementation of climate finance, is through bypassing implementing agencies both in the making of proposals to funds and in project implementation. Hence, what found above broadly applies also in the context of 'ownership', with the difference that some climate finance institutions have set up more indirect means to coordinate their activities with recipient countries. This is the case for the CIFs and the World Bank which rely on the collaboration of developing countries' administrations in laying down national climate finance strategies. Perhaps surprisingly, no such coordination process has been established by the GEF, which instead relies almost entirely on the capacity of its implementing agencies: albeit listed in its principles, significant country involvement is not provided by the GEF's regulation on access modalities.

Finally, a note must be spent on the CDM, whose characteristics allow little comparability in terms of 'country ownership' of finance: for its peculiar structure countries hosting CDM projects are rarely the beneficiaries of CERs issuance.[213] Nonetheless, DNAs retain a pivotal role in assuring that the proposed CDM project complies with national sustainable development strategies and laws.

3. PARTICIPATORY PROCESSES FOR INDIVIDUALS, NGOS AND CSOS

The third regulatory factor for the comparative analysis of this chapter is participation by non-state actors to the activities of climate finance institutions. Participation represents a means of input legitimacy, in the sense that climate finance institutions construct and maintain a legitimating process with their numerous actors by receiving contributions of knowledge, policy direction, or even contestation. Thus, while until this point the actors involved in legitimacy have mainly been the members of each institution, this section and the

[213] The rare case is where a state-owned company in the host country is itself an investor or a project participant in a CDM project.

following will mainly refer to the wide variety of actors that are affected at any level by the decisions and activities of the institution.

To understand how potentially wide the set of interested individuals and entities can be, we can make the case of a climate finance institution which is receiving a project application to co-finance a hydropower plant in a least developed country. Its decision is likely to raise the interests of at least the following, aside from the recipient government: i) the local individuals or communities which might be relocated as a result of the change in the hydrology of the area, or might even see violated their individual or collective human rights, such as private life, health, property, access to justice, and so on; ii) the same people, as well as local environmental groups and NGOs, which would be concerned on the environmental impact of the project on the local ecosystem; iii) local business associations, which instead see in the possible financing an opportunity for economic development; and iv) multinational enterprises and technology providers, who are interested in project procurement contracts.

There are, therefore, various reasons why climate finance institutions should seek direct engagement with entities that do not have procedural rights in their internal decision-making process. In order to provide a systemic overview of how they translate those engagements into actual regulatory mechanisms, the focus here will be only on formal procedures that allow a certain degree of participatory rights to the various NGOs and Civil Society Organisations (CSOs),[214] which have an interest in the activities of the institution.

Further, a distinction is proposed between participatory processes that allow stakeholders to participate to the meetings of institutional organs or engage with representatives of the institution (general level), and processes that envision participation during national programming or at project level.

[214] Hereinafter the terms ‘NGOs’ and ‘CSOs’ are used interchangeably.

3.1. General level participatory processes

With regards to participatory regulations in the formulation of general strategy and policy programming, virtually all the climate finance institutions under analysis offer observer status to NGOs and other CSOs during the meetings of the various assemblies or executive bodies. Observers do not have any power in decision making, but might influence discussions, both because of their informal advocacy at meetings and because they are allowed in certain circumstances to have the floor and present their views on agenda items.[215]

Observers' participation at meetings is often restricted for efficiency purposes. For instance, observers can participate only if formally invited by the GEF CEO, during GEF Council or GEF Assembly meetings.[216] The CDM EB meetings are instead potentially open to all UNFCCC accredited CSOs, unless if "[…] in the context of efficiency" the EB decides to limit the attendance to just its members and the UNFCCC Secretariat.[217] A similar provision applies to the AF Board observers.[218] Despite the World Bank's By-Laws expressly provide participation of observers by invitation, there is no practice of NGOs or CSOs attendance to the Board of Governors and the Board of Executive Directors meetings.[219] As to the CIFs, the Head of the Administrative Unit has the discretion to invite CSO representatives, in consultation with the Trust Fund Committees.[220] Conversely, the GCF is the most open to CSOs participation at meetings, as its Board is bound by its Instrument to "[…] allow for effective participation by accredited observers in its

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[215] Boyle and Chinkin, *The Making of International Law*, *supra* note 1, Ch.2. This is the case of the CIFs 'active observers' provisions treated below.

[216] Respectively, *Rules of Procedure of the Third GEF Assembly*, para 5, <http://www.thegef.org/gef/sites/thegef.org/files/documents/Assembly-3-rules-procedure-2005-EN.pdf>; and *GEF Council Rules of Procedure*, October 2007, para 22, <http://www.thegef.org/gef/sites/thegef.org/files/publication/11488_English.pdf>.

[217] *Rules of Procedure of the Executive Board of the CDM*, Decision 4/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, Annex, Rule 27.

[218] *Rules of Procedure of the Adaptation Fund Board*, Decision 1/CMP.4, UN Doc. FCCC/KP/CMP/2008/11/Add.2, 19 March 2009.

[219] IBRD, *By-Laws*, as amended on 26 September 1980, Section 4(b) <http://go.worldbank.org/3PMBT6T7E0>.

[220] CIFs, *Rules of Procedure for Meetings of the Trust Fund Committee of the Clean Technology Fund*, CTF-SCF/4, 18 November 2008, para 15, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/CTF_Rules_of_Procedure_November_08_TFC_Meeting.pdf>; and CIFs, *Rules of Procedure for Meetings of the Trust Fund Committee of the Strategic Climate Fund*, CTF-SCF/5/Rev.1, 13 November 2008, para 15, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/SCF_Rules_of_Procedure_Revised_Nov13.pdf>.

meetings",[221] thus GCF Board members and Chairs do not have discretion on whether or not hosting observers at meetings.

Because of the myriad of potentially interested CSOs, spanning among national, local, indigenous, and global organizations, and given the impossibility of having all of them observing, climate finance institutions have also promoted the creation of dedicated NGOs' networks or self-selection processes for meetings attendance.

The GEF-CSO Network counts dozens of CSOs members, from all regions. It was established in 1995 and faced a substantive restructuring in 2008.[222] Differently from common practice at international level,[223] the accreditation of CSO members is left to the Network,[224] whose main body is a Coordination Committee, comprising CSO representatives from up to sixteen Regional Focal Points.[225] The GEF-CSO Network has a pyramidal structure of representation, whereby NGOs members from each region elect one representative as Regional Focal Point. The Coordination Committee then appoints one Central Focal Point to represent the Network at formal meetings, although Regional Focal Points can also participate in open sessions with the Council.[226] The GEF practice is in fact to hold consultation with the GEF-CSO Network *before*, and not *during* each Council meeting,[227] probably because of the number of CSO representatives wishing to participate.

Differently from the GEF, the AF NGO Network has been established by a leading NGO in the field, Germanwatch, with a view of clustering and organising all interested NGOs at the international and national level.[228] Therefore, it is not created, nor officially recognised under a decision of the AF Board, but it is rather a self-regulatory effort by NGOs

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[221] GCF Governing Instrument, *supra* note 65, para 16. These 'active observers' are two civil society and two private sector representatives equally divided from developed and developed countries.
[222] GEF-CSO Network, *Revised Rules of Procedures for the Operation and Management of the GEF-CSO Network*, Amended – v. 1.2, May 2013, at sec. 1.1, <http://gefngo.org/index.cfm?&menuid=154&lang=EN> .
[223] See for instance, the NGO accreditation process to the UN via the Economic and Social Council: *Resolutions and Decisions of the Economic and Social Council*, UN Doc. E/1996/96, Sup. No.1, 24 July 1996.
[224] GEF-CSO Network, *Revised Rules of Procedures*, *supra*, at sec. 2.1.
[225] Ibid., at sec. 2.2.1. In addition there are three additional focal points for Indigenous People Organisations.
[226] Ibid., at sec. 4.
[227] See <http://www.gefngo.org/index.cfm?&menuid=247&parentid=126>.
[228] See <https://af-network.org>.

to organize and have more impact at AF Board meetings. This does not pre-empt accredited NGOs outside the NGO Network to participate at AF Board meetings anyway.

Because the attendance to meetings is restricted to six or eight observers depending on the Trust Fund Committee,[229] the CIFs leave to CSOs the self-selection of their observer representatives, with the peculiarity that the CIFs Administrative Unit selects the organization to run the self-selection process. [230] Moreover, the CIF Partnership Forum, which was originally envisioned to gather MDBs, other climate finance institutions and country representatives, has been recently called to increase engagement with CSOs.[231]

Conversely, the World Bank does not have a formal selection process for CSOs, although it has increasingly recognized the need of engagement since 1998.[232] Given its prominent role as a global MDB it offers two main –and primarily informal– avenues of general engagement. First, the World Bank organises an annual Civil Society Programme together with the International Monetary Fund, where numerous CSOs participate in discussions and panels with Executive Directors.[233] Second, it holds Global Consultations open to the public on specific topics of the Bank's future policies: interestingly, one consultation verged on the 2008 Strategic Framework for Climate and Development.[234]

Also the CDM has an established practice of consultative processes over its regulatory reforms: the EB is proactive in releasing calls for public inputs for specific technical issues, such as methodologies, standards or procedures.[235]

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[229] CIFs, *Guidelines for Inviting Representatives of Civil Society to Observe Meetings of the CIF Trust Fund Committees*, 20 April 2009, para 7, <http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/Guidelines%20for%20Inviting%20Reps%20of%20Civil%20Society...pdf>: four representatives from CSOs; and two from business associations for the CTF; in addition, two indigenous peoples representatives for the SCF, and one representative from a community subject to adaptation issues in the Pilot Programme for Climate Resilience Sub-Committee.

[230] For NGOs, the organization RESOLVE periodically runs elections for candidate NGOs that respect eligibility criteria to attend meetings.

[231] CIFs, *Guidelines for Inviting Representatives of Civil Society to Observe Meetings of the CIF Trust Fund Committees*, *supra*, at paras 10-1.

[232] WB, *Guidance Note on Bank Multi-stakeholder Engagement*, Doc. No. 49220, June 2009, para 23, <http://documents.worldbank.org/curated/en/2009/06/10792677/guidance-note-bank-multi-stakeholder-engagement>.

[233] See <http://go.worldbank.org/ZEL7JBJM90>.

[234] WB, *Guidance Note on Bank Multi-stakeholder Engagement*, *supra* note 232, para 10.

[235] See <http://cdm.unfccc.int/public_inputs/index.html>.

3.2. Participation in national programming and at project level

On different degrees, climate finance institutions also provide means of active engagement with individuals, local CSOs and other affected stakeholders during the formulation and implementation of single climate projects, as well as in broader national programming for climate change.

The World Bank displays the most detailed set of policies. At the level of national programming, the Bank's Operational Policies on Country Assistance Strategies broadly require the Bank's staff to "seek the government's prior agreement" to have consultations with non-governmental stakeholders,[236] with the aim of promoting public acceptance of the strategy. However, no specific guidance is provided as to the selection of eligible stakeholders.

Other participatory processes that can apply to climate finance are found throughout different areas of the World Bank's internal regulation. For instance, for projects subject to environmental impact assessment, the Bank Procedures provide consultation with "affected groups and local NGOs" across different phases of the assessment.[237] Similarly, in case of involuntary resettlements due to project implementation, the Operational Policies require that displaced persons are informed, consulted, and provided with prompt and effective compensation.[238] Similar consultation processes are also required in projects involving natural habitats and forests.[239]

In 2012 the GEF Council adopted a revised Policy on Public Involvement in GEF Projects, with a view of enhancing the environmental and social sustainability of projects, by

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[236] See World Bank, *Country Assistance Strategies*, BP 2.11, revised April 2012, *supra* note 184, para 6, <http://go.worldbank.org/79F6YYJWC0>.

[237] World Bank, *Environmental Assessment*, BP 4.01, revised April 2013, <http://go.worldbank.org/SVK9ODJWI1>.

[238] World Bank, *Involuntary Resettlement*, OP 4.12, revised April 2013, para 6(a), <http://go.worldbank.org/96LQB2JT50>.

[239] WB, *Guidance Note on Bank Multi-stakeholder Engagement*, *supra* note 239, at 7, footnote 22.

taking into account the needs of people affected.[240] Although the policy requires the GEF Agencies and recipient governments to insure that substantive participation of affected public is reached, it nonetheless recognizes that "[r]esponsibility for assuring public involvement rests within the country, normally with the government, project executing agency or agency, with the support of GEF Partner Agencies."[241] Thus, apart from a performance review, the GEF fully relies on participatory processes of implementing agencies and governments, without the possibility of adopting regulatory consequences in case of violation of public involvement principles, such as the temporary suspension of accredited implementing agency for future projects.

In the context of their peculiar access modalities, the CIFs regulations envision in-country consultations with CSOs during the phase of national investment plans. Although not existing during the initial years of CIFs' activity,[242] in 2012 the Joint Meeting of the Trust Fund Committees adopted a policy of stakeholders' involvement in national programming activities.[243] It requests MDBs, when reviewing the various national investment plans, to convene programmatic consultations every two years, together with other development partners, recipient countries and interested stakeholders.[244] Furthermore it requests countries to undertake a pre-identification of interested stakeholders before the process of national investment plans takes place.[245] Under the Strategic Climate Fund, the CIFs Forest Investment Programme regulations appear the most detailed in identifying

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[240] GEF, *Policy on Public Involvement in GEF Projects*, GEF/PL/SD/01, 13 August 2012, para 5, <http://www.thegef.org/gef/sites/thegef.org/files/documents/document/Public_Involvement_Policy.Dec_1_2011_rev_PB.pdf>.
[241] Ibid., at para 6.
[242] Neither the CIFs founding instrument, nor the following adopted guidelines for investment plans require the establishment of consultation meetings with CSOs. See CIFs, *Clean Technology Fund guidelines for Investment Plans*, CTF/TFC.1/2, 3 November 2008, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/CTF_Guidelines_for_Investment_Plans_TF_Meeting_November.pdf>.
[243] CIFs, *Enhancing Country Coordination Mechanisms, MDB Collaboration and Stakeholders Engagement in CIF Programs*, CTF-SCF/TFC.8/5, 16 April 2012, <http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/CTF_SCF_5_Enhancing_Country_Coordination_Mechanisms_etc_0.pdf>.
[244] Ibid., at 2.
[245] Ibid., at 3.

relevant stakeholders, when they require that the recipient government shall "take the lead" in insuring that all stakeholders, including indigenous people and local communities, are properly consulted both in programming as well as in implementation and monitoring.[246]

While no assessment can be done for the GCF, because no specific policies have yet been adopted, the AF regulations provide a mechanism similar, but even more transparent than the previous ones. The AF Environmental and Social Policies impose as an accreditation requirement to all its implementing entities that, during the planning and preparation of individual project proposals, all relevant stakeholders shall be consulted in a manner that is "[…] timely, effective, inclusive […] and free of coercion".[247] Although the policies do not specify how and to what extent public comments should be taken into account, differently from the previous institutions they also require that environmental and social impact assessments should be publicly disclosed and that any subsequent modifications to projects should undergo public consultations in a timely manner.

With regards to the CDM, its project cycle regulations provide a necessary step of 'global stakeholders' consultation' for each project that is passing through the validation phase, as conducted by the Designated Operational Entity. In particular, all relevant project proposal documentation must be published on the CDM website for a period of at least 180 days, during which all interested countries and stakeholders, including the public, can submit their views and inputs both at national and international level. Following, the DOE and the project developers are expected to address all the comments.[248] Moreover, the lack of effective publication for public consultation on individual projects can be ground of requests

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[246] CIFs, *FIP Operational Guidelines*, 29 June 2010, at paras 12-5, <https://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/FIP_Operational_Guidelines_final.pdf>.
[247] AF, *Operational Policies and Guidelines*, Annex III, supra note 47, para 33.
[248] *CDM Project Cycle Procedure*, Version 04.0, CDM-EB65-A32-PROC, paras 17 and 24-25, <http://cdm.unfccc.int/filestorage/e/x/t/extfile-20130730105000281-pc_proc01.pdf/pc_proc01.pdf?t=OFN8bXJ5M3VvfDAnJkBsvBdLivpFeDBACwQy>.

of reviews proceedings, which, as will be seen below, constitute an effective accountability mechanism.

A final issue regards the way minority communities and in particular indigenous people's views and rights are taken into account when projects are framed and implemented in a manner that can affect their livelihoods. Since 2005, the World Bank adopted a specific Operational Policy which provides that any project to be funded by the Bank and potentially affecting indigenous communities shall pass through a process of *prior and informed consent*, and consultation.[249] It is however a duty of the recipient country to carry on such consultative activities, while the Bank only verifies their outcomes.

The only other institution to contain a special policy on the matter is the GEF. Such policy, however, whilst containing various safeguards and conditions for GEF finance, only requires that its agencies ensure that "full and effective" participation of indigenous communities is achieved.[250]

3.3. Analysis of participatory processes

The analysis above shows that all the climate finance institutions at stake provide pathways of engagement with external actors. Taking stock of decades of experience from international development activities, it would be unimaginable to see a climate finance institution not promoting participatory processes in some way. As seen in the previous chapter, meaningful participation is a crucial legitimacy factor in the competitive institutional arena of climate finance.

Yet, there are emerging issues and different approaches among institutions that affect the substantive working of participatory processes. In regards to the general level of

[249] World Bank, OP 4.10, Indigenous Peoples, July 2005, as lastly revised in April 2013, paras 1 and 10, <http://go.worldbank.org/UBJJIRUDP0>.

[250] *Principles and Guidelines for Engagement with Indigenous Peoples*, GEF/C.42/Inf.03/Rev.1, para 36, <http://www.thegef.org/gef/sites/thegef.org/files/publication/GEF%20IP%20Part%201%20Guidelines_r7.pdf>.

participation, the outcomes of the analysis point to the *relevance of selection procedures of eligible NGOs and of the locus of observers' involvement*.

Being involved in an activity of global nature, it is inevitable for climate finance institutions to adopt procedures that identify who should be involved as observer, given the numerous CSOs potentially interested in being engaged. In doing so, global institutions need to strike a balance between the effective running of decision-making processes, and the meaningful engagement with external actors, which is vital for input legitimacy. Moreover, the same selection procedures can affect the legitimacy of the selected CSO if a fair process or good reasons for its selection are not provided.

The GEF-CSO Network constitutes the most articulate effort in this sense among the institutions under scrutiny. Its bottom-up model of selection provides a mainstreamed process whereby all interested regional CSOs can contribute to the selection of the central Coordination Committee. This level of regulatory engagement is less present in the CIFs model, which does not provide a staged procedure of selection and leaves to the CIFs Administrative Unit, and not to the CSOs, the individuation of the leading entity to coordinate the selection process. The AF, which has not regulated any process of CSO selection, fully relies on a self-regulated AF NGO Network, while leaving open participation to other entities. Finally, it is perhaps striking that the World Bank neither has a clear selection procedure for CSOs nor hosts observers during the meetings of is executive bodies, despite the provisions of its Articles of Agreement.

This leads to the second issue of the *locus* of general participation, which for the World Bank and the GEF appears to take place *outside* the formal meetings of their executive bodies. Again, while this regulatory choice points towards the effectiveness of decision-making, nonetheless it raises questions on the substantive role that observers can play, as they are not allowed to intervene on specific agenda items during meetings, including decisions on project funding. Conversely, all the other institutions provide for active participation of observers during the meetings of executive bodies, in particular the

GCF Board and the CIFs Trust Fund Committees rules impose the participation of selected observers, thus granting a substantive participatory right.

Shifting to the participatory processes in national programming and project level, it emerges again that all institutions generally provide for some forms of stakeholders' engagement, with the difference that some rely entirely on the regulations and policies of their implementing agencies.

In this regard, while at the level of national programming there are only scant provisions, several World Bank regulations require forms of participation and consultation at project level in the area of environmental impact assessment, involuntary resettlement, and forest-related projects. An inherent limit here is that such regulations require the 'borrowing country' and not the Bank to implement and ensure public consultations for each project. While this approach seems justified to avoid excessive interference by the Bank in the borrowing country's internal affairs, and even if the Bank could review elements of the project if consultations have not proved satisfactory, nevertheless substantive participatory rights might not be adequately granted, given that the Bank's regulations are not binding on the borrowing state. Yet, as will be seen, lack of consultation can be ground for claims under the Bank's Inspection Panel, where it shows non-compliance with the relevant Operational Policies. The same lack of substantive participatory rights at the programming and project level is also found in the other multilateral funds with the addition that they entirely rely on their implementing agencies for the implementation of participatory requirements. This overlapping regulatory setting not only leads to different participatory processes depending on the implementing agencies, but has led to critical findings in the last independent reviews of the GEF and the CIFs.[251] Furthermore, the lack of any sanction or accountability for the

[251] See respectively, GEF Evaluation Office, *Civil Society Organizations Engagement*, OPS5 Technical Document No.14, November 2013, para 2, <http://www.thegef.org/gef/OPS5>; IFC International, *Independent Evaluation of the Climate Investment Funds*, Interim Report, July 2013, at 83, <http://www.cifevaluation.org/cif_interm_report.pdf>.

implementing agencies not complying with the fund's participatory standards is another element that questions the meaningfulness of current participatory processes in multilateral climate funds.

Finally, the CDM grants the highest level of participatory rights at project level: not only the documentation of proposed projects must be open to public consultation for several months, but the DOE in the validation report must address and respond to all the meaningful inputs provided by stakeholders. This participatory requirement is further strengthened by the possibility that projects not complying with this requirement might pass under the scrutiny of requests for reviews, as will be seen in the next section.

4. ACCOUNTABILITY MECHANISMS

The accountability mechanisms internal to each institution are the final regulatory factor in this comparative analysis. As is manifest from their name, such mechanisms relate to the concept of accountability, an overarching notion that can be taken from different political and legal perspectives. Because the term accountability holds an indeterminate meaning, before comparing different institutional models, it is worth dedicating some lines on the core features of this concept, the type of accountability mechanisms that are theorised by the legal scholarship, and a definition of what typology of accountability mechanisms will be taken into account here.

4.1. Mapping the accountability of international institutions and the role of their internal mechanisms

At the broadest level, accountability describes a phenomenon where "some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards and to impose sanctions if they determine that

these responsibilities have not been met."[252] As Harlow argues, this concept initially took shape in Anglo-American constitutional discourses and, subsequently, in response to the new and pervasive forms of global governance structures has assumed at international and transnational levels the connotations of so called 'good governance' values.[253] Accountability is linked to democratic structures of government, with the rule of law principle and with legitimacy. In regards to the former, Grant and Keohane aptly note that the democratic processes typical of nation states are not a necessary condition for accountability at the international level. They explain this by making an initial argument that accountability can either be understood according to a delegation or a participation model, the difference being that delegation attains to the level of power transferred to 'power-wielders' from subjects originally holding those powers (in a democracy these are typically the constituent polities); conversely, participation links accountability of a 'power-wielder' to those subjects that are potentially affected by the authority (still in a national democratic context, citizens can exercise accountability through their vote).[254] While at national level democratic structures have generated complex constitutional models granting a certain degree of accountability of institutions, in the international (and global) sphere the absence of democratic and hierarchical structures led to the engendering of different mechanisms of accountability. At the same time, this was also object of critical reflections on the role and manifestations of the rule of law.[255]

[252] RW Grant and RO Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *The American Political Science Review* 29.
[253] C Harlow, 'Accountability in Global Administrative Law' in G Anthony, J Auby, J Morison and T Zwat (eds), *Values in Global Administrative Law* (Hart Publishing 2011) 173-92, at 191.
[254] Grant and Keohane, 'Accountability and Abuses of Power in World Politics', *supra* note 253, at 31.
[255] For instance, with referral to global governance models, Palombella claims that, despite its current unclear presence in the global space, the rule of law is necessary to secure those "legal principles widely practiced, conditioning the viability of legal intercourses, and capable of developing as 'positive' law". G Palombella, 'The Rule of Law as Institutional Ideal' (2010) 9 *Comparative Sociology* 4, at 36. A similar concern –but from a different angle– is shared by Slaughter in relation to transgovernmental networks, constituting "fast, flexible and decentralized" structures of global governance. After distinguishing between i) transgovernmental networks within IOs; ii) those stemming from specific agreements; and iii) spontaneous formations, the author raises accountability concerns for each of those models: AM Slaughter, 'The Accountability of Government Networks' (2000) 8 *Indiana Journal of Global Legal Studies* 347.

More importantly, accountability and legitimacy dynamics play in close relationship and affect one each other. At the abstract level, the more the actors and stakeholders acting under the regulatory umbrella of an institution are facilitated to raise accountability concerns and hold the institution in line with its standards, the more the legitimacy of the institution is nurtured by the fact that its authority and activity is grounded on moral and reasoned justifications.

An ever increasing scholarship is discovering and theorising new means through which institutions of global character are subject to or engender different forms of accountability under the paradigms of delegation or participation.[256] The problem is also legal since, as Reinisch has pointed out, "the lack of substantive and procedural restraint [by IOs] may pose serious problems",[257] particularly in terms of access to justice from the actors directly affected by the actions of international institutions.

While the majority of the international legal scholarship focuses on the accountability mechanism *par excellence*, namely international and national judicial adjudication against

[256] One of the key rationales of the Global Administrative Law (GAL), International Public Authority (IPA) and Informal International Law Making (IN-Law) research projects is exactly to explore ways through which accountability takes form in global governance. Apart from the literature analysis provided in chapter II, see for a GAL understanding B. Kingsbury, 'Global Environmental Governance as Administration' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 63-84, arguing that accountability in global environmental governance takes different political and legal forms according to the various models of administration (distributed, international, networked); IPA scholars implicitly reframe accountability concerns of global governance within the conceptualization of public authority of international institutions. As a consequence it is a function of public law the one of controlling public activities through substantive and procedural standards: A Bogdandy, P Dann, and M Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in *The Exercise of Public Authority by International Institutions* (Springer 2010) 1-32, at 10. Finally, the conclusive findings of the IN-Law project expressly lays down viable alternatives for promoting accountability and take into account the interests and rights of all affected parties by the activities of international institutions. J Pauwelyn, 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable' in J Pauwelyn, W Ramses and J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 500-37, at 519-26.

[257] A Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131. For a fierce critique of the current lack of any guaranteed legal remedy versus IOs, see M Parish, 'An essay on the Accountability of International Organizations' (2010) 7 *International Organizations Law Review* 277. Wellens also shares the same concerns: "The need for a reasonably comprehensive and consolidated body of applicable rules, recommended practices and guidelines is all the more pressing given the ever-increasing calls from various quarters - states and non-state parties potentially affected in their interests and/or rights by the acts, actions or omissions of international organisations - for appropriate remedies to become available." K Wellens, *Remedies against International Organisations* (CUP 2002), at 7.

IOs,[258] arguably, the most promising starting point for a comprehensive understanding of accountability of international institutions under a legal framework is the report of the International Law Association (ILA) on the accountability of IOs.[259] This work is the result of eight years of research and discussions of an ILA Committee comprising internationally renowned lawyers in the field. Correctly, in the report accountability of IOs is defined as a notion rather than an accepted general principle of international law which "[…] clearly rules out, from the start, any requirement that only legal interests may trigger accountability."[260] With such premise the report distinguishes between three "interrelated and mutually supportive"[261] levels of accountability. The first relates to the internal perspective of IOs and concretises in a series of common principles, objectives and practices resulting in forms of "scrutiny and monitoring *irrespective* of potential and subsequent liability and/or responsibility."[262] The second level of IOs accountability encompasses the area of non-contractual (tortious) and contractual liability of an IO versus third parties, while the third addresses the issue of international responsibility stemming from acts or omissions by the IO in violation of an applicable rule of international law.[263]

While the second and third levels of accountability chiefly involve means of judicial dispute resolution and mediation, the first level is so conceptually vast to include elements of 'good governance' (access of information; transparency; a participatory decision-making process; a well-functioning international civil service, a sound financial management; and a

[258] Works directly relevant in the field are: A Reinisch, *International Organizations Before National Courts* (CUP 2000); A Reinisch, *Challenging Acts of International Organizations before National Courts* (New York : OUP 2010); and Wellens, *Remedies against International Organisations*, *supra*. Somehow connected to judicial means of accountability are the issues of IO's immunity from jurisdiction, international responsibility and international legal personality: in these fields the literature is vast: some recent contributions are E Gaillard and I Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass' (2002) 51 *International & Comparative Law Quarterly* 15; A Reinisch, 'Privileges and Immunities' in J Klabbers and A Wallendahl (eds), *Reseach Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011) 132-55; T Gazzini, 'Personality of International Organizations' in Ibid., 33-55. On responsibility, the International Law Commission in 2011 released a set of Draft Articles on the argument: UNGA, 'Report of the International Law Commission' UN GAOR 66th Session Supp No 10 UN Doc A/66/10 (2011), 52-198.
[259] International Law Association (ILA), 'Accountability of International Organisations', 2004 Berlin Conference, Final report, <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.
[260] Ibid., at 4 and 6.
[261] Ibid., at 5.
[262] Ibid., at 5. [*emphasis* added].
[263] Ibid., at 18-36.

reporting and evaluation system),[264] and other principles of institutional activity, including *inter alia* the principle of good faith, of constitutionality and institutional balance, of reason-giving and procedural regularity.[265]

Because the purpose of this section is to provide a fruitful account of how accountability is sought in relation to climate finance institutions, the second and third levels of accountability will be excluded from the object of analysis for two main reasons. First, this chapter's enquiry rely on the idea and existence of certain regulatory indicators of legitimacy, which relate to the procedures of the *internal* institutional law of an entity. Conversely –as will be seen below– judicial accountability before international, national or regional tribunals is a process available *externally* to the regulatory realm of an institution. The second reason for dismissing an analysis of judicial accountability is that –despite of the vast literature and the complexity of the issue–[266] IOs, and by extension most of the climate finance institutions at object, enjoy functional immunity from states jurisdiction under international law.[267] Furthermore, the overwhelming practice tells that such immunity is rarely waived before regional or national tribunals and mainly concerns cases about labour or procurement contracts.[268] Therefore, although intellectually stimulating, for practical reasons the second and third level of institutional accountability will not be object of analysis.[269]

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[264] Ibid., at 8-12.
[265] Ibid., at 12-15.
[266] The issue can be divided at least into three main strands. i) responsibility of IOs from internationally wrongful acts; ii) extra-contractual liability before regional and national courts; and iii) contractual liability with third parties. The matter is complicated by the controversial issue international immunity of IOs before national tribunal and their legal subjectivity.
In fact, because only formal IOs can enjoy immunity from suits, in the case of the climate finance institutions under analysis it is unclear whether some of them can be regarded IOs or other institutional realities. Further, even if personality is assumed, it is unclear to what extent an IO can claim to have immunity from jurisdiction.
[267] Parish, 'An essay on the Accountability of International Organizations', *supra* note 258; and Reinisch, 'Privileges and Immunities', *supra* note 267.
[268] Reinisch, *International Organizations before National Courts*, *supra* note 259.
[269] This is in part confirmed by Dann when he argues that the option for recipient states to sue donors or international development institutions exists mostly in theory. P Dann, 'Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight' (2006) 44 *Archiv des Völkerrechts* 381, at 388.

Returning to the first level of accountability, in a recent contribution de Wet criticises the approach taken in the ILA report. In particular she claims that "[…] decisive is not whether the normative act is legally binding in the formal sense, but rather whether it has a de facto impact on the rights and interests of States and/or non-State actors."[270] In other words, conflating heterogeneous accountability concepts in a general 'first' and 'less-legal' category risks to understate their legal significance. The same author goes further by proposing a conceptual understanding of the various complexities of those accountability mechanisms. First of all, a broad distinction is traced in regards to the constituencies holding accountable international institutions: on one side the traditional principle of states equality in international law justifies the various means of *general* accountability that are exercised by members of the institution according to its internal governance.[271] On the other, a cosmopolitan understanding of accountability embraces also the 'interested public' and departs from the traditional, state-centric relationship between an institution and its members: under this view, individuals, local groups and other polities should be able to hold the institution accountable for its actions.[272]

The following comparative analysis will narrow down the object to formal mechanisms of accountability existing within the regulatory process of a climate finance institution. For this reason they are defined as 'centralised' mechanisms, in opposition to the judicial redress, potentially available to both states and individuals, which is instead 'decentralised'.

[270] E de Wet, 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' in A Bogdandy, P Dann and M Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010) 855-882, 856.
[271] Ibid., at 857-9.
[272] Ibid.

4.2. Centralised accountability mechanisms

Still once the object of analysis of institutional accountability is narrowed down, a further distinction must be provided before comparing the various mechanisms: accountability mechanisms within an institution can either be of a 'general' or of 'individual' kind. General oversight is often exercised by vertical or horizontal relationships between organs within the institution, while for individual accountability mechanisms it is here meant those internal processes open to complaints from eligible actors against internally set standards. As de Wet notices, general accountability mechanisms are often available only to states or members of the institutions; conversely, individual mechanisms reflect a cosmopolitan understanding of institutional accountability.[273] Hence, this differentiation is also fruitful to distinguish between the different constituencies of accountability, namely those entities or individuals who retain means to hold institutions accountable. Accordingly, the constituencies in general mechanisms are chiefly states, acting both as contributors and as recipients of the finance: in other words, the broad political interests of states are on one side to ascertain that public sources from tax payers are spent efficiently (donors), and on the other that climate finance institutions provide a fair, expedite and non-intrusive means of channelling finance (recipients). Other constituencies in general mechanisms are institutions themselves: in particular, all the institutions under analysis here engender some forms of accountability on the other entities they rely on for the proper disbursement and implementation of climate projects. This is particularly the case for multilateral trust funds and their implementing agencies, which aim to ensure that the latter comply with their social and environmental safeguards and other internal regulations for disbursement. What emerges, then, is a complex chain of accountability relationships of general type, which stems from the internal regulations and reflects the different constituencies interested in keeping the institution into account.

[273] Ibid., at 863-70. It must be noted that correctly the author includes in the category of individual mechanisms also decentralised judicial review of the actions and regulations of institutions. However, as justified above, the analysis is here confined only to centralised mechanisms.

By contrast, individual mechanisms address different constituencies than general ones and find their rationale in a 'cosmopolitan' understanding of accountability of international institutions, as opposed to the general one hinging on the classical principles of states equality in international law.[274] Directly, or indirectly, climate finance projects and programmes may affect the legitimate interests or rights of entities and persons that are different from the members of the institution. Examples span from involuntary resettlements due to projects' implementation, to legitimate economic expectations of private sector entities for the execution of a procurement contract.

Accordingly, there appear to be four main avenues that a person negatively affected by an act or an omission by an IO can take in order to seek accountability and redress: i) diplomatic protection by the State of the national whose legitimate interest is affected; ii) requesting the contested IO to waive its immunity when sued before a national court; iii) claiming that the IO is acting *ultra vires* and, by consequence, seek a change of behaviour and remedy directly to the competent IO organ; and iv) trying to 'pierce the corporate veil' of the IO, and bring action against one or more states' members responsible or liable for their conduct within the IO. As Bradlow has noted in the context of MDBs accountability mechanisms, none of these strategies has proven successful apart from marginal cases.[275]

For these reasons, the focus here stands only on those mechanisms working within the regulatory processes of the institutions. As will be seen, climate finance institutions have responded differently and to different degrees to the accountability demands of constituencies that would have otherwise hardly been heard.

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[274] Ibid., 858.

[275] DD Bradlow, 'Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2004) 36 *Georgetown Journal of International Law* 403, at 406. As the latter strategy might be applicable to international institutions that are not formally recognised as IOs under international law, Meijer noted that Clean Development Mechanism organs could be brought before national courts. Although applicable to other climate finance institutions like the AF Board, to our knowledge this solution has never come to practice. See Ernestine E. Meijer, 'International Institutions of the Clean Development Mechanism Brought before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice, The' (2006) 39 *New York University Journal of International Law and Politics* 873.

4.2.1. General mechanisms

Perhaps the most evident general mechanism of accountability in climate finance institutions is the exercise of voting rights and political pressure of members of the institutions according to the regulations and processes of internal governance. The nature of such accountability is primarily political and depends *inter alia* on the internal configurations of power within the executive organs of climate finance institutions as reflected by decision-making procedures. Therefore, the findings of the first section of this chapter dedicated to this matter apply also in regards to a comparison between the impact of this type of accountability amongst the five institutions: thus, balances vary between those institutions that bestow more weight (hence, more room to make accountability claims be heard) on contributing countries, and those that either strike a balance or, like the AF, assign a major role to recipient countries.

Still, it is important to remark how the notion of accountability requires a set of standards against which the institution can be hold accountable:[276] with this premised, the direct consequence is that only when states directly seek to hold accountable the institution for violation or lack of implementation of a standard then an actual general accountability takes place. While a thorough analysis of cases where such an action has been exerted by climate finance institutions falls outside the object and capacity of this analysis, the above findings on the internal governance structure of these institutions allows drawing two broad assessments. On one hand, it is evident that not all member states have 'parity of arms' in successfully raising accountability concerns within an institution, given the different weights afforded to contributing and recipient countries in decision-making. On the other, it might not always be the case that the interests of a state in the finance and implementation of a climate project coincide with the equally legitimate interests of affected stakeholders and individuals within the jurisdiction of the same state. This latter point is made by Bradlow and Hunter about the World Bank, noticing how through time this institution has paralleled a

[276] Grant and Keohane, 'Accountability and Abuses of Power in World Politics', *supra* note 253, at 29.

host of direct and non-contractual relations with local entities to the formal legal engagements with member States under its various organs.[277]

The CDM makes a special case in the context of these general means of accountability. Within its complex project cycle the CDM regulations codify a process of review of individual projects that can only be initiated by a participant state or at least three members of the Executive Board, which –as found above– comprises only elected states representatives. There are two Requests for Reviews (RfRs) available across the project cycle: one can be started after the Executive Board has registered a project in its pipeline, while the other can occur after the same body has decided on the issuance of Certified Emissions Reductions (CERs) from a registered activity.[278] The nature and mode of implementation of RfRs are similar: the main difference stands on the standards of accountability, which in the case of RfRs during registration are based on issues related to the lack of compliance with CDM requirements during the validation process as carried on by DOEs; instead, RoRs contesting the issuance of CERs are only confined to cases of "fraud, malfeasance or incompetence" of the DOE.[279] If the nature of such mechanism is general because open only to states, nonetheless the implementing procedures for RoRs adopted by the EB envision a quasi-judicial process, whereby the affected project participant and the DOE can file documents clarifying their position in regards to the matter.[280] Given their peculiar structure, RoRs work as an effective and highly procedural general accountability mechanisms, which seek mainly to grant the integrity of each project vis-à-vis the CDM requirements.[281]

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[277] Bradlow and Hunter, *International Financial Institutions and International Law*, *supra* note 113, Introduction, xxvii.

[278] Decision 3/CMP.1, UN Doc. FCCC/KP/CMP/2005/8/Add.1, 20 March 2006, paras 41 and 65.

[279] Ibid., para 65.

[280] Respectively, EB, *Procedure for Review of Requests for Registration*, Version 01.2, EB 55 Rep. Annex 40, paras 8-9; and EB, *Procedure for Review of Requests for Issuance of CERs*, Version 02.0, EB 64 Rep. Annex 4, paras 8-9.

[281] For a list of current RfRs see http://cdm.unfccc.int/Projects/review.html.

The second kind of general accountability mechanisms reflects the vertical relationship between on one side power-delegating entities and climate finance institutions, and on the other between climate finance institutions and their delegated agent entities, mainly implementing agencies. As previously underlined in Chapter II, also here a basic distinction can be made between climate finance institutions formally linked by inter-institutional or constitutive instruments with the UNFCCC supreme bodies, the COP and the CMP, and those that instead are outside any relation of delegation from the UNFCCC, but nonetheless act for the implementation of UNFCCC's obligations on finance.

The AF and the CDM have been created by and are under a relationship of *authority* and *guidance* with the CMP. In a similar fashion, being operative entities of the UNFCCC Financial Mechanism, it is provided that both the GEF and the GCF shall be *accountable* and function under the *guidance* of the COP.[282]

Being an institution formally established outside the UNFCCC umbrella, the accountability relationship between the GEF and the COP is crystallised in a Memorandum of Understanding (MoU) between the two entities.[283] The instrument generally clarifies that the COP retains the authority of deciding on "policies, programme priorities and eligibility criteria" related to the Convention, and that the GEF Council must ensure compliance with such criteria and shall periodically report to the COP.[284] Interestingly, a specific procedure for reconsidering funding decisions of the GEF Council envisions the possibility for a state Party to raise the matter to the COP. If the COP finds the claim founded – it "[…] may ask the Council of the GEF for further clarification on the specific project decision and in due

[282] In this respect a slight difference of terms must be noted. Under Article 12(4) of the Kyoto Protocol, the CDM is subject "to the *authority* and guidance" of the CMP. The same proposition is replicated in the case of the AF (Decision 1/CMP.3, UN Doc. FCCC/KP/CMP/2007/9/Add.1, 14 March 2008, para 4). While the two operating entities of the UNFCCC Financial Mechanism – the GEF and the GCF - "function under the guidance of and [are] *accountable* to" the COP (UNFCCC Article 12(1) and, for the GCF, Decision 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, para 102). In practice, however, no difference of treatment emerges in practice between the terms 'authority' and 'accountability.'

[283] Decision 12/CP.2, UN Doc. FCCC/CP/1996/15/Add.1, 29 October 1996, Annex.

[284] Ibid., paras 2 and 4.

time may ask for a reconsideration of that decision".[285] This accountability mechanism has never been exercised either by a UNFCCC Party or the COP for the likely reason that –as has been noted–[286] the MoU does not explain the consequences of the GEF Council not addressing the matter or deciding contrary to the indications of the COP.[287]

Also the GCF is formally positioned in an accountability relationship with the COP, the latter being supreme body of the Convention and of its Financial Mechanism. At the time of writing an accountability mechanism is yet to be formalised, since that GCF is still at an embryonic stage before its operationalization. However, the COP has lately mandated its Standing Committee on Finance[288] to agree with the GCF on future arrangements between the COP and the GCF.[289] The interesting side of this solution is that –contrary to the cases of the AF and the CDM– the COP decided to afford quite a high degree of institutional independence to the GCF, for the reason that any accountability relationship will be agreed by the two entities rather than being imposed from the COP.

The accountability relationship between the CMP and its dependent institutions, the AF and the CDM is instead stricter. As noted above, the relevant CMP decisions clarify that the two entities are under the *authority* and guidance of the CMP. In terms of general accountability mechanisms this concretises in a more substantive decisional role of the CMP in the regulatory realm of this two entities. For instance, certain relevant prerogatives for the functioning of the CDM have not been delegated by the CMP to the EB, such as the formal accreditation of DOEs and decision-making on general aspects.[290] In a similar vein, the CMP decides over "the overall policies" of the AF,[291] it periodically reviews its performance, and provides general guidance on its strategies and institutional arrangements. If this is coupled

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[285] Ibid., para 5.
[286] A Ballesteros, S Nakhooda, J Werksman, and K Hurlburt, 'Power, Responsibility, and Accountability: Rethinking the Legitimacy of Institutions for Climate Finance' (2010) 1 *Climate Law* 261, at 271.
[287] This procedure has been agreed in implementation of UNFCCC Article 11(3)(b), which call for the establishment of "modalities by which a particular funding decision may be reconsidered in light of these policies, programme priorities and eligibility criteria."
[288] For the nature and scope of this body see Chapter II above, at 131.
[289] Decision 7/CP.18, UN Doc. FCCC/CP/2012/8/Add.1, 28 February 2013.
[290] Decision 3/CMP.1, *supra* note 52, para 3(a) and (c).
[291] Decision 5/CMP.2, FCCC/KP/CMP/2006/10/Add.1, 2 March 2007, para 1(e).

with the fact that the GCF Board, AF Board and EB members are formally nominated by the COP/CMP Parties, it might be questioned to what extent then the supreme bodies of the climate conventions can be deemed as separated organs from the internal governance those institutions. The decision not to consider the former hypothesis, when treating of the internal governance structures of those institutions, is mainly for descriptive purposes and to simplify the comparative analysis. Conversely, no vertical accountability relationship is formally established between the UNFCCC supreme bodies on one side and the CIFs and the World Bank on the other, because of their complete institutional independence from the climate treaties. As will be seen, while this is a typical feature of international composite administration, it might also signal an emerging accountability gap.

A third and final type of centralised general mechanisms of accountability are the periodical and independent evaluations that occur within the five institutions, which in some cases led to the actual establishment of independent evaluation units as part of the internal governance. As found above in the first section of this chapter, this is the case for all the institutions under analysis apart from the CDM. In particular, the WB, the GEF and the GCF have their own in-house evaluation units;[292] The AF relies on the external evaluation of the GEF Evaluation Office,[293] while at the same its Board established an Ethics and Finance Committee to which are delegated monitoring and evaluating functions, including the one to recommend decisions to the AF Board.[294] The CIFs rely, instead, on a delegated joint committee of evaluation units of their MDBs which contracts independent evaluations to external entities.[295]

[292] The GCF is yet to formally establish one, but it is envisioned in its Governing Instrument, *supra* note 65, para 18(l).
[293] AF, 'Evaluation Framework', no date, 11, <https://www.adaptation-fund.org/sites/default/files/Evaluation_framework.pdf>.
[294] Ibid., at 11.
[295] See <http://www.cifevaluation.org/about.html>.

General accountability mechanisms in climate finance institutions are not exhausted from the three types analysed here. The same institutions enter into different accountability relationships depending on the constituencies they address. For instance, if it is a contributing country's interest the one of effective and sound disbursement of its money, climate finance institutions then will stipulate a financial agreement with a recipient country's entity, ensuring the compliance with its own fiduciary standards during the implementation of the projects. At the same time, the recipient country's interest in the effective and streamlined disbursement of finance is consolidated through the accreditation standards that implementing agencies of the multilateral trust funds need to fulfil in order to be eligible under a fund's scheme. Although relevant for a general assessment of accountabilities in climate finance, these numerous chains of legal engagements fall out the object of this analysis for the reason that they do not directly address the accountability *of* a climate finance institution, but it is rather the climate finance institution that promotes the accountability of other entities.

4.2.2. Individual mechanisms

Whilst a certain uniformity of practice emerges in the context of general accountability mechanisms, the climate finance institutions compared here show different degrees of implementation of individual accountability mechanisms.

The first in time and arguably the most developed mechanism is the Inspection Panel of the World Bank (WBIP), established in 1993 by a resolution of the Bank's Board of Executive Directors[296] in response to two main concerns: one –shared by the President and

[296] Resolution No. IBRD 93-10 and IDA 93-6, 22 September 1993, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf> [hereinafter 'the WBIP Resolution' or 'the Resolution']. The Resolution was subject to authoritative interpretation by the Board with the following clarifications: *1996 Clarification on Certain Aspects of the Resolution*, 17 October 1996, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1996ReviewResolution.pdf> [hereinafter 'the 1996 Clarification']; and *1999 Clarification of the Board's Second Review of the Inspection Panel*, 20 April 1999,

the Board– of improving the management of the Bank's portfolio, and the other, coming from the public, regarding the lack of accountability and transparency of the Bank.[297] It is noteworthy that it was a Bank's co-financed large-scale hydropower project in India (hence, a 'climate finance project') that in the late eighties fuelled public resentments towards the Bank's approach to financing and led to the establishment of the WBIP.[298] Legal scholars have produced a vast amount of literature addressing the nature of the WBIP from different perspectives.[299] Further, this mechanism also served as a primer for other MDBs which later adopted their own independent individual mechanisms.[300]

The WBIP counts three members, appointed by the Bank's President after consulting with the Executive Directors. They must be in an independent and impartial position from the Bank's management and from specific "developmental issues" in developing countries.[301] They hold a five years' mandate and elect a Chairperson, who works on a full-time basis at the Bank's headquarters, and are formally appointed as officials of the Bank.[302] With regards to its 'jurisdiction', the Panel receives "[…] requests for inspection presented

<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf> [hereinafter 'the 1999 Clarification']. The three instruments are currently incorporated in the Bank's Operational Manual (BP 17.55).

[297] IFI Shihata, *The World Bank Inspection Panel: In Practice* (World Bank Publications 2000), at 1-2.

[298] Ibid., at 5-8. Along other components, the project's implementation entailed a resettlement of approximately 120.000 people from an area of 370 kilometers.

[299] See for instance, Shihata, *The World Bank Inspection Panel*, *supra*; A Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations' (2005) 2 *International Organizations Law Review* 57; L Boisson de Chazournes, 'Le Panel d'Inspection de la Banque Mondiale : à Propos de La Complexification de l'Espace Public International' (2001) 1 *Revue Générale de Droit International Public* 145; and E Hey, 'The World Bank Inspection Panel and the Development of International Law' in N Boschiero, T Scovazzi, C Pitea and C Ragni (eds), *International Courts and the Development of International Law* (T. M. C. Asser Press 2013) 727-38.

[300] Inter-American Development Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism*, 17 February 2010, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768> ; Asian Development Bank, *Accountability Mechanism Policy 2012* (2012) <http://www.adb.org/sites/default/files/accountability-mechanism-policy-2012.pdf>; IFC and MIGA, Office of the Compliance Advisor/Ombudsman Guidelines, undated, <http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf>; European Bank for Reconstruction and Development, *Independent Recourse Mechanism Rules of Procedure*, 6 April 2004, <http://www.ebrd.com/downloads/research/policies/procedur.pdf>; and African Development Bank and African Development Fund Board of Directors Resolution B/BD/2004/9 and F/BD/2004/7, as amended by No B/BD/2010 – FB/BD/2010/04, 16 June 2010, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Boards%20Resolution%2016%20June%202010.pdf>. European Investment Bank, *The EIB Complaints Mechanism*, February 2010, <http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf>. For a detailed comparative analysis of these mechanisms (excluding the one of the EIB) see Bradlow, 'Private Complaints and International Organizations', *supra* note, 113.

[301] WBIP Resolution, para 2 and 4.

[302] Ibid., paras 7, 9 and 10.

to it by an affected party in the territory of the borrower which is not a single individual […]": hence only a minimum of two individuals or a legal person like local CSOs are eligible to initiate the accountability process.[303]

The WBIP Resolution sets clear limits on the admissibility of the claim and the applicable standards against which accountability is checked:

> "The affected party must demonstrate that its *rights or interests* have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its *operational policies and procedures* with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, *a material adverse effect*."[304]

This provision clearly defines the contours and the nature of the WBIP process. The Resolution affords quite an ample spectrum of protection of standards, because it embraces 'rights' (although it is not specified whether they are national and/or international) and quasi-administrative legitimate interests. A direct link between the harm (or the risk of its occurrence) and the action or inaction of the Bank needs to be proved by the claimant, which is further restricted to limit its claim to the fact that such harm must go against the internal policies of the Bank.[305]

If claims before the WBIP report "serious alleged violations" of Bank's policies, an investigation may be initiated at the request of an Executive Director.[306] However, before reaching this stage, it is requested that the claimants try to address the matter with the Bank's management before resorting the WBIP, while the management is allowed to file evidence of its compliance with the Bank's policies and procedures.[307] Following these steps, the WBIP produces a recommendation to the Executive Directors as to whether an investigation should

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303 The 1996 Clarification specifies that individuals need to "share some common interests or concerns".
304 Ibid., para 12. [*emphasis* added]
305 In addition the Resolution excludes certain types of complaints from the competence of the WBIP.
306 Ibid. The 1996 Clarification states that in this early phase, the WBIP is should make a *prima facie* assessment of damages suffered by the affected party. Further, the 1999 Clarification allows the WBIP to make direct in-country visits, if they are deemed necessary to address the case (para 7).
307 Ibid., para 13.

be initiated. If the Executive Directors response is positive, one or more WBIP members shall initiate an investigation which culminates into a final report.

At the time of writing, 88 cases have been brought before the WBIP since 1994[308] and of these at least eleven are about climate-related mitigation projects:[309] the most recurrent are claims stemming from the implementation of hydropower projects involving cases of involuntary resettlement, and other environmental and social issues.[310]

As a Clarification of the Executive Directors stated, rather than a judicial body, the WBIP is a "fact-finding" entity under the authority of the Board of Executive Directors.[311] The appointment process, the decisional role of the Executive Directors during the process and, more importantly, the lack of authoritative decisional (jurisdictional) power of the WBIP, make this mechanism more an administrative process internal to the institution, than an example of international administrative justice.[312] If that is true, Parish goes further by noting the complete lack of due process requirements in the WBIP for the reason that it does not hold hearings, hear witnesses, or order discovery.[313] Such critique is partially[314] founded if one uses traditional international tribunals as a comparative term, but not if the World Bank is compared with other IOs which completely lack any type of internal accountability mechanism despite their potential to affect individuals and groups within states.

The GEF, the AF and the GCF have also established internal mechanisms open to individual complaints.

[308] Cases documents are accessible at <http://go.worldbank.org/XADAJLHWS0>.
[309] A selection has been made according to the various components of the projects, taking into account the relative definition of climate-related project. For instance, two projects on transportation reforms in Mumbai and Lima have been included given their estimated impacts on GHGs reductions.
[310] One case, however, involved missed distribution of CDM CERs generated by the project to local farmers: WBIP, *India: Improving Rural Livelihoods through Carbon Sequestration Project (TF058308)*, Report on Request for Inspection, 17 October 2012, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Report&Recommendation_IndiaImprovingRuralLivelihoodsProj.pdf>.
[311] 1999 Clarification, para 12.
[312] On the same line see Hey, 'The World Bank Inspection Panel and the Development of International Law', *supra* note 299.
[313] Parish, 'An essay on the Accountability of International Organizations', *supra* note 258, 92.
[314] The WBIP has full access to Bank's management documents and can request to undertake in-country inspections, which are indeed means of discovery.

In 2007 the GEF CEO set up a Conflict Resolution Commissioner to be responsible for addressing and solving complaints put forward by national administrations or by local CSOs.[315] The object of complaint can be "a contract dispute, lack of communication, the perception of wrongdoing, or genuine concerns."[316] Although documents regarding cases are not publicly available, this feature of the mechanism makes the figure of the Commissioner closer to the one of an ombudsman, than to the quasi-judicial procedure of the WBIP. The ombudsman is traditionally an entity which addresses accountability issues in an informal, flexible and less proceduralised manner. Flexibility and practicality emerge from the fact that the type of person or entity eligible to report a claim is unrestricted, as well as the content of the claim, whose admissibility is not restricted to a violation by the GEF of its internal regulations. Although available documents do not substantiate it, it might be the case that the establishment of the Conflict Resolution Commissioner derives from the Compliance Advisor Ombudsman, a similar figure present in the IFC and MIGA, which are two entities part of the World Bank Group.[317] In addition to the figure of the Commissioner, individual accountability at the GEF is also delegated to its implementing agencies. A recent GEF policy, in fact, requires its partner agencies implementing and disbursing finance at national level to have a system or a set of practices that ensure accountability from complaints or grievances raised by local stakeholders.[318] Due to its networked structure hinging on the collaboration of other entities, this latter policy, although very recent, appears to fill accountability gaps, whenever an issue related to a GEF financed project involves an implementing agency rather than the GEF itself. Yet the policy does not prescribe clear consequences from non-compliance with accountability standards by implementing agencies.

[315] GEF, *GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards*, GEF/C.41/10/Rev.1, 18 November 2011, Annex III, <http://www.thegef.org/gef/sites/thegef.org/files/documents/C.41.10.Rev_1.Policy_on_Environmental_and_Social_Safeguards.Final%20of%20Nov%2018.pdf >.
[316] Ibid., para 2.
[317] Bradlow, 'Private Complaints and International Organizations', *supra* note 113, at 432-4.
[318] *GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards*, *supra*, para 25 and 69-70.

Shifting to the case of the AF, the Rules of Procedure of its Board, approved via a CMP decision, require the Chair of this organ to accept "unsolicited communications" from the public and address them after consultation with the AF Board.[319] With the operationalization of the Fund, in 2012 a Mechanism for Handling Complaints was established[320] with the scope of collecting alleged cases of frauds and misconduct of the AF national or multilateral implementing agencies. This accountability mechanism is open to any individual or entity and, similarly to the case of the GEF, relies on a broad procedure which leaves ample discretion to the AFB as to whether consider individual claims. At the time of writing no formal complaints have been raised by affected individuals or private entities, but only by recipient authorities against multilateral implementing agencies.[321] At the same time, the AF Board is considering the adoption of a set of principles and guidelines for investigations into allegation of corruption or misuse of funds.[322]

Although not yet operational, the GCF is also expected to establish its own redress mechanism. In this regard, both the Governing Instrument and a recent decision of the GCF Board contain very broad provisions outlining that such mechanism is expected to "[…] receive complaints related to the operation of the Fund and will evaluate and make recommendations."[323] From this sentence it is possible to anticipate that the GCF redress mechanism might consist of a process of administrative rather than judicial or quasi-judicial character, although it is not specified who will be the subjects allowed to seek redress as well as the standards to be respected.

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[319] Decision 1/CMP.4, FCCC/KP/CMP/2008/11/Add.2, 19 March 2009, Annex, para 35.
[320] Decision B/17/1, AFB Rep. AFB/B.17/6, 16 March 2012, para 16, <https://www.adaptation-fund.org/sites/default/files/FinalReport17thAFB%20compressed.pdf>. It must be noted that the decision does not formally constitute the mechanism.
[321] Private email exchange with AF Secretariat staff, on file with the author.
[322] Decision B.21/14, AFB Rep.B.21/8, 15 August 2013, <https://adaptation-fund.org/sites/default/files/AFB21%20Report_final_190813.pdf>.
[323] Governing Instrument of the GCF, *supra* note 3, para 69; and for the decision establishing the mechanism see Decision B.04/09 (f), GCF Rep. GCF/B.04/17, 3 July 2013, <http://www.gcfund.net/fileadmin/00_customer/documents/pdf/B-04_17_decisions.pdf>.

Finally there are no individual accountability mechanisms available in the CDM and the CIFs. The former constitutes a peculiar case for the reason that EB final decisions on projects registration and issuance of CERs indeed directly affect the legitimate expectations of various actors, in particular project participants. Even if concerns have been raised both by the literature and several Kyoto Protocol parties on the need to establish an independent review process of EB decisions,[324] at the time of writing the issue is still under negotiations before the Subsidiary Body for Implementation to the CMP and is expected to lead to a final decision at the CMP-9.[325]

In line with their institutional governance, the CIFs entirely rely on the individual mechanisms of the implementing MDBs. Two remarks in this regard are that all MDB participating to the CIFs have an established complaint mechanism similar to the WBIP; at the same time, however, *it is unlikely that an individual claim concerning an alleged violation by the MDB of CIFs regulations and standards would be admissible before such mechanisms*. Referring at least to the WBIP requirements reported above, this is confirmed by the fact that the panel is competent to hear cases of alleged violations of the World Bank's standards only.

Internal accountability mechanisms of climate finance institutions extend to the case of corruption, fraud and malfeasance committed either by the staff of the institution itself or during procurement activities. Being a large and ramified IO, the World Bank is the only institution of the ones under analysis to have set up in 2001 a Department of Institutional Integrity[326] which investigates alleged cases of corruption. As a Vice-Presidency unit, it works independently from other units of the Bank and has full access to all internal documents related to projects. Any individual can report, even in anonymous form,

[324] von Unger and Streck, 'An Appellate Body for the Clean Development Mechanism: A Due Process Requirement', *supra* note 185.

[325] The agenda item is entitled "Procedures, mechanism and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism". See UN Doc. FCCC/SBI/2012/33, SBI Rep 7 March 2013, 25.

[326] Dann, 'Accountability in Development Aid Law', *supra* note 278.

allegations of frauds and corruption. Once the Department has carried its investigation, it then reports its findings to the World Bank President, who as chief of staff can take appropriate measures.[327] In addition, the department can debar private enterprises which are found to incur in fraudulent or corrupt practices during procurement activities with the Bank.[328] Also this process is based on a detailed quasi-judicial procedure, whereby the Department of Institutional Integrity carries on individual investigations and recommends possible sanctions to a special Sanctions Committee.[329] Respondents have the chance to be heard before the latter body and to appeal its final decision. In the case such grievance is rejected, the firm is put on a public list of debarred enterprises.[330] In 2010 the World Bank made a step further by adopting together with other major MDBs an Agreement for Mutual Enforcement of Debarment Decisions.[331] The core innovations of the agreement are the automatic acceptance of a debarment decisions amongst MDBs and a harmonisation of internal procedures of investigation which guarantee due process for respondent entities.

The other multilateral funds do not have existing procedures of similar kind and reasonably rely on the existence of anti-corruption policies of their implementing agencies. Hence, a concern might be raised in regards to corruption practices of climate finance institutions officials, although of little relevance due to their small number and 'concentrated' presence at the World Bank headquarters.[332]

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[327] *Department of Institutional Integrity: Terms of Reference*, undated, <http://siteresources.worldbank.org/INTDOII/Resources/Integritytermsofreference.doc>.

[328] D Thornburgh, RL Gainer, and CH Walker, 'Report Concerning the Debarment Process of the World Bank', 14 August 2012, <http://siteresources.worldbank.org/INTDOII/Resources/thornburghreport.pdf>. Grounds for debarment of enterprises are: i) corrupt; ii) fraudulent; iii) collusive; and iv) coercive practices: see S Williams, 'The Debarment of Corrupt Contractors from World Bank-Financed Contracts,' (2006) 36 *Public Contract Law Journal* 277, 286.

[329] Ibid., 16-7.

[330] The Sanctions Committee Procedures are <http://go.worldbank.org/BJ9P6TARY1>. See also Williams, 'The Debarment of Corrupt Contractors from World Bank-Financed Contracts', *supra*, 297-8. The full list is <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>.

[331] The World Bank Group, *Mutual Enforcement of Debarment Decisions among Multilateral Development Banks*, 3 March 2010, Annex A, <http://siteresources.worldbank.org/INTDOII/Resources/Bank_paper_cross_debar.pdf>. The participating MDBs are the Asian Development Bank, the African Development Bank the Inter-American Development Bank and the European Bank for Reconstruction and Development.

[332] As seen in section I of this chapter, all multilateral funds secretariats excepts for the GCF operate in the World Bank's headquarters.

To conclude, a self-standing case is the one of the CDM for the fact that it receives administrative services from the UNFCCC/KP Secretariat. While no specific policies address corruption practices of UNFCCC officials,[333] the CMP is considering the adoption of CDM procedures to address the liability of DOEs for "significant deficiencies in validation, verification and certification reports".[334] Given such a broad mandate, it is not possible at the moment to grasp whether such liability process will extend to corruption and malfeasance by DOEs.

4.3. Analysis of accountability mechanisms

Climate finance institutions appear to include in their structures several types of centralised mechanisms in a way that their accountability can be sought in various forms and by different constituencies. However, there are dissimilarities on the means they can eventually be hold accountable, which can potentially raise considerable gaps and, as a consequence, affect their legitimacy.

The internal governance and decision-making rules of each institution can affect the capability of state members to raise accountability claims through general mechanisms. Recalling the findings of the first section of this chapter, it can be affirmed that general accountability is more successfully sought by the constituency that has the major decisional weight in the internal governance of an institution. Put simply and with an example, it is more likely that the World Bank's Board of Executive Directors will be more sensitive to accountability claims of state members with major voting power, than to the ones raised by client states. The contrary stands in the case of the AF, whose internal governance gives prevalent weight on developing countries.

[333] But general UN anti-corruption procedures apply.
[334] Decision 8/CMP.7, UN Doc. FCCC/KP/CMP/2011/10/Add.2, 15 March 2012, para 13.

In this context, the RoRs in the CDM are instead a case of neutral general accountability, because they define a process according to which EB members, nominated by states parties, can raise accountability concerns in regards to individual projects.

To the extent that one sees the UNFCCC as the 'natural place' where international climate finance policies should be formulated, another issue stemming from the analysis of general mechanisms is the 'vertical' accountability gap for those institutions lacking any formal relationship with the UNFCCC supreme bodies. Such accountability gap indeed can work against the interests of those actors who see in the UNFCCC the legitimate forum for regulatory action on the climate. As a consequence, this can affect the legitimacy of those institutions acting outside the UNFCCC authority and guidance.

In this comparative analysis, this is the case for the CIFs and the World Bank, because they are not formally bound by any relationship of 'accountability' or 'guidance' from the COP. General accountability in this context might be demanded by states in the case where those two institutions would depart from or go against general principles, guidance or standards present in the UNFCCC and its implementing decisions. Given the general character of UNFCCC provisions on finance, this accountability gap has not yet emerged. However, it might become relevant if a future international agreement on the climate or COP decisions will regulate in more detail modalities and standards of climate finance.

Shifting the focus on individual mechanisms, the panorama appears less homogenous. For though all the institutions engendered participatory mechanisms with their stakeholders, some of them receive accountability claims through internal procedures, while others either rely on their implementing agencies or lack any mechanism.

It might come as surprise that the World Bank –one of the most criticised international institution by the scholarship, NGOs and media– [335] indeed provides developed means for

[335] To name but a few: B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1; JE Stiglitz, 'Democratizing the International Monetary Fund

individual accountability claims. Its Inspection Panel constitutes the most defined and transparent mechanism of the ones canvassed here: it is framed in a way that guarantees a certain degree of independence of its three members; it provides reasoned answers to accountability claims from a defined range of subjects; and is bound to make recommendations on the basis of clearly identifiable standards. Further, the World Bank offers the possibility to raise accountability claims also in regards to individual misconduct of its officials and enterprises with whom it deals to implement its projects.

In the middle ground, the GEF and the AF provide less defined accountability mechanisms. Their respective Conflict Resolution Commissioner and Mechanism for Handling Complaints appear to work more as an informal dispute resolution service provided by the institution's administration, in a similar vein to the ombudsman figure in other international or national administrative experiences. While this solution might be a practical response to the concerns expressed by their stakeholders, they nevertheless amount to individual mechanisms that do not follow due-process requirements, such as transparency and availability of reasons giving, clear rules of procedure and definition of the standards against which accountability claims can be raised. The lack of due process indeed raises questions on the substantive contribution that these mechanisms make to institutional accountability.

Finally, two institutions of the ones canvassed do not provide any means of individual accountability. In the case of a multilateral fund, the CIFs, this lack is possibly justified by its reliance on the activity and regulations of their implementing MDBs: however, it might be regarded a partial justification, because, despite all their implementing MDBs make available complaint mechanisms similar to the WBIP, nonetheless this would not provide substantive accountability when individual claims would address breaches of CIFs internal

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and the World Bank: Governance and Accountability' (2003) 16 *Governance* 111; and C Tan, 'The Poverty of Amnesia: PRSPs in the Legacy of Structural Adjustments' in D Stone and C Wright (eds), *The World Bank and Governance: A Decade of Reform and Reaction* (Routledge 2007) 147-67. From the press, see, for instance, Noemi Klein, 'The World Bank has the perfect standard bearer', The Guardian, 17 May 2007, <http://www.theguardian.com/commentisfree/2007/apr/27/comment.business>.

regulations. For instance, the WBIP rules make admissible only claims having at object breaches of World Bank's internal regulations.

The lack of individual mechanisms in the CDM is even more striking, for the fact that, differently from other institutions, the EB has *de facto* the authority to regulate and decide on matters that directly affect the legitimate interests of individuals, in particular project developers and investors. Given the numerous projects registered and private entities involved in the CDM, the lack of a grievance mechanism available to them to review EB decisions taken in breach of CDM regulations and standards has raised well founded concerns. It must be noticed, however, the promising fact that the matter is under consideration in the EB and the CMP.

Two concluding reflections should be made in regards to the overall significance of the current individual mechanisms. First, even the more available and defined, constitute only internal administrative processes, rather than proper judicial or quasi-judicial means of accountability. None of the described mechanism, in fact, seems to fill one of the core general principles of judicial proceedings, namely the *nemo judex in causa sua* principle. Even the WBIP, for how independent its members might be, is eventually a consultative body embedded within the World Bank's administration, also for the reason that the ultimate decisional power on its cases rests on the Board of Executive Directors. Hence, referring to national experiences in administrative law, Hey makes a good parallel when she recalls how – before becoming proper administrative courts – also the French *Conseil d'Etat and the* Dutch *Raad van State* were consultative bodies to the Crown.[336] However, it would be difficult to maintain that a transformation in proper judicial devices should be the natural solution for global governance mechanisms like the ones at object. What eventually matters is noticing that, the more the climate finance institutions will mobilize finance and affect

[336] Hey, 'The World Bank Inspection Panel and the Development of International Law', *supra* note 299, 735, referring to the French *Conseil d'Etat* and the Ducth *Raad van State*. The same experience occurred for the Italian Consiglio di Stato.

interests of individuals and local groups, the more the lack of availability of proper judicial proceedings against the decisions of those institutions will become a concern to be addressed.[337]

The second and final point is related to the previous and in a way justifies the current lack of judicial or fully-fledged individual accountability mechanisms amongst all climate finance institutions. It is, in fact, a matter of institutional sensitiveness and political economy within each institution to gauge what kind of individual mechanisms are needed. In this regard, institutional responsiveness is crucial and the two cases of the World Bank and the CDM form two clear, yet contrasting example. While the former has since the nineties arguably proved quite sensitive to stakeholders' claims for more accountability, the CDM has shown restraints and sluggishness in considering the creation of an appeal mechanism to EB decisions. These different degrees of sensitiveness eventually may indeed affect the social legitimacy of an institution.

CONCLUSIONS

This chapter delved into a detailed comparative analysis of four regulatory factors as enacted by six climate finance institutions. Given the complexity, the study has led to numerous and, at times, divergent findings on their quality and relevance for legitimacy. Hence, by way of illustration, the GEF has the most developed regulatory process of stakeholders' participation among the six institutions, but it lacks a meaningful internal mechanism of accountability, as well as an access modality enhancing 'country ownership'. By the same token, the World Bank internal governance favours major contributing countries more than the other models, however its secondary law establishes a comprehensive programming process which engages both recipient countries administrations as well as interested

[337] In a similar vein, see Parish, 'An Essay on the Accountability of International Organizations', *supra* note 258.

stakeholders; in addition it also created the most articulate internal accountability mechanism among the six institutions.

The theory and methodology expressed in Chapter IV specifies that the issue should be viewed under the lens of an integrated 'interplay of legitimacies' between all the six institutions, in a way to provide an understanding of the overall legitimacy of the international composite administration of climate finance.

Crucial findings under this perspective, as well as some key reflections on the overall significance of this work, will be object of the following, concluding chapter.

CHAPTER VI
CONCLUDING REFLECTIONS

Climate finance is indispensable for a global low-carbon pathway and climate-resilient development in developing countries. As emerged in various parts of this work, the type of finance that is public or managed by public institutions is but a fraction of the current and projected private capital flows towards climate-related infrastructures and projects in developing countries. Despite the small number, one can hardly dispute its pivotal role in adaptation, as well as in capital leverage, and building 'enabling environments' for private investments in mitigation activities. Moreover, ensuring a sustainable institutional structure and a clear international legal framework for climate finance can also provide the needed stimulus to the slow-paced international negotiations under the UNFCCC.

The findings of this work spring from some reflections both on the institutional difficulties and substantive legal issues arising from the current state of climate finance, against the background of scaling such finance up to the needed levels. Overall, while the findings and arguments have been perhaps numerous, the core aim of this work has been answering to two broad questions: i) what is the international law applicable to climate finance? And ii) how can one address under a *legal* purview the problems arising from its institutional complexity?

It is worth dividing the answers into two levels, a 'micro-' and a 'macro-level'. The first, 'micro-', level will address those two questions within the specific ambit of climate finance (section one and two). The second 'macro-level' will conclude by fitting these

findings into a broader reflection for clarifying and, perhaps, reviving a *legal method* to canvass the institutional complexities of all areas of global governance (section three).

1. THE INTERPLAY OF LEGITIMACIES IN CLIMATE FINANCE

Part II of this work was dedicated to the problem of the contested legitimacies of climate finance institutions, against the background of an institutional governance dominated by the dynamics of complementarity and competition. The choice to look through the prism of legitimacy indeed offered insights in addressing the legal consequences of institutional complexity.

In particular, the argument went as far to find that in the context of a heterarchical and competing ground for managing scarce financial resources and acquiring 'regulatory shares',[1] the more an institution is perceived legitimate vis-à-vis the numerous actors it interacts with, the more it will be successful in this competition. Furthermore, Chapter IV set the methodological basis for engaging into an in-depth analysis of regulatory factors of social legitimacy of the six most relevant climate finance institutions, with the clarification that from a *legal* purview, the most meaningful –yet limited– approach would have been to focus on the *procedural* components of legitimacy, because expressed via regulatory devices displaying the nature and language of law.

While the previous chapter has proceeded with such comparative analysis and offered insightful findings for each of the four factors, this heading will apply the general 'standard of review' adopted in Chapter IV, with a view of shedding light on the *interplay of legitimacies*[2] in the context of an international composite administration.[3] As argued in that chapter, it would be unwieldy –and impossible with the results of the analysis– to weight

[1] J Black, 'Legitimacy and Competition for Regulatory Share', LSE Law, Society and Economy Working Paper No. 14/2009, at 14-6.
[2] L Boisson de Chazournes, 'Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies' (2009) 6 *International Organizations Law Review* 655.
[3] See Chapter IV above, at 118.

precisely the different legitimacies and to draw a final ‘legitimacy rank’ of climate finance institutions. The same findings are rather useful to understand how the balance between the legitimacy of each institution plays against the possibility that an *institutional alternative* is always available in a competitive international composite administration.[4] The interplay of legitimacies is a crucial factor in the institutional proliferation in climate finance, with its positive and negative features.

An example of institutional alternative stems from the establishment of the Green Climate Fund, which was created by the COP in response to the developing countries discontent about the Global Environment Facility, particularly to its internal governance and access and disbursement modalities. Also the establishment of the Climate Investment Funds can be seen as an institutional alternative to existing financial channels at the time, initiated by a developed countries call on multilateral development banks to scale and coordinate their climate finance efforts. To be sure, the Climate Investment Funds have proven to be a valid alternative to other mitigation and adaptation funds, being able to source a major share of capital from developed countries.

In order to provide a fair picture of how the interplay of legitimacies works, three cross-cutting and inter-connected themes emerged from the analysis: i) the dominating role of contributor countries; ii) country ownership of funds; and iii) the accountability of climate finance institutions and international implementing agencies. These themes shape the interplay of legitimacies by influencing the possibility that either an institutional alternative might be sought by states or that a regulatory development within one institution is adopted by another.[5]

[4] Ibid, recalling the standard proposed by A Buchanan and RO Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics & International Affairs* 405.
[5] This phenomenon was termed cross-fertilization in Chapter III above, at 128.

1.1. Contributor countries bias

It comes perhaps as no surprise that both the institutional governance and the way some substantive provisions have been implemented favour the interests of contributor countries. To be sure, this is a feature of the law and administration of international development cooperation taken at large,[6] but it also takes specific forms in the context of climate finance.

There is a generally-acknowledged interest by contributors in climate finance that sums mobilized towards climate-related activities should effectively serve their purposes. This is particularly a sensitive issue in mitigation, where agreed measuring, reporting, and verification standards (MRV, in the 'climate jargon') are claimed by developed countries as a pre-condition for increased levels of finance.[7] Yet the findings in the first chapter revealed also that developed countries' interests might go further than the reasonable expectations of 'effective spending' and lead in extreme cases to forms of 'mission creep', through certain practices of conditionalities via foreign aid agreements, both from multilateral and bilateral institutions.[8]

As emerged in the previous chapter, the internal governance and decision making rules of the institutions under analysis tends to assign a major role to contributor countries with clear consequences on the issue of 'general accountability' that developing countries can exercise. The Global Environment Facility and the World Bank's executive bodies assign decisional power depending on the level of funds pledged or capital share. Furthermore, the very corporate governance model of the World Bank is replicated by other multilateral development banks engaged in climate finance. Furthermore, it was noted that,

[6] P Dann, *The Law of Development Cooperation: a Comparative Analysis of the World Bank, the EU and Germany* (CUP 2013), at 215-9.
[7] As seen a successful case is the Clean Development Mechanism.
[8] SL Babb and BG Carruthers, 'Conditionality: Forms, Function, and History' (2008) 4 *Annual Review of Law and Social Science* 13.

notwithstanding its role as a mere trustee of funds, the World Bank has also influenced the governance structure of several climate multilateral trust funds via its secondary laws.[9]

The tendency of favoring developed countries interests was also found in the context of access and disbursement modalities. On one side, the level of regulatory complexity and overlap between multilateral trust funds and accredited international implementing agencies seems to fulfill the general interest of achieving higher control and fiduciary standards, at the cost of challenging the capacity of developing states (particularly least developed ones) to navigate such complexity. On the other, the ample discretion of multilateral development banks in access and disbursement modalities and the lack of pre-set regulations for the Climate Investment Funds eventually leave the final decision to their respective internal governance structures, which in the first case is unbalanced towards contributor countries and in the second is evenly split between developed and developing countries, but with substantive influence from multilateral development banks.

The 'contributor country bias' has nonetheless been facing several readjustments both at general level, with the adoption of two non-binding declarations under the aegis of the OECD and developments in the UN,[10] as well as within climate finance, after the establishment of the Adaptation Fund and the Green Climate Fund. These two funds shifted their internal governance and decision making in such a way that it gives increased decisional power to developing countries. This change, taken also in response to the current geopolitical shifts in international relations and climate politics, should however be seen against the background of the framework adopted in this work. Looking at the low level of sourced funds from the Adaptation Fund, it could be argued that the interplay of legitimacies

[9] See Chapter V above, section 1.6.
[10] *Declaration of Paris on Aid Effectiveness*, OECD Doc. DCD/DAC/EFF(2005)1/FINAL, 3 February 2005; and the work of the UNDESA office, Financing for Development, after the 2002 Monterrey Conference <http://www.un.org/esa/ffd/documents/>.

has played against this institution and in favour of the competing adaptation programme under the Climate Investment Funds:[11] because the internal governance rules and access and disbursement modalities assign a prevalent role to developing countries, this might have worked as a crucial factor for contributors not to pledge sums under the Adaptation Fund and rather prefer other multilateral and bilateral institutions. Although it is too early to make an assessment, also the Green Climate Fund might face legitimacy challenges in its ability to source ambitious funding, if implementing secondary laws in access and disbursement modalities under the Board and its sub-bodies, will tend to favour developing countries standards and direct access. A crucial test ground in the interplay of legitimacies for the Green Climate Fund is likely to be the issue of country eligibility: the analysis above found that the broadly-defined '*developing countries*' and not the listed Annex-II countries to the UNFCCC are eligible to the Fund's finance. The way the Board will shape further differentiations among developing countries under the various financing windows (mitigation, adaptation, REDD+, etc.) is likely to play a considerable role for the Green Climate Fund's legitimacy in relation to other institutions.

1.2. Country ownership

The concept of 'country ownership' stands at the basis of recent regulatory developments from some climate finance institutions: it is adopted as a response to the frustration of developing countries about regulations and practices assigning increased executive roles to international implementing agencies, reflecting the general 'contributor country bias' of their institutional governance. While 'country ownership' was first formulated in the Paris Declaration on Aid Effectiveness[12] and, therefore, in the broader context of official development assistance, it also assumes a stronger legitimacy pull in climate finance: it is, in fact, highly contested from the beginning whether the latter should constitute mere official development assistance, or a special form of financial transfers owed by industrialized states

[11] The Pilot Programme for Climate Resilience.
[12] *Declaration of Paris on Aid Effectiveness*, *supra* note 10.

for their 'ecological debt' resulting from centuries of unfettered GHGs emissions. Arguably, developing countries tend to view the issue from this second perspective, particularly in the case of adaptation finance. Therefore, they call for a high level of country ownership in climate finance, being a type of money 'owed' by industrialized states.

Against this contested background, climate finance institutions have interpreted and implemented the concept in two main procedural components: the regulations on national or subnational programming, and direct access in access and disbursement modalities.

The foregoing comparative analysis gave evidence of regulatory processes requiring climate finance institutions to engage in national programming activities with eligible host states, before progressing to the project design and approval stages. The core scope of these programming activities is to align national development priorities, as identified by government and participatory processes, with potential climate finance interventions. Hence, the World Bank's Country Assistance Strategies, the Climate Investment Funds' joint missions, and the Designated National Administrations in the Clean Development Mechanism serve the purpose of fostering the 'country ownership' of the approval process or the project cycle.

By the same token, direct access has been the flagship initiative to enhance country ownership in the Adaptation Fund. The possibility to accredit National Implementing Agencies as eligible entities to submit project proposals to the Adaptation Fund Board is indeed an innovation in the context not just of climate finance, but of all multilateral development financing. The influence of direct access in the interplay of legitimacies has led other climate finance institutions to also adopt similar processes: among the entities in the comparative analysis this has been the case for the Green Climate Fund and partly for the Global Environment Facility.

However, even if direct access can potentially revolutionize the administration of climate finance flows, there are some substantive issues which rather show a mere symbolic

role of this process in garnering legitimacy from developing countries. First, in terms of institutional competition in sourcing funds, the scarce resources pledged to the Adaptation Fund should work as signal of the role direct access can play in the interplay of legitimacies, where its main competing institution, the Climate Investment Funds which lack direct access modalities, has managed in comparison to almost triple the capital pledged in adaptation. Another substantive issue is the lack of capacity that least developed countries might face in setting up accredited administrative structures to the various multilateral climate funds. The issue is particularly relevant in the case where a least developed country facing capacity restraints to accredit directly to a fund, eventually enjoys less 'country ownership' and, possibly, success to receive finance than other, 'more capable', eligible countries. Therefore, lack of capacity in the context of direct access can frustrate the expectations from some developing countries and affect the legitimacy of the climate finance institution.

1.3. Accountability

Accountability is a cross-cutting theme affecting the legitimacy of institutions and their interplay. The comparative analysis showed the complex and manifold accountability relationships of general and individual kind that climate finance institutions establish with both their members, and other international and national entities.

Across the complex chains of accountabilities, several gaps in terms of standards and sanctions emerged throughout this work, which if taken together can shed some light on the interplay of legitimacies. In particular, they evidence an unbalanced structure of accountabilities potentially favouring contributor countries and climate finance institutions, at the expense of recipient countries and affected groups and individuals.

One type of gap pertains to the general accountability between the COP and the operational entities of the Financial Mechanism (the Global Environment Facility and the Green Climate Fund). These entities are under the *guidance* and shall be *accountable* to the COP, but in the case of the Global Environment Facility, no clear consequences are

envisioned from a possible diversion from the COP guidance, while the standards of accountability are currently being negotiated for the Green Climate Fund. At the same time, another accountability gap –or, rather, different standards of accountability– apply to climate finance institutions untied from formal accountability relationships with the UNFCCC supreme bodies, such as multilateral development banks and the Climate Investment Funds.

Under the lens of the interplay of legitimacies, these gaps and misaligned accountability regimes in the composite administration imply that eventually standards and sanctions depend on the different regulations on internal governance and decision making of the 'power-wielders'.[13] While for institutions acting within the international climate change regime the 'power-wielders' are the supreme bodies of the treaties (the COP and the CMP), instead for those acting outside this framework general accountability takes place only within the internal governance structures, which, as seen, tends to favour contributing countries. For instance, in the case of the COP-Global Environment Facility relationship, accountability will be sought both via the COP and the general accountability under the internal governance of the Global Environment Facility. Conversely, general accountability in the World Bank will mainly depend on Boards of Governors and Executive Directors, as well as on the President.

A second type of accountability gap emerges from the role of international implementing agencies as 'end-users' and implementers of climate-related projects in developing countries. As outlined in several parts of this work, climate finance institutions often delegate the management and implementation of individual projects to accredited agencies, being themselves international institutions. The existence of accreditation procedures, social and environmental safeguards, individual accountability mechanisms, as well as financial agreements applicable to international implementing agencies engenders

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[13] RW Grant and RO Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *The American Political Science Review* 29.

different accountability (and responsibility) relationships between them and the climate finance institution. However, as the comparative analysis showed, the regulatory overlap between climate finance institutions and international implementing agencies along the process cycle can lead to a double and misaligned regulatory regime applicable to the recipient country, which is instead left with little-defined accountability mechanisms, when they are available. By way of example, this is the case for the Global Environment Facility and in part for the Adaptation Fund: despite the existence of environmental and social safeguards applicable to all accredited agencies,[14] the Global Environment Facility lacks an accountability mechanism that sanctions breaches of and ensures compliance with such regulations, furthermore the same regulations apply only during the process of accreditation of implementing agencies and not also during project implementation. The same applies to the Adaptation Fund's Environmental and Social Policy,[15] with the difference that its Mechanism for Handling Complaints[16] admits informal complaints by recipient countries against implementing agencies. However, the same mechanism does not envision clear sanctions or consequences.

The third and final type of accountability gaps concerns the relationships between the climate finance institution on one side, and the local groups and national entities affected by its decision-making and regulations on the other. The comparative analysis showed that on different degrees climate finance institutions offer forms of individual mechanisms –some of them at an embryonic stage. Yet a more complete picture of accountability gaps can be drawn if one parallels the findings of individual accountability mechanisms with the ones on

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[14] GEF, *GEF Policies on Environmental and Social Safeguards*, GEF/C.40/10, 26 April 2011, <http://www.thegef.org/gef/sites/thegef.org/files/documents/C.40.10_GEF_Policies_on_Safeguards_and_Gender.April_26_2011.pdf>.

[15] AF, *Operational Policies and Guidelines for Parties to Access Resources from The Adaptation Fund*, as amended on November 2013, Annex III <https://www.adaptation-fund.org/sites/default/files/OPG%20ANNEX%203%20Environmental%20&%20social%20policy%20(Nov2013).pdf>.

[16] See Chapter V above, at 261.

participatory processes available for the same kind of groups and entities, because accountability from non-state actors can also be indirectly sought by raising reasons for grievance in participatory processes.

Therefore, when neither the accountability mechanism nor the participatory process allows a *meaningful* assessment of the grievance, an accountability gap of the climate finance institution might ensue and, as consequence, the legitimacy of the institution finds grounds of contestation. As seen, the World Bank Inspection Panel is the most detailed and proceduralized individual mechanism among the ones addressed. Furthermore, the mix of general and in-country participatory processes allow different avenues for affected groups or entities to make their case heard and assessed. Conversely, the GEF displays both a loosely-structured individual mechanism and a participatory process which, even if thoroughly regulated and structured, does not allow observers to be heard on agenda items during Council's meetings.

2. UNDERLYING TENSIONS FOR LONG-TERM FINANCE

In addition to understanding the mechanisms of the legitimacies interplay, by adopting a long-term perspective, there is a second strand of reflections on climate finance stemming from the findings throughout this work.

Climate finance is clearly at crossroads: following the period of 'fast-track finance' (2010-2012) envisioned in the 'Copenhagen pledge', the challenge has shifted on framing a complex structure capable to source and channel at least USD 100 billion a year, from multiple sources in a fair and effective manner. Yet, negotiations and policies are still in the limbo of diverging interests and unclear commitments. The discussion on legitimacy in Chapter IV described how the COP has been seeking to facilitate negotiations under a two-year 'long-term finance work programme', whose report addresses several "barriers" for

mobilizing and scaling up the finance. Expectedly, issues familiar in this work are contained in the report, such as defining and accounting for climate finance; coherence and coordination of in-country efforts among all institutions; individuating financial instruments to scale up private investments; country ownership; accountability of climate finance institutions, etc… Overall, rather than clear suggestions, the findings of the report simply highlight the most important issues ("barriers" in the text) to address future finance under a *policy* perspective.[17]

The core reflection here is that under a *legal* perspective this work has unveiled some tensions underlying these policy "barriers" to long-term finance, which should prompt further study and interpretation by lawyers and inform policy processes. In particular, against the background of indeterminate international legal obligations, this work found that the *subsequent practice* of states and, especially, climate finance institutions, both under international law and an 'intimated' inter-institutional law, has already engendered agreed forms of implementation. It is submitted that also such tensions, and not just the ensuing 'policy barriers', as unravelled by the UNFCCC work programme above, need to be properly addressed.

These tensions can be divided into two broad areas: one related to the sphere of substantive law and the other of institutions.

2.1. Substantive tensions

An interpretation under the subsequent practice tells that the international obligations applicable to long-term finance are likely to be more burdensome on recipient countries than the letter of the UNFCCC seems to provide, and this inevitably raises suspicions and scepticism in negotiations.

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[17] *Report on the outcomes of the extended work programme on long-term finance*, UN Doc. FCCC/CP/2013/7, 1 November 2013.

In Chapter I this interpretation was reached after looking at the nature of financial instruments viable to implement the UNFCCC financial obligations, and at the practice of conditionalities found particularly in financial agreements between climate finance institutions, including bilateral agencies, and recipient countries. After the paradigm shift of the 'Copenhagen pledge', it is accepted, for the purposes of compliance under the UNFCCC, that long-term public finance will be channelled also via non-concessional loans of multilateral and bilateral institutions, thus increasing the financial burden on recipient countries. Although accepted and practiced, yet this stands at the heart of the tensions between developed and developing countries, particularly those who deem climate finance a form of 'payment for the ecological debt' due to the historical responsibilities of industrialized states in polluting the atmosphere.

At the same time, the practices of conditionalities, despite recent changes, still end up framing individual projects and programmes under goals and policy objectives that might be misaligned with the ones of the recipient country. This tension is only partially mitigated by some genuine efforts from climate finance institutions to enhance participation and 'country ownership', because, as just seen above in the context of the interplay of legitimacies, these initiatives often come at a legitimacy cost for the same institutions in their ability to source public funds from industrialized states.

To be sure, the tensions stemming from this interpretation of the extant international law and practice go hand in hand with the indeterminate and changing nature of the very legal principle buttressing climate finance. The hard dichotomy developed/developing countries of the Common But Differentiated Responsibility principle is being progressively softened[18] to reflect the most recent science on emissions reduction scenarios, the new morphologies of climate politics, and, more generally, global economic and geopolitical

[18] J Brunnée and C Streck, 'The UNFCCC as a Negotiation Forum: towards Common but More Differentiated Responsibilities' (2013) 13 *Climate Policy* 589.

shifts, such as the sheer economic growth in the last two decades of some developing countries. Thus, under the recent COP developments, both developed and developing countries need to submit their voluntary pledges with a view of reaching "an agreed outcome with legal force" by the end of 2015.[19] Moreover, a new biannual reporting process and review is being established for both developed and developing countries, although a less intrusive review applies to the latter.[20]

Yet one must also notice that other areas of practice in climate finance do not replicate the tensions stemming from the use of financial instruments and conditionalities. The Clean Development Mechanism, as a hybrid market-based mechanism of climate finance, neither relies on conditionalities on recipient states, nor on loans or other traditional financial instruments. It was rather demonstrated how the rules of its complex project cycle and its governance indeed confer quite a substantive role on recipient countries during the design and approval of individual projects. Certainly the Clean Development Mechanism comes with its own substantive issues of accountability, integrity, additionality, scarce price signal, and so on. However, they do not hamstring the relationships between contributors, climate finance institutions and recipients of finance.

On the legal plane, transition and indeterminacy do not and should not lead to an over-simplistic call for an international agreement on each of the policy barriers, or on each substantive tension: the means of reaching set goals is a policy task. Rather, the legal clarifications in this work should prompt a constant engagement by lawyers with the subsequent practice of states and climate finance institutions, which might lead to interpretations addressing and, possibly, soothing substantive tensions. This claim will be further refined in the final section below.

[19] Decision 1/CP.17, UN Doc. FCCC/CP/2011/9/Add.1, 12 March 2012, para 2.
[20] Decision 2/CP.17, *supra*, Annex I and II.

2.2. Institutional tensions

The second area of the underlying tensions for future long-term finance pertains to the institutional dimension standing at the core of this work. Arguably, the very framework of the competition/complementarity dynamics in an international composite administration unveils some crucial tensions among climate finance institutions with the policy problems of uncoordinated and incoherent financing at the global and national levels in the foreground.

These tensions stem from the relationships between the two dynamics and do not just occur *between* climate finance institutions, but also *within* each institution. The former, horizontal, tensions take place in the context of scarce public financial resources, which, as seen, prompt climate finance institutions to compete and, at the same time, to strive in promoting complementarity of their activities with other overlapping institutions. The latter, vertical, tensions instead require each institution to shape its internal processes and secondary law in order to reflect the expectations of its members and actors.

What both types of institutional tensions imply is that each climate finance institution must entertain complex exercises of balance, which this work has been able to dissect and define under a legal purview and should be carefully addressed for the prospects of long-term finance. Such exercises, in fact, should take into account the regulatory factors of legitimacy used in this work's analysis.

Should a climate finance institution adopt access and disbursement modalities with pre-defined 'envelopes' so to guarantee each recipient country a share of the pot?[21] If so, how would that impact on the contributors interest in effective financing, if some country envelopes remain 'unspent' at the end of a funding cycle? And should direct access be extended to all multilateral trust funds, and, partly to multilateral development banks? How stringent should the fiduciary standards and the accreditation process be? If stringent, how would that impact on the different capacities of developing countries in dealing with such regulatory complexity?

[21] As seen this is the case of the Global Environment Facility.

These are but few sample questions which creep under the policy mantra of 'more institutional coherence and coordination', and shape the 'intimated' law of the discovered inter-institutional processes of complementarity. Thus, under a legal understanding, this again implies constant analysis of the developments and subsequent practice by climate finance institutions. At the same time, this work shows that, given the scarce probability of having a centralized and hierarchical institutional structure of climate finance in the future, these tensions will hardly be eased or leapfrogged by 'more defined' international obligations in the much-waited "legal outcome" of the 2015 COP20 in Paris. Therefore, the spontaneous development of inter-institutional instruments and of the interplay of legitimacies should also be recognized as relevant issues to take into account for the development of long-term finance.

3. THE GOVERNANCE OF LEGITIMACY AND THE LEGITIMACY OF GOVERNANCE: A ROLE FOR THE LAW

Whilst the two sections above have distilled some reflections on the legal challenges in the prospect of ambitious long-term finance objectives, this conclusive one zooms out the view and offers a broader, macro-level, reflection which, going beyond the boundaries of climate finance, seeks to suggest a legal method to be exercised in the interstices of global governance.

The word 'governance' and 'legitimacy' have permeated the analytical parts of this work and, as seen, at the same time have sparked a wealth of theorizations from legal scholars on how law, and international law in particular, should 'react' and relate to the dynamic realities of institutional complexity.

To be sure, both the terms are outside the law-speak and the techniques of legal reasoning. 'Governance' –it is now widely accepted– implies something different from, and

perhaps ‘something more’ than, ‘government’: the conceptual tenets of the state and its sovereignty enmesh with new spaces of authority of transnational and at times private nature. Polities, as construed under the idea of modern constitutional states, are not the only pillars upon which governance architectures are legitimately built: new arcades are being erected beside the refined central structures of constitutionalism.

‘Legitimacy’ follows suit. Not only because of its fluid and essentially contested nature, but also because the process of its verification leads to nuanced (more or less legitimate) results, which the binary logic of legal reasoning cannot fully grasp: on the legal plane, there is no place for facts that are ‘more or less’ legal. It comes natural to say that a legal understanding of institutional legitimacy comes with inherent limitations, mainly because it constitutes but a variable of a more complex equation.

Overall, this work has also investigated and proposed a legal method to address and understand a very specific ambit of global governance. Importantly, it has not created a novel theoretical framework, but has relied on the existing, more convincing ones. Even if limited and initial, both the approaches adopted in the arenas of governance and legitimacy have been premised by careful re-imaginations or meta-conceptualizations, stemming both from theory and from the empirical realities of climate finance.

Thus, in Chapter III addressing the ‘governance’ issue, the strand of institutional theory of international relations helped to re-imagine the institutional structure of climate finance as a regime complex. On the legal plane, the core implication was that the idea of fragmentation, prominent in the international legal scholarship, does not embrace the institutional aspects of climate finance, because ‘fragmentation’ presupposes some kind of ‘unity’, which in such case has never existed. The idea of regime complex instead translated neatly on the legal plane in the construct of international composite administration, as a

meta-concept able to expose the nature and role of climate finance institutions under the exercise of public authority in the global sphere.

A final step was nonetheless needed, in order to discover whether international or other ‘intimated’ law was emerging within this international composite administration: namely, to single out from the empirical realities and contestations the two key dynamics occurring among climate finance institutions. Therefore, only after being equipped with the details of complementarity and competition, it has been possible to filter some ‘intimated’ legal realities that are being forged in the international composite administration in order to overcome regulatory, geographical and functional overlaps among institutions.

Chapter IV, dealing with legitimacy, also entered into a path of meta-conceptualization before progressing into the actual analysis. The method hinged on two conceptualizations: one, stemming from the empirical contestations of legitimacy made by all actors, went to discover four regulatory factors affecting social legitimacy. The second grounded such standards both on broader theorizations of input and output legitimacy, as well as under an international legal scholarship deeming the concepts of ‘democracy’ and ‘fairness’ as the key determinant of global governance legitimacy in international law.

Nonetheless these methodological efforts encountered limits inherent in the very legal approach proposed. On one side, in fact, the toolbox of international law proved inadequate at start to embrace the relevant facts of institutional complexity as *legal facts* of the system. By necessity this led to a shift on heterodoxy and on deeming legal developments towards institutional complementarity as ‘intimated’ law, which is by definition still loosely-framed and contested. At the same time, the very analysis was limited by the high degree of informality in the legally-relevant dealings among institutions.

On the other hand, the limits of a legal analysis of institutional legitimacy are twofold: first, the analysis relied on the assumption that those regulatory factors indeed affect the social legitimacy of institutions, because they have been contested in official negotiations or

evaluation documents. Second, the standard of review based on the interplay of legitimacies is not purely legal, but admittedly comprises ideas of political theory and morality.

To conclude with the gist of this broader set of reflections, the argument is that methodologically it is a more fruitful path for international lawyers to deal with the legitimacy of (global) governance, rather than with the governance of legitimacy. The reason is that the intellectual goal of 'governing legitimacy' hinges on a managerial idea of the law: once some key 'problems' of institutional governance are spotted, international law is seen as a tool to 'manage', or 'solve' them. Thus international legal scholars have questioned how to make the WTO more legitimate;[22] the UN Security Council more accountable;[23] how to 'orchestrate' an effective climate regime complex;[24] how to 'manage' fragmentation of environmental institutions.[25]

These are but a few of the emerging questions posed under the 'managerial' idea that no underlying political choice is already made; and that law is neutral in answering these questions. As Koskenniemi has aptly highlighted in the very context of international regimes interactions,[26] this attention by international legal scholars in suggesting how institutions should govern their legitimacy or their components is a reflection of their discomfort in dealing with some valid discoveries and new languages from other branches of political science –in particular international relations. Moreover, on the legal plane the heuristic of these approaches at times overshadows the complex relationships between international law

[22] R Howse and K Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16 *Governance* 73.
[23] A Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851.
[24] KW Abbott, 'Strengthening the Transnational Regime Complex for Climate Change' (2014) 3 *Transnational Environmental Law* 57.
[25] KN Scott, 'International Environmental Governance: Managing Fragmentation through Institutional Connection' (2011) 12 *Melbourne Journal of International Law* 177.
[26] M Koskenniemi, 'Hegemonic Regimes' in Margaret A. Young (ed), *Regime Interaction in International Law* (CUP 2012) 305-24.

–or other law– and these institutional realities, or least recognizes the scarce problem-solving capacities of the law in a managerial context.[27]

The broader legal method of this work instead reversed the focus on the 'legitimacy of governance'. In contrast to the managerial approach the method suggested here is primarily analytical and dependent on those re-imaginations and meta-conceptualizations described above with all their inherent limits.

The promise of this approach is that *it can work as fertile ground for analytical advancements and discoveries in the law rather than politics*. This very method is similar in kind, but smaller in proportion, to what prompted the re-imaginations and meta-conceptualizations of other branches of law, which today are regarded as fully-fledged legal systems. After all, public international law was prompted by the imagining that states should be treated as equally sovereign and independent monads in a heterarchical legal system;[28] modern administrative law was reflective of the dynamics between an authoritative and unaccountable administration of the crown, and the subject facing his/her legitimate interests affected by the same administration; finally, the very idea of sovereignty, seeding the later nascent modern public law, was framed to explain the legitimate authority of an absolute crown.[29]

Yet, this work has focused on a very specific realm of global governance, which presents its own dynamics, substantive issues and peculiarities: thus, despite relying on recent legal theorizations of international law, it also found that the same theorizations –such as global administrative law, international public authority, constitutionalism, and informal international lawmaking– are still too general to work as toolbox of legal conceptualizations in each global governance domain: the mutating realities of global governance are unlikely to be captured by a one-size-fit-all theory of law.

[27] H van Asselt, 'Managing the Fragmentation of International Climate Law' in EJ Hollo, K Kulovesi and M Mehling (eds), *Climate Change and the Law* (Springer 2013) 329-57.
[28] This regardless of 'who' incepted such ideas: be it Grotious, De Victoria, Vattel, etc…
[29] As notably framed by Jean Bodin.

While this view in a way espouses accounts of global legal pluralism,[30] it also does not imply a full rejection of general theories, but rather a complementary effort by international lawyers to deepen, re-conceptualize and look afresh into each 'micro-space' of governance. Only if also these dimensions will be covered, international law or other laws are likely to spring from the spontaneous and burgeoning social realities of global governance.

[30] N Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (OUP 2012).

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