

Reconceptualizing the Green Climate Fund's Project Reconsideration Procedure for Institutional Accountability

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[Abstract]

This article addresses the design of the project reconsideration procedure of the Green Climate Fund ("GCF"). Operationalized in 2014, the GCF and its governance have been bootstrapped steadily since the Cancun Meeting of the UNFCCC Conference of the Parties in 2010. The GCF's Board of Directors must now institute a procedure that fulfills the right of eligible developing countries to request review of a decision denying funding to a proposed project, but the details of the procedures' design are still under discussion. After reviewing the GCF's project selection procedures and evaluating its institutional accountability mechanisms, I propose that the project reconsideration procedure be robustly designed so as to provide institutional review of the GCF's project selection procedure. Constituting the project reconsideration this way will strengthen GCF's administrative accountability to the least developed and most climate-vulnerable States of

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the UNFCCC.

I . Introduction

This article concerns the project reconsideration procedure of the Green Climate Fund (“GCF”), the 194-country fund established in 2013 to coordinate the provision of collective climate finance under the United Nations Framework Convention on Climate Change (“UNFCCC”). Operationalized in 2014, the GCF is actually the culmination of many years of multilateral negotiations, having been created as a successor to, and improvement upon, a number of fragmented attempts to manage climate finance in implementation of the UNFCCC.¹⁾ Its announcement at Cancun in 2010 ushered in an unprecedentedly ambitious era for climate finance, under a transformed, State-centered governance structure through a global finance institution with its own legal personality and its own Secretariat. The UNFCCC States themselves resolved to collectively manage the technically difficult problem of choosing projects to receive donor countries’ finance, instead of entrusting this to the World Bank and UN institutions, as before.

Since Cancun, the GCF has been bootstrapped by the UNFCCC States with the help of the World Bank and the Global Environmental Facility (“GEF”). In its haste to approve its first projects before the twenty-first Conference of the Parties (“COP”) in December 2015, GCF’s Board of Directors (“the Board”) left several important governance questions to be resolved.²⁾ Among these is

1) Smyth, Sophie, “A Practical Guide to Creating a Collective Financing Effort to Save the World: The Global Environment Facility Experience,” *Georgetown International Environmental Law Review*, Vol. 22, No. 1, p. 29, January 2010. Lyman, Erica. “The Green Climate Fund: Achieving Complementarity and Coherence among the UNFCCC Financial Institutions,” *환경법과 정책* 제13권 (2014.9.30), 128-183

2) For a complete list, see Schalatek, Nakhoda and Watson, “The Green Climate Fund,”

the shape of a project reconsideration procedure that would allow developing countries that have been denied funding for a project to request a review of a project denial. The project reconsideration procedure is one part of the GCF's multi-sided accountability framework that is mostly worked out but not fully realized.³⁾ The Governing Instrument ("GI") has identified three "Accountability Mechanisms:" an information disclosure policy, the Independent Integrity Unit and the Independent Redress Mechanism, (discussed in section II. C. below). Afterwards, it was decided that the Independent Redress Mechanism, which handles complaints from individuals adversely affected by projects, should also review project reconsideration requests. The final form of the project reconsideration procedure involves complex questions about the autonomy of the GCF as well as the practical ability of least developing and climate vulnerable countries to hold the GCF to account for the consistency of funding decisions.

The right to request project reconsideration has been mandated from the inception of the UNFCCC in Art. 11.3(b), (although such a request has never been raised). The GCF is an operating entity of the financial mechanism, defined in Article 11(1), which stipulates that the UNFCCC COP "shall decide its policies, programme priorities and eligibility criteria." Art. 11. 3(b) requires the COP or the operating entity itself to make arrangements to give effect to "(b) modalities by which a particular funding decision may be reconsidered in light of these policies, programme priorities and eligibility criteria."⁴⁾

The first operating entity of financial mechanism, the GEF, is subject to a reconsideration procedure as prescribed in a Memorandum of Understanding between the GEF and the UNFCCC COP.⁵⁾ Under the Memorandum, Member

Heinrich Boll Stiftung Foundation, Climate Funds Update, December 2015 at p. 7

³⁾ *Id.*

⁴⁾ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

⁵⁾ (FCCC/Decision 12/COP 2,) "Memorandum of Understanding between the Conference of the Parties to the United Nations Framework Convention on Climate Change and the

States of the GEF that are dissatisfied with a decision may finally refer the issue to the COP.⁶⁾ After the COP adopted the GCF's the governing instrument ("GI") in 2011⁷⁾ requiring the Board to set up the Independent Redress Mechanism ("IRM") as an accountability mechanism to handle complaints related to funded projects, controversy erupted in 2013⁸⁾ when developing countries suggested that the IRM should facilitate direct appeals of funding decisions to the COP.⁹⁾ Representatives from the United States and Australia vigorously objected, saying that the prospect would create "political risk" that would discourage contributions from the private sector.¹⁰⁾ The COP has provisionally instructed the Board of the GCF to institute project reconsideration inside the IRM, while postponing the procedure's final design until the IRM is in operation.¹¹⁾ For now, the GCF must include in its reports to the COP any recommendations made by the IRM concerning project reconsideration, while "the COP may provide additional guidance to clarify policies, programme priorities and eligibility criteria as they impact funding decisions."¹²⁾

Council of the Global Environment Facility," 1996.

- 6) "If any Party considers that a decision of the Council regarding a specific project in a proposed work programme does not comply with the policies, programme priorities and eligibility criteria established by the COP in the context of the Convention, the COP should analyse the observations presented to it by the Party and take decisions on the basis of compliance with such policies, programme priorities and eligibility criteria." *Id.*
- 7) The Governing Instrument for the Green Climate Fund, (FCCC/Decision 9/COP 17/Add. 1) also available at: http://gcfund.net/fileadmin/00_customer/documents/pdf/GCF-governing_instrument-120521-block-LY.pdf.
- 8) Muller, Benedict. "Metaphysics or Pragmatics?" How to proceed with the Arrangements between the COP and the GCF? Submission to the Standing Committee on Finance for its fifth meeting, 22 August 2013.
- 9) This style of dispute resolution is similar to that in several traditional IGOs, where the supreme plenary body becomes an arbiter for disputes inside the organization, as in the ILO, IBRD, the IMF, the IMO and the WHO. In the ICAO, IMO and WHO, the outcome may then be appealed to the ICJ.
- 10) Muller, *supra* note 12.
- 11) (FCCC/Decision 5/CP19.) Arrangements between the Conference of the Parties and the Green Climate Fund.
- 12) *Id.* para 10-16

How should the project reconsideration mechanism be constituted in light of the GCF's mandate for accountability? In Part II, first I describe the normative background and governance mechanisms of the GCF. Then I evaluate the operationalization of GCF's accountability mechanisms when compared to GCF's constitutional norms as expressed in its founding documents. Based on my assessment of GCF's incomplete fulfillment of the norms and objectives in its founding documents, and its accountability mechanisms in particular, I argue in Part III the project reconsideration procedure should be established as a robust institutional review mechanism that fills gaps in GCF's current accountability procedures. Part IV concludes.

II. Analysis of the GCF's Accountability

Suggesting a form for the decision-reconsideration procedure in Art. 11(b) of the UNFCCC requires identifying the underlying norms of the climate finance regime, and understanding the project selection and accountability procedures, in order to identify a form that fulfills these norms without impeding efficiency. A basic assumption of this article is that the State-centered governance of GCF is unique among climate funds, and that simply replicating accountability procedures of other funds is inappropriate. Below I describe how, within the UNFCCC regime complex, a new climate finance regime has emerged since the Copenhagen Conference, manifested in normative statements embodied in the relevant decisions of the COP and the GCF's GI.

A. GCF as the Center of an Emerging State-Centered Climate Finance Regime

Robert Keohane and David Victor have described climate change governance

overall as a “regime complex” in contra-distinction to a “comprehensive regime.”¹³⁾ In international relations theory, a regime is a system of “principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”¹⁴⁾ Whereas a comprehensive regime will contain a higher degree of consensus on norms and methods of implementation focused on a single legal instrument, a “regime complex,” such as the climate change regime, is composed of “nested (semi-hierarchical) regimes with identifiable cores and non-hierarchical but loosely coupled systems of institutions” with “no overall architecture that structures the whole set.”¹⁵⁾ According to this view, the UNFCCC stands among a competing assemblage of other bilateral and multilateral initiatives sponsored by the most powerful actors in international relations. The authors count among these groups, *inter alia*, the Montreal Protocol, “Clubs” such as the G20 and the Major Economies forum, Multilateral Development Banks and national and sub-national carbon trading platforms.¹⁶⁾

The relative lack of binding norms or norm-interpreting institutions for the UNFCCC has allowed for the fundamental norms of the original UNFCCC treaty to be adjusted in successive decisions by the COP. Most famously, the principle of common but differentiated responsibilities in Article 3 of the UNFCCC, which formerly was interpreted to mean under the Berlin Accord that developing countries have no mitigation obligations under the climate change treaty, appears transformed in the Paris Accord. Now, as “the principal of common but differentiated responsibilities and respective capabilities, in the light of different

¹³⁾ Keohane, Robert and David Victor, “The Climate Change Regime Complex”, Harvard Project on International Climate Agreements, Discussion Paper 10-33, January 2010., p. 4

¹⁴⁾ Stephen Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables, in *Power, the State and Sovereignty : Essays on International Relations*, Routledge, 2009,p. 119

¹⁵⁾ Keohane, *supra* note 13., at 4

¹⁶⁾ *Id.* at 5.

national circumstances,”¹⁷⁾ it expresses a new constitutive norm for cooperation in which all parties have obligations.

Similarly, new purposes can also emerge in subsequent instruments on equal footing as those of the UNFCCC. “Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development”¹⁸⁾ now stands prominently in Article 2 of the Paris Accords as one the three major purposes of the post-Kyoto climate regime. Notwithstanding this normative flexibility, the UNFCCC remains the most universal and important forum for climate change policy-making. As I describe below, new normative convergence in climate finance is manifest with GCF as its focal point.

1. Previous Climate Funds

The GCF is a successor to a number of fragmented attempts by donor countries to implement climate finance obligations under the UNFCCC. In 1996 the GEF was restructured as the GEF Trust Fund to become the operating entity of the financial mechanism for the UNFCCC. Today the GEF allocates and disburses over \$6 billion dollars per year in projects in energy efficiency, renewable energy, sustainable urban transport and sustainable management of land use, land-use change, and forestry.¹⁹⁾ The GEF manages separate adaptation-focused funds under the UNFCCC, including the Least Developed Countries Fund, the Special Climate Change Fund and the Adaptation Fund, which has been replenished by proceeds from the UNFCCC’s Clean Development Mechanism.

The GEF has an executive Governing Council, a plenary Assembly made up of 70 Participant nations, and a Secretariat. Most of the project development

¹⁷⁾ FCCC/CP/2014/L.9, Article 2

¹⁸⁾ *Id.*

¹⁹⁾ UNFCCC Standing Committee on Finance: Biannual Assessment of Climate Finance Flows, available at http://unfccc.int/cooperation_and_support/financial_mechanism/standing_committee/items/8034.php at45

and proposals are handled by its Implementing Agencies: the UNDP, the UNEP and the World Bank. Serving as the Trustee for the GEF, the World Bank also mobilizes and invests contributions. Unlike, the GCF, the GEF does not possess its own legal personality, so that it cannot itself enter into contracts with donors and recipients or with its service suppliers.

In the last decade-and-a-half, most public climate finance has been channeled by donor countries through the World Bank and other Multilateral Development Banks (“MDBs”) outside of the financial mechanism pursuant to Art. 11 of the UNFCCC, as “financial resources related to the implementation of the Convention through bilateral, regional and other multilateral channels.” The World Bank has administered the Climate Investment Funds (from 2008), comprising the Clean Technology Fund and the Strategic Climate Fund, itself composed of the Pilot Program for Climate Resilience (PPCR), the Forest Investment Program (FIP), and the Scaling-Up Renewable Energy Program for Low Income Countries (SREP).

Above all, private sources of funding have overtaken public sources of funding for climate finance. According to the 2014 Biannual Report of the Standing Committee on Finance, of the UNFCCC, of total climate finance flows USD 340 to USD 650 billion per year, only USD 35 to USD 50 is public finance.²⁰⁾ About 11.7 billion has been pledged to the above multilateral climate finance funds housed in the World Bank and the GEF²¹⁾, while the other MDBs channeled about 24.7 billion in 2012.²²⁾

2. Centralizing UNFCCC Climate Finance: The Standing Committee on Finance and the GCF

In the field of climate finance, if the Copenhagen Accords and the Cancun

20) *Id.* at 7.

21) *Id.* p 43.

22) *Id.* p 47.

Agreement²³⁾ establishing the GCF were not a constitutional moment, then they qualify as a minor big bang, signifying a dramatically expanded long-term commitment to the effective and equitable distribution of climate finance. Following on the unilateral pledge of the developed countries to provide up to US\$100 billion per year in long-term climate finance by 2020 at Copenhagen, the COP created the GCF at Cancun to “play a key role in channeling new, additional, adequate and predictable financial resources to developing countries and will catalyze climate finance, at the national, regional and international levels,” and “promote a paradigm shift toward low-emission development.”²⁴⁾

The advent of the GCF evidenced a conclusive shift in governance and related norms for climate finance. A growing trend toward State control had been evident in previous climate finance and development funds.²⁵⁾ In the GCF’s GI, the new multi-layered State-centered governance is manifest in the requirement that the Board of Directors are to be chosen by their respective State constituencies and would have “full responsibility for funding decisions,”²⁶⁾ while para 25 while the Trustee, on the other hand, “shall administer the assets of the Green Climate Fund only for the purpose of, and in accordance with, the relevant decisions of the Green Climate Fund Board.”²⁷⁾

Integral to the new climate finance mechanism of the UNFCCC is the notion of equity grounded in the recognition that the populations of the least developing countries and the small island States will suffer disproportionately for climate

²³⁾ 1/CP.16 in FCCC/CP/2010/7/Add.1 Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, para 102.

²⁴⁾ GI, *supra* note 7, Art. 1 Objectives and Guiding Principles.

²⁵⁾ “(T)he story of collective finance for development is a story of an ongoing quest to find alternatives to the behemoths (the World Bank and United Nations),” (referring to the donors’ choice for agents to raise and allocate development funds.) Smyth, Sophie. “Collective Action for Development Finance,” *University of Pennsylvania Journal of International Law*, Vol. 32, p. 961, 2011 at p. 984

²⁶⁾ *Supra* note 7

²⁷⁾ *Supra* note 7, paras 102-112.

change to which they have not contributed, and that developed countries have an obligation to provide climate finance to the most climate vulnerable States as a priority. Because this finance has the dual purpose of fostering low carbon growth on the one hand, and preventing small island states from disappearing and least developing countries from further falling behind developed countries because of climate change, on the other, the decisions on allocating finance unavoidably have serious distributional implications. Accordingly, the GI reaffirms the priority of the most climate vulnerable countries in both the initial section on Object and Guiding Principles (para 2) and the section on Allocation, both of which state the “Board will take into account the urgent and immediate needs of developing countries that are particularly vulnerable to the adverse impacts of climate change, including LDCs, SIDS and African States.”(para 57)

The GCF was designed against the backdrop of the 2005 Paris Declaration on Aid Effectiveness²⁸⁾ and the 2008 Accra Agenda for Action²⁹⁾ between the OECD countries and the developing countries. The Paris Declaration produced five major principles: Ownership, Alignment, Harmonization, Management for Results and Mutual Accountability. The Accra Accord deepened commitment to these principles.³⁰⁾ In order to fulfill them for specialized climate finance, many States at Copenhagen and Cancun envisioned that the GCF should ultimately become the main channel for public climate finance.³¹⁾

²⁸⁾ The Paris Declaration on Aid Effectiveness: Five Principles for Smart Aid, available at <http://www.oecd.org/dac/effectiveness/45827300.pdf>

²⁹⁾ The Accra Agenda for Action, available at <http://www.oecd.org/dac/effectiveness/45827311.pdf>

³⁰⁾ Dresse, Geord, Funds for Development: Multilateral Channels of Concessional Financing. ADB. 2011.

³¹⁾ According to civil society observers, “The formation of the GCF is being viewed by many as away to simplify the intricate network of multilateral and bilateral funding mechanisms and bilateral agreements, largely through traditional channels for development aid, that currently provide support for developing countries addressing climate change.”Neil Bird, Jessica Brown and LianeSchalatek, Climate Finance Brief #4, Design challenges for the Green Climate Fund at 4.

i. The Standing Committee on Finance

At the same time as it adopted the GCF in Cancun in 2010, the COP created a Standing Committee on Finance (“SCF”) for “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 support” provided to developing country Parties.³²⁾ Subsequently it was tasked with drafting guidance to the operating entities of the financial mechanism, conducting a biennial review of climate finance, and making recommendations on coherence, effectiveness and efficiency of the financial mechanisms. The SCF also provides expert input into the periodic review of the financial mechanism that takes place every four years.

ii. The GCF and its Governing Instrument

The GI was drafted by a Transitional Committee throughout 2011 in accordance with the one-page terms of reference provided by the Cancun decision. Of its 40 members, 15 members were from developed country Parties and 25 members from developing country Parties as follows: seven members from Africa, Asia; and the Group of Latin America and the Caribbean, each, and two members from small island developing States and the least developed countries, each. In the section below, I discuss the GCF's “constitutional” aspects--its objectives and guiding principles, the division of powers and its mandate for operations--followed by a description of the current procedures for selecting projects, in order to evaluate the adequacy of GCF's accountability framework.

Objectives and Guiding Principles

Unlike most environmental funds, GCF combines a specialized finance-and

³²⁾ 1/CP 16, *supra* at note 23, para 112.

development-related mission with environmental protection. GCF is to “promote a paradigm shift towards low-emission and climate-resilient development pathways” (para 2); “(in) the context of sustainable development, it will catalyze climate finance, both public and private, and at international and national levels” (para 3). At the same time its purposes are firmly linked to those of the UNFCCC. The Fund is to be guided by the principles and provisions of the UNFCCC and contribute to the ultimate objective of the UNFCCC: it will provide “support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change, taking into account the needs of those developing countries particularly vulnerable to the adverse effects of climate change,” (para 2). The third paragraph speaks mostly clearly to the operations of the GCF, saying it will “operate in a transparent and accountable manner guided by efficiency and effectiveness.” The Fund must strive to “maximize impact for mitigation and adaptation and seek a balance between the two.” The Fund is also mandated to pursue “a country driven approach” and strengthen “engagement at the country level.”(para 3).

The Board of Directors

At the apex of GCF is the Board, consisting of 24 members, 12 from developed countries and 12 from developing countries. Each of the UN regional groupings is represented in the individual constituencies. In the developing country constituency, three seats are reserved from members of LDCs and SIDs with one floating seat. The Board has two Co-Chairs, one each from a developing and a developed country. The Board allows participation in its meetings by two civil society representatives and two private sector representatives. Currently the Board makes decisions on project funding and other decisions by consensus, pending the approval of backup voting procedures.

Among the most important duties of the Board listed in the GI are 1) approving funding in line with the Fund’s criteria, modalities, policies and programs, 2)

developing environmental and social safeguards and fiduciary principles and standards, 3) developing criteria for the approval of implementing agencies, 4) establishing a framework for monitoring and evaluation of performance and financial accountability 5) developing working relationships with other bodies in the UNFCCC and 6) “exercise functions as may appropriate to fulfill the objectives of the Fund.”³³⁾

The other main pillars of the GCF are the Secretariat and the Trustee. Headed by an Executive Director appointed by the Board, the Secretariat is responsible for the day-to-day administration of the Fund and operationalizing the project cycle. The Secretariat plays a crucial role in keeping track of project information and monitors and reports on the financial performance of the implementing entities and the projects and as well as their compliance with Fund social and environmental policies.³⁴⁾ The Trustee manages the financial records and prepares financial statements and other reports required by the Board. The Trustee maintains separate records and accounts to identify the assets of the Fund, but is permitted to commingle the assets with other assets owned by the fund for administrative and investment purposes.³⁵⁾

Operational Modalities

Many of the specific requirements in the chapter on Operational Modalities dovetail with the aims in the Paris and Accra Accords, such as the requirement for direct access and accreditation for national as well as regional and international implementing agencies in accordance with the country-driven approach (reflecting Ownership and Alignment). The critical section on Allocation³⁶⁾ affirms that all developing country parties of the UNFCCC are

³³⁾ GI, *supra* note 7, para 18.

³⁴⁾ *Id.*, para 23.

³⁵⁾ *Id.*, paras 24-27.

³⁶⁾ *Id.*, paras 3-53.

eligible for funding according to national climate change strategies and plans, and reiterates a requirement to balance between adaptation and mitigation projects and the need to “take into account the urgent and immediate needs of developing countries and the particularly vulnerable to the adverse affects of climate change” in allocations for adaptation.³⁷⁾

Participation by the Private Sector

Up until now, most climate funds have been funded by governments to support public sector activities, although a trend of increasing private sector participation was evident in the World Bank’s climate funds. Not mentioned in the Cancun Decisions, the Private Sector Facility (PSF) was added during the Transition Committee meetings. Viewing the Copenhagen pledge difficult to achieve with public sector finances alone, the developed countries had espoused a strategy of using public finance to leverage even larger amounts private finance. A corollary is that the private sector should have autonomy for its governance to induce its participation. Developing countries have insisted on developed countries fulfilling the Copenhagen commitment through the public sector and have been skeptical that the PSF will offer the added benefits of leveraging that have been promised.

Developing countries and civil society have compared the PSF to the experience of the Clean Development Mechanism, through which investment flowed overwhelmingly to emerging markets and high income developing countries and almost none to the least developing countries in Africa, presumably because the private sector prefers investments in countries with relatively stronger financial, commercial and technological infrastructure. Civil society advocates pointed out that a clear minority of the investment financed through the World Bank’s private sector arm, the International Finance Corporation, has ended up

³⁷⁾ *Id.*, paras 50-52.

in the least developed countries.³⁸⁾ Developing countries voice concern that GCF funding will ultimately mainly benefit developed country intermediaries and consultants. Some civil society observers have contended that it will be more difficult for the Fund to monitor compliance with the Fund's environmental and social safeguards and fiduciary standards for private sector-financed projects, since it must rely on self-reporting and some of the private sector arms of the MDBs rely on intermediaries that are domiciled in tax havens or jurisdictions with lax financial supervision.³⁹⁾

Reflecting some of these concerns, the GI expressly provides for direct access⁴⁰⁾ for the PSF and requires the PSF to be consistent with the country-driven approach and to promote participation by the private sectors of developing countries, especially small and medium enterprises and intermediaries.⁴¹⁾

The final integration of the PSF in the GCF reflected compromise on private sector autonomy and Board supervision. In 2013 the Board decided that the PSF will operate under the guidance and authority of the Board and as an integral component of the Fund.⁴²⁾ Full responsibility for approving PSF projects and programmes remains with the Board, the PSF CEO reports to the Fund Secretariat's Executive Director, and accreditation of PSF partner private sector-facing intermediaries remains with the Fund's Accreditation Committee.⁴³⁾ Projects proposed by the PSF are subject to a "no-objection" procedure, which gives recipient countries the right to object to private sector investment that is

³⁸⁾ For a full summary of arguments and outcomes of CDM and IFC projects, see Friends of the Earth US, "Recommendations for the Transitional Committee, July 29, 2011 Role of Private Sector Finance and the Green Climate Fund." https://unfccc.int/files/cancun_agreements/green_climate_fund/application/pdf/foe_submission_on_ws_iii.pdf

³⁹⁾ *Id.*

⁴⁰⁾ Direct access allows a developing country national implementing agency to receive the disbursement.

⁴¹⁾ GI, *supra* note 7, paras 41-44.

⁴²⁾ Decision B.04./08 in GCF/b. 04/17 available at http://www.gcfund.net/fileadmin/00_customer/documents/pdf/B-04_17_decisions.pdf

⁴³⁾ Decision B.04/07 p. 10, *Id.*

not in line with national priorities.⁴⁴⁾

B. GCF Project Selection Procedures

1. Proposal Stage

The GCF currently operates on a single-tiered, project-based decision-making process distributed between both adaptation and mitigation themes. Projects are mostly developed and proposed by the GCF's implementing agencies on behalf of developing countries. As of the end of 2015, three-quarters of the implementing agencies are international or regional as opposed to national or sub-national.⁴⁵⁾ GCF addresses this by making funding available for developing countries to promote their institutional readiness to propose their own project proposals as required by para 40 of the GI. Once a proposal is received, the Secretariat will perform due diligence on a project proposal to ensure it conforms to the GCF's environmental and social policies and a preliminary assessment of the project against performance criteria⁴⁶⁾ before deciding to forward a project to the Independent Technical Advisory Panel(ITAP).

2. The Vetting Stage: the Independent Technical Advisory Panel and the Investment Framework, Sub-criteria and Methodology

The ITAP refers its recommendations to the Boards for a final decision based on its review. The Panel has balanced representation from developing countries and developed countries, composed of members chosen by the Board with

⁴⁴⁾ GCF, "Engaging with the Green Climate Fund" November 2015, p. 3.

⁴⁵⁾ "List of Accredited Entities" available on the GCF web-site [www.greenclimatefund /,,,GCF_List_of_Accredited_Entities.](http://www.greenclimatefund/,,,GCF_List_of_Accredited_Entities.;); 14 are international, four are regional and three are national.

⁴⁶⁾ The Board decided to adopt the environmental and social policies of the International Finance Corporation as its interim environmental and social policies. Schalatek, *supra* note 6 at 5.

collective expertise in “a range of specialties related to adaptation, mitigation, the private sector, financing, development and implementation of projects in developing countries.”⁴⁷⁾

The methodology the ITAP and the Secretariat will use when applying the investment framework (the Board's terminology for the criteria for selecting projects)⁴⁸⁾ to the project proposals is one of the most important questions still not settled. As a general guideline the Board has resolved to approve support for mitigation and adaptation on a 50:50 basis; however the project selection process is subject to an investment framework which may require evaluating individual proposals quantitatively. In 2015, the Board adopted five criteria with which to assess a project (paradigm shift potential, sustainable development potential, needs of recipient country, country ownership and efficiency and effectiveness), along with sub-criteria and indicative assessment factors.⁴⁹⁾ In a meeting in 2015, the Board split on whether minimum benchmarking/ranking should be used, with developing countries generally objecting that it would make it more difficult for the neediest to qualify. The Board asked the Secretariat to develop indicative minimum benchmarks for a pilot to “(i) Encourage ambition; and (ii) Take into account the needs of those developing countries particularly vulnerable to the adverse effects of climate change, in particular the least developed countries (LDCs), small island developing States (SIDS), and African States, according to project size, mitigation/adaptation, and local and sector circumstances.”⁵⁰⁾ The controversy shows the technical difficulty of designing guidelines without ultimately relying on an unstable mix of qualitative and quantitative decision factors and the independent judgment of the

⁴⁷⁾ Terms of Reference of the Independent Advisory Panel, GCF/B.09/09 18 February 2015.

⁴⁸⁾ GCF/B07/06 May 2014.

⁴⁹⁾ Further Development of the Initial Investment Framework, **GCF/B.08/20** 4 October 2014.

⁵⁰⁾ IISD Reporting Services, Summary of the Ninth Meeting of the Green Climate Fund Board, 24-26 MARCH 2015, Songdo, Republic of Korea, available at <http://www.iisd.ca/climate/gcf/gcf9/html/crsvol172num20e.html>

decision-makers, a situation in which non-objective, political influences could slip in easily.

C. The Accountability of the GCF

1. Defining Legal Accountability

Perhaps the fundamental design question is whether GCF's project reconsideration procedure should be a legal procedure focused on accountability as opposed to an internal, managerial procedure, as the Board currently favors.⁵¹⁾ What do legal scholars mean by "accountability" and how is it realized? Political scientists Grant and Keohane in their seminal article⁵²⁾ observed that accountability "implies 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." Global Administrative Law cofounder Richard Stewart defines accountability from an institutional standpoint, considering accountability mechanisms to be one of three basic categories of global governance regulatory mechanisms.⁵³⁾ Accountability mechanisms generally satisfy three characteristics:

- (1) A specified "accounter," who is subject to being called to provide account, including, as appropriate, explanation and justification for his conduct;

⁵¹⁾ "The IRM is not intended to be a court of appeal or a legal/adjudicating mechanism," Terms of Reference for the Head of the Independent Redress Mechanism, Terms of Reference of the IRM, GCF/V.10/17, p. 34.

⁵²⁾ Grant, Ruth and Robert Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review*, Vm. 99, No. 1 Feb. 2005, 29-43.

⁵³⁾ Stewart, Richard, "Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness" *The American Journal of International Law*, Vol. 108, No. 2 (April 2014), pp. 211-270 p. 212.

- (2) As specified “account holder” who can require that the accouter render account for his performance; and
- (3) The ability and authority of the account holder to impose sanctions or mobilize other remedies for deficient performance by the accouter and perhaps also to confer rewards for a superior performance by the accouter.⁵⁴⁾

According to Stewart, legal accountability mechanisms are distinguished from other types of accountability mechanisms because they do not *per se* “require a delegation or transfer of authority or resources from one actor or set of actors (account holders) to another actor or set of actors (accounters).… Rights and mechanisms of legal accountability for their vindication are created by law, including the municipal public and private law of nations, by international law, and by the internal law of organizations. Some cases involve prior delegations of resources and authority from a principal to an agent, but, in such cases, the legal rights and obligations are created by law and not by the delegation.”⁵⁵⁾ He cites electoral, hierarchical, supervisory, and fiscal accountability mechanisms as examples of non-legal accountability mechanisms based on a principal-agent relationship. Stewart’s general definition of accountability is synonymous with the way the World Bank and other financial institutions conceptualize accountability, embracing various reporting procedures for fiscal accountability mechanisms in addition to quasi-judicial procedures such as the World Bank’s Inspection Panel or the GCF’s IRM discussed below.

For complete legal accountability, advocates of Global Administrative Law stress procedures inspired by domestic administrative law for non-decisional participation and *ex post* review in order to insure that vulnerable communities and individuals are not disregarded in governance.⁵⁶⁾

⁵⁴⁾ *Id.* p. 244.

⁵⁵⁾ *Id.*

⁵⁶⁾ *Id.*

2. Privileges and Immunities

The privileges and immunities of intergovernmental organizations (“IGOs”) shield them from legal liability and potentially international responsibility in national court systems. Attaining privileges and immunities based on UN-affiliated IGO status is widely sought after by new institutions in order to avoid liability and preserve operational discretion.⁵⁷⁾ Following the instruction of the COP, the GI states that the GCF “will possess juridical personality and will have such legal capacity as is necessary for the exercise of its functions and the protection of its interests” and “shall enjoy such privileges and immunities as are necessary for the fulfillment of its purposes,” after Art. 105 of the UN Charter and the Standard Clauses of the Vienna Convention.⁵⁸⁾

As the host state of its GCF’s Secretariat, the Republic of Korea has granted the GCF broad privileges and immunities. The GCF’s Secretariat’s Headquarters Agreement grants GCF immunity from “any form of legal process, including search, requisition, confiscation, foreclosure, seizure attachment, injunction or expropriation, whether by executive, administrative, judicial or legislative” (Art. 9). It also guarantees the inviolability of all Archives of the Fund, wherever located (Art. 8.)⁵⁹⁾ The GCF Executive Director has campaigned for similar privileges and immunities worldwide, but has had to settle for entering into bilateral agreements with the States in which it operates for immunities, unless the COP decides to make a request to the General Assembly.⁶⁰⁾

⁵⁷⁾ Aziz, Davinia, “Global Public-Private Partnerships in International Law,” *Asian Journal of International Law*, Vm2 Is 02 / July 2012, pp 339-374. Aziz states entities such as the “Global Fund have become prototype models for extending preferential legal treatment to global public-private partnerships within national jurisdictions.”*Id.* at 2.

⁵⁸⁾ GI *supra*, note 7.

⁵⁹⁾ Agreement Between the Republic of Korea and the Green Climate Fund Concerning the Headquarters of the Green Climate Fund, signed in Bonn on July 2, 2013 and Incheon on July 10, 2013.

⁶⁰⁾ GCF correspondence with the Office of the UN Legal Counsel.

3. Public Access to Information

a. The GCF's Interim Information Disclosure Policies

The GI stipulates the GCF will have an information disclosure policy as one of its accountability mechanisms in Art. XI, para 62. Although in principle information is publicly available on web-site, the GCF has exercised some discretion about disclosure. For two years the GCF had no comprehensive information disclosure policy and operated on general principles laid out in an Interim Information Disclosure Policy adopted in 2013. Civil society representatives and developing countries sharply contested GCF's refusal to broadcast Board meetings live and the policy that disallows the disclosure of the identities of the applicants for accreditation until they have already been approved.⁶¹⁾ Developing countries have complained that by not publishing discussion items far enough in advance, and by not broadcasting the Board meetings live except to those present at the meeting, they are impeded in their ability to comment on and respond to new initiatives as compared to the developed country delegations who can afford to send delegations.⁶²⁾ Several commentators have observed that the GCF's information disclosure does not meet the standards of other climate funds and UN bodies.⁶³⁾

b. The Information Disclosure Policy

An Information Disclosure Policy discussed by the Board in April 2016⁶⁴⁾ includes a long-promised negative list of exemptions. The policy is guided by

⁶¹⁾ Anju Sharma “.”It Must be Said! blogJul-13 Oxford Climate Policy Brief.

⁶²⁾ Third World Network “An Update on the GCF 10thBoardMeeting” available at <http://www.transparency-korea.org/2015/07/gcf-10th-board-meeting/>

⁶³⁾ Sharma, *supra* note 62.

⁶⁴⁾ GCF, “Information Disclosure Policy: Stakeholder Consultation Draft 27 August 2015” available at http://www.greenclimate.fund/documents/20182/24913/OGC_27-08-2015_-_Call_for_Public_Input__Information_Disclosure_Policy.pdf/d712464f-f2a5-4109-b41b-3ddf2c6c6786?version=1.0

four principles: maximize access to information, limited exceptions, simple and broad access to information, explanations of decisions and the right to review. However, the policy grants the Fund blanket discretion to decide whether “effective functioning of the GCF requires it to protect certain types of information” deemed to be harmful by the GCF. Thus “The GCF may, in exceptional circumstances, decide not to disclose information that would normally be accessible if it determines that the harm that might occur by doing so will outweigh the benefits of access.”⁶⁵⁾

The exemptions list includes wide categories that are critical to accountability, such as “deliberative information” and “Board Proceedings.”⁶⁶⁾ Board oral proceedings are only released three weeks after they take place, while minutes and other deliberative materials will only be released ten years after they take place.⁶⁷⁾ Also, deliberative information related to Committees, Panels, Groups and Accountability Units may be exempted from disclosure. The GCF will redact any portions, which, “if disclosed, may cause prejudice to the GCF, any persons associated with it other related parties.”⁶⁸⁾

c. The Information Appeals Panel

The new policy allows a requester who is denied access to information to file an appeal to an internal Information Appeals Panel (“IAP”), if the requester is able to prove the policy has been violated or can make a case for overriding the policy. The IAP will be composed of three staff members appointed by the Executive Director and will include two members of Board-appointed panels and external groups. Crucially, the IAP’s decisions to uphold or reverse the denial

⁶⁵⁾ *Id.* para 9, para 14.

⁶⁶⁾ For comparison, see recommended practices on access to information, International Law Association’s Committee on Accountability of Intergovernmental Organisations, Third Report, New Delhi, 2002, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9>

⁶⁷⁾ *Supra* note 65 at 8.

⁶⁸⁾ *Id.* para 10(i)

of information by the GCF or to approve requests for disclosure in the public interest are subject to final approval of the Board, (for Board documents), and of the Executive Director, (for other documents.)⁶⁹⁾

2. The IIU, the IRM, and the IEU

The GCF has announced a multi-faceted accountability framework for compliance with environmental and social safeguards as well as fiduciary standards to apply to the accredited entities and supported projects and programs. The GI itself stipulates three “Accountability Mechanisms” in Section 11: the information disclosure policy, an internal auditing unit called the “Independent Integrity Unit” (IIU)⁷⁰⁾ to deal with misconduct by employees of the Fund such as fraud or conflict of interest, and the “Independent Redress Mechanism (IRM).” Similar to the World Bank’s Inspection Panel, the IRM addresses grievances and complaints by communities that have been adversely impacted by the failure of a project or program to comply with the Fund’s environmental and social policies, and in addition, reconsideration of funding decisions.⁷¹⁾ Pursuant to para 59 of the GI, the Board also established an Independent Evaluation Unit⁷²⁾ for measuring and reporting the Fund’s performance to the COP and the public. The IIU and the IRM mechanisms will operate through a comprehensive Monitoring and Accounting Framework⁷³⁾ for monitoring the compliance by the accredited agencies and individual projects and programs with the Fund’s environmental and social policies and fiduciary standards. They will rely on and cooperate with the accountability arms of the implementing agencies and the Nationally Designated Entities of the Fund in carrying out their tasks.

⁶⁹⁾ *Id.* para 33.

⁷⁰⁾ For the Terms of Reference, see GCF/B.06/18, 17 April 2014 Annex IV.

⁷¹⁾ For the Terms of Reference, see *Id.* Annex V.

⁷²⁾ For the Terms of Reference, see *Id.*, Annex III.

⁷³⁾ Green Climate Fund, DECISION B.11/10,11/6/2015, “Agenda item 15: Initial monitoring and accountability framework for accredited entities”

Although these entities are all labeled “independent,” they are internal structures within the GCF, whose members are appointed by the Board of the GCF. Moreover, these units may only make non-binding recommendations to the Board on the matters they submit to it.

3. IRM’s Reconsideration of Funding Decisions

According to the Interim procedures for project reconsideration drafted by the Secretariat, request for reconsideration can be made from a developing country that has been denied funding though resources are available. Requests must “substantiate the reasons why the developing country believes that the denial was inconsistent with the policies, programme priorities and eligibility criteria of the Fund, including those implementing guidance provided by the Conference of the Parties.”⁷⁴⁾

After reviewing the request in “an open and transparent manner,” the IRM will first attempt informal means for amicable resolution of the request. Then, if informal means do not succeed it will “determine whether the Fund was inconsistent with its policies, programme, priorities and eligibility criteria when denying funding to a specific project or programme” and (p)repare a report for the Board’s consideration, including recommendation on possible remedial actions.⁷⁵⁾

III. The Case for GCF Project Decision Reconsideration as a Form of Institutional Review

Cumulatively, GCF exhibits balanced decisional-participation for developing

⁷⁴⁾ “Interim Procedures for Redress, Reconsideration of Project Funding Decisions,” Board Agenda Item 12(f), 17 June 2016 (GCF /B.13/17)

⁷⁵⁾ Id.

countries at the final stages of project approval and other structural features to promote the country-based approach. A threshold question in designing the project reconsideration procedures must be whether more accountability is desirable at all. As Benedict Kingsbury has observed: “Accountability can dissipate effectiveness, participation can result in capture by special interests, transparency can mean populism triumphs over justice. Institutional design is important.”⁷⁶⁾

A. GCF is an Entity Exercising Significant Public Functions with Respect to Other Public Entities

An entity to be entrusted with billions of dollars in public revenues as a “channel” for global climate change funding, the GCF exercises significant public powers with respect to other public entities, both donors and recipient States, such that it should meet heightened requirements for procedural regularity and impartiality currently considered necessary by international legal scholars, in particular, those advocating Constitutional and Global Administrative Law approaches. It is clear the ex-ante measures for decisional participation embodied in the GCF’s project selection-process are insufficient when the many gaps in the information disclosure framework and other structural factors are all taken into account.

B. GCF’s Information Disclosure Practices Fetter the Accountability Mechanisms.

As things currently stand, the accountability of the GCF is compromised by

⁷⁶⁾ Krisch, Nico and Benedict Kingsbury, “Global Governance and Global Administrative Law in the International Legal Order,” *European Journal of International Law*, Vol 17, No. 1, 2006 at 4.

inadequate information disclosure practices that prevent the Accountability Mechanisms from operating effectively. The Information Appeals Panel is not institutionally significant because the Executive Director or the Board have final authority on each disclosure decision. According to the interim information disclosure policy, most new policies which have been devised internally by the Secretariat are announced to the public at the same time as the Board receives them.⁷⁷⁾ This means any opportunity for non-decisional participation, such as presenting evidence and argument on a decision on an individual case or a policy, is absent. Furthermore, there are apparently no opportunities for non-decisional participation at the pre-approval stage for developing countries, when the Secretariat makes critical decisions about which projects to send on to the ITAP (See II.A 2(b) above)

C. More Accountability Is Necessary to Fill Accountability Gaps and Address Structural Disregard

Despite GCF's delicately balanced decisional framework at the decision approval stage, developed countries and their business constituents are still best placed to access the GCF's procedures, develop proposals and to defend the policies that favor them. This is partly because developing countries lack funds to send their representatives to participate directly in Seoul and partly because right now the accredited entities who develop and sponsor the proposals are international and regional, representing the interests of their donors, and not of the countries to receive the funding. Since the Board's voting procedures have not been finalized, the prospect of voting based on contributions could eventually

⁷⁷⁾ Under the proposed, not-adopted, "Comprehensive Information Disclosure Policy of the Fund" the public could see Board Meeting documents relating *inter alia* to policies, strategies, and governance 21 days in advance of Board Meetings. (GCF/B12/24) 8 March 2016. Section X. However, Board oral proceedings would still only be made public three weeks after the meeting.

significantly overshadow the above-mentioned decisional participation of developing countries at the approval stage. The political influence of the donor countries through voting⁷⁸⁾ could be amplified by the practice in collective finance of the MDBs acting as implementing agencies for each other, enhancing the probability of approval of the projects that they sponsor at the expense of nationally-sponsored project proposals.

D. Robust Project Reconsideration is Needed to Guarantee Equity

Currently, proposals from States from a variety of circumstances may be compared for a quantitative outcome using a variety of potentially conflicting desiderata. This risks the prospect of a climate-vulnerable country being denied funding for a project because the “paradigm shift potential” of a mitigation project in a wealthier country receives a higher quantitative outcome (See II2(b)2 above.) The project reconsideration mechanism, therefore, must scrutinize project denials to ensure the proposals of climate vulnerable countries have not been put in the same pool to be ranked against projects of countries with less urgent needs. At a minimum, adaptation projects should be compared with adaptation projects only.

Thus far, GCF has scaled up nonstop without finalizing the project approval decision-making methodology. In effect, the standard for making decisions on project approval has been a moving target. Ex post review and expanded non-decisional participation can provide the ex ante incentives to carry out the mission effectively and without prejudice according to the GI and the instructions of the COP.

⁷⁸⁾ Hey, Ellen. “International Institutions,” in Bodansky, ed. *Handbook of International Environmental Law*, Oxford, 2008, 749-769 at 762.

IV. Conclusions

Fulfilling project reconsideration for the GCF offers a fresh opportunity to build administrative accountability into the new, State-centered climate finance regime. Despite carefully balanced decisional participation at the approval stage for project funding, the GCF's policies on disclosure of information hamper the transparency of its accountability mechanisms, leaving gaps in its administrative accountability to the States that founded it. The GCF exercises significant public powers with respect to other public entities, both donors and recipient countries, such that it must meet heightened requirements for procedural regularity and non-decisional participation. Independent *ex post* procedural checks can instill the *ex ante* incentives to comply with the legislative guidance provided by the COP in an objective way. The project reconsideration procedure should be robustly designed as a form of institutional review for procedural due process, providing developing countries with checks on whether an applicant has received equal opportunity for non-decisional participation at the pre-approval stage and equitable decision-making at the project selection stage.

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[국문초록]

제도적 책임성 관련 녹색기후기금 프로젝트 재검토 절차의 재개념화

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이 논문에서는 녹색기후기금(GCF) 프로젝트 재검토 절차의 디자인에 대해 논한다. 2014년 부터 운영되어 온 GCF와 그 관리구조는 2010년 칸쿤의 UNFCCC 당사국 회의 이후 독자적으로 설립되어 지속적으로 유지되어 왔다. GCF 이사회는 이제 자격을 가진 개발도상국이 제안한 프로젝트의 자금제공 거부결정에 대해 검토를 요구할 수 있는 권리를 이행하기 위한 절차를 제도화하여야 한다. 그러나 그 절차의 디자인에 대한 세부사항은 아직도 논의 중에 있다. GCF의 프로젝트 선정절차를 검토하고 그 제도적 책임성 메커니즘을 평가한 이후, GCF의 프로젝트 선정절차에 대한 제도적 검토가 제공될 수 있도록 GCF의 프로젝트 재검토 절차를 견고하게 디자인할 것을 제안한다. 동 프로젝트 재검토를 이런 방식으로 구성하게 되면 UNFCCC의 최저 개발국 및 최고 기후취약국가에 대한 GCF의 행정적 책임성을 강화하게 될 것이다.

주 제 어 기후 금융, UNFCCC, 책임성, 제도적 검토, 정부간 기구

Key Words climate finance, UNFCCC Green Climate Fund, accountability, institutional review, intergovernmental organizations