



Non-State Actors and REDD

Issues Surrounding the Participation of Indigenous People and Local Communities

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OBJECTIVE

As part of a larger study concerning the assessment of critical elements of the Reducing Emissions from Deforestation and Degradation (“REDD”) component of a post-2012 climate regime, commissioned by the Government of Norway and being facilitated by the Meridian Institute, Climate Focus North America (“Climate Focus”) has been asked to assess a number of legal issues that are relevant for the potential consideration of indigenous peoples and local communities in the context of an international REDD agreement.

In particular, Climate Focus has been asked to answer the following questions:

1. What are the procedural rights that have been assigned to non-state actors under the United Nations Framework Convention on Climate Change and the Kyoto Protocol?
2. How can similar or other procedural rights be included in an emerging REED agreement?
3. What would be the potential role of the Compliance Committee or an appellate body hearing cases under the Clean Development Mechanism and Joint Implementation under a REDD mechanism?

This memo responds to the request for advice addressing the questions in the order listed above.

ANALYSIS

1. What are the procedural rights that have been assigned to non-state actors under the UNFCCC and the Kyoto Protocol?

Despite not being endowed with any formal legal personality under international public law, non-state actors have been playing an increasingly important role in the development of multilateral environmental regimes and, in particular, in the United Nations Framework Convention on Climate Change (“UNFCCC” or the “Convention”) and Kyoto Protocol regime.

In most multilateral environmental agreements participation of non-state actors is achieved through the granting of ‘observer status’ to non-governmental organisations (“NGOs”), allowing these entities to, within the limits imposed by the treaty regime, influence the negotiation process, promote transparency and accountability.

The international climate change regime however accepts the participation of NGOs not only as actors in international regulation and supervision, but also directly involves private and public



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entities in its overall compliance framework. In this section we describe the procedural rights available to non-state actors under the Convention and Kyoto Protocol.

Rights of Non-state Actors Participating as Observers

Article 7.6 of the UNFCCC establishes the mandate for the admission of NGOs as observers into the UNFCCC process:

“Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.”¹

In order to be admitted as observers, NGOs must demonstrate that they are non-for-profit organizations and that their main competence lies in the matters of dealt under the Convention. NGOs are admitted to participate in sessions of the subsidiary bodies on a provisional basis, being the formal accreditation performed by the Conference of Parties to the Convention (“COP”) at its subsequent session following the application.² In accordance with decision 36/CMP.1, admission to attend sessions of the COP also apply to sessions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (“COP/MOP”).

The participation of NGOs is organized under separated channels of communication known as constituencies. Grouping NGOs under different constituencies is regarded as a way of promoting a balanced representation of civil society. Initially composed of only two constituencies, i.e. the business and industry and the environmental NGOs, the set of constituencies has grown and currently includes also local governments and municipality authorities, indigenous peoples groups, research and independent NGOs, and trade unions.³

The rules of procedure of the COP further regulate the participation of NGOs as observers in the official proceedings and meetings of the Convention. Rule 7.2 of these procedures secures the right of accredited as observers to participate, upon invitation of the President of the COP, in the proceedings of any session of direct concern to them, unless one third of the Parties present object to such participation.⁴ Participation of NGOs, however, do not entail the right to vote.⁵ According to the footnote to Rule 30, admitted observers are also allowed to participate in private meetings.⁶

¹ Text of the Convention is available at www.unfccc.int.

² See mandate governing admission of NGOs at http://unfccc.int/parties_and_observers/ngo/items/3667.php.

³ The list of the current constituencies can be found at:

http://unfccc.int/files/parties_and_observers/ngo/application/pdf/8_constituency_contact_point_information_50907.pdf.

⁴ See FCCC/CP/1996/2, available at www.unfccc.int.

⁵ Ibid., Rule 6.2.

⁶ Footnote of Rule 30 states that: "Consistent with the Rules of Procedure of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, upon which the draft rules were largely based, Rule



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As a general practice, an opportunity is often given to NGO constituencies to address the COP and subsidiary bodies in plenary meetings. In addition, NGOs admitted as observers may also hold side-events or exhibitions at these sessions and provide inputs through submissions to the Secretariat.

Rights of Non-state Actors under the Flexible Mechanisms of the Kyoto Protocol

Under the Kyoto Protocol, private entities and other non-state actors are also involved directly in the in so-called flexible mechanisms. The International Emissions Trading (“IET”), Joint Implementation (“JI”) and the Clean Development Mechanism (“CDM”) are market-based tools designed to allow for a more cost-effective way for Parties listed in the Annex B of the Kyoto Protocol to meet their emission reduction targets. In all three market mechanisms the participation of public and private entities is permitted, provided that the Party involved consents to such participation.

The CDM, in particular, provides for a good example of sovereign nations, traditional players in international public affairs, interacting with non-state entities under the same international regulatory framework. The vast majority of CDM projects developed until today, as well as the carbon transactions which resulted from such projects, were entered into between private or public entities authorized by Party states to take part on this offsetting mechanism. Private actors (known as “Designated Operational Entity” or “DOE”) also certify compliance with the CDM’s rules and procedures when they act as validators or the project design and verifiers of greenhouse gas emission reductions. Consequently, the CDM provides a fertile ground for the analysis of the relationship created between these non-state actors and the international autonomous bodies constituted to further develop and supervise the implementation of the Kyoto Protocol. These non-state actors, even though not the subjects of the international treaty-based obligations agreed by the Parties, are endowed with the capacity to actively participate in a mechanism overseen almost exclusively by official international bodies.

Under the CDM, non-state actors may be involved as DOEs, project participants or stakeholders. As stakeholders, non-state actors may participate in the approval of a CDM project by expressing their views at the time the project is being designed. According to the CDM rules and procedures, an accredited independent DOE is charged with the responsibility to verify that local stakeholder’s concerns are taken into account and are properly addressed by project developers wishing to have their project validated. In order to secure the views of stakeholders are duly addressed, validators may undertake on-site inspections and perform interviews.⁷

In addition, the CDM rules also provide for international consultations mandating DOEs to publish the relevant CDM project documentation for a thirty-day public ‘scrutiny’ period by admitted observers and Parties to the Protocol.⁸

30 of the draft rules of procedure would be interpreted as permitting duly accredited observers to participate in ‘private’ meetings.”

⁷ See Decision 3/CMP.1, Modalities and procedures for a clean development mechanism, paragraph 37(b) and 62(b).

⁸ Ibid., paragraph 40(c).



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Under JI, a similar provision is made for public participation in projects pursuing approval through the so-called “JI track-II”.⁹ Like DOEs under the CDM, Accredited Independent Entities (“AIE”) under JI are obliged to make the project information available for public comments during a thirty-day period and ensure that due account is taken of any comments provided.¹⁰ Furthermore, all Parties involved in JI projects must establish national guidelines for approving projects which include consideration of stakeholder comments.¹¹

The table below provides a summary of the instances in which public participation by stakeholders is permitted under the CDM and JI project cycle:

Public Participation	CDM	JI Track-II	JI (general)
General			JI Parties must inform the UNFCCC secretariat of their national guidelines and procedures for approving JI projects, including the consideration of stakeholders’ comments.
Elaboration of Project Documentation	Project participants must invite local stakeholders to provide input on the proposed CDM project.	Not required	
Validation (or Determination)	DOE must make the project documentation available for a 30-day comment period to stakeholders and accredited observers.	AIE must make the project documentation available for 30-day comment period open to stakeholders and accredited observers.	
Verification	DOE verifying project emissions reductions <i>may</i> interview local stakeholders and conduct on-site inspections of projects	-	

It is however through the status of project participant (and as DOEs) that the non-state actors acquire most of their rights under the Kyoto Protocol regime. Project participants are the entities that have a direct connection to a CDM project, that act as investors, project developers, carbon credit sellers or purchasers, as consultants or intermediaries, in short: those that have a direct or indirect interest in the certified emission reduction credits (“CERs”) to be issued for a project.

⁹ Analogous to the CDM, JI track-II subjects projects to the supervision and sanction of constituted international bodies.

¹⁰ Decision 9/CMP.1 at paragraph 32.

¹¹ Ibid., paragraph 20.



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Project participants are limited in number and nominated at the time a project is being submitted for registration to the CDM Executive Board.

Any private or public entity, NGO, public authority, local community or even natural persons can act as project participant provided that these entities are properly authorized by the host country. The authorization by a Party involved is a necessary condition to allow a public or private entity to participate in the CDM project. The project approval and authorization to participate in the project activity is issued by the Designated National Authority (“DNA”) appointed by each Party.

The following are rights of project participants under the current CDM rules and procedures:

- the right to communicate with the Board and other accredited bodies on matters related to the project, its registration and the issuance of certified credits;¹²
- the right to determine if certain information provided to these bodies are to be treated as confidential information;¹³
- the right to be heard if a decision to suspend or withdraw a DOE has adversely affected their registered project;¹⁴
- the right to be notified if a review of the project (or of the issuance of CERs) is requested by the CDM Executive Board or by one of the Parties involved;¹⁵ and
- the right to hold and receive CERs under the Kyoto unit accounting and tracking system.¹⁶

The rights of project participants under the JI mechanism, on the other hand, are less elaborated. They include:

- the right to communicate with the JI Supervisory Committee (or “JISC”) and with the AIEs in matters related to the project under track-I JI;¹⁷
- the right be communicated of the decision of the JISC in relation to a request for review of the project determination performed by an AIE;¹⁸ and
- the right to receive and hold Emission Reduction Units issued by Parties under the track-I and track-II JI.

Call for Additional Procedural Rights to Non-state Actors

With the rapid growth of the CDM in terms of numbers of projects and value of the carbon market created, criticism began to mount over the fractured governance system that currently characterizes the CDM approval process. One of the main complaints put forward by project

¹² Decision 3/CMP.1, Annex. Paragraph 66.

¹³ Ibid., paragraph 6.

¹⁴ Ibid., paragraph 23.

¹⁵ Decision 4/CMP.1, Annex III, paragraphs 9(b) and 14.

¹⁶ Supra note 11.

¹⁷ See Modalities of communication of project participants with the Joint Implementation Supervisory Committee, Version 1, JISC 8, Annex 4, paragraph 5.

¹⁸ Decision 9/CMP.1, Annex, paragraph 35.



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proponents and other stakeholders engaged in CDM project development is that international constituted bodies like the CDM Executive Board have been exercising both a regulatory and a *de facto* legislative role without following basic due process norms and standards. It is the Executive Board which has the final say on crucial issues such as project registration, approval of new methodologies and issuance of credits. At the same, at each Board meeting, the Executive Board interprets, further develops and implements the decisions adopted by Parties during COP/MOP meetings.

While the decisions of the Board have no formal binding effect on the Parties of the Kyoto Protocol and much less to non-state project participants, each guidance or clarification issued by the Executive Board has acquired a *de facto* binding effect on project participants. That, coupled with the absence of minimal due process rights and guarantees, is capable of negatively affecting the interests of non-state entities engaged in the CDM.

The following points describe the discontent of DOEs and project participants as a result of the fundamental lack of clear and unambiguous procedural rules:

- lack of transparency – problems relating to a lack of transparency regarding the activities performed by the CDM Executive Board and deficiency of communication channels between the main CDM regulatory bodies and project participants;
- lack of tools to safeguard impartiality in decision-making – political conflicts of interest in the decision-making process of the Board. It is not unusual that Board members hold also positions as UNFCCC and Kyoto Protocol negotiators for their countries, or managers of large government CDM purchasing programs.
- lack of predictability – the decisions and interpretations of the Executive Board are often hard to predict and many of its decisions have come as a surprise to project participants and technical project experts.

Overall, the current governance structure is suffering from shortcomings relating to transparency, accountability, and impartiality, all of which constitute the basic features of any rule-based regulatory regime dealing with private interests and rights. It is in this context that the claim for additional administrative and procedural rights that secure that commonly accepted principles of good governance and administrative procedure between international bodies and non-state actors arises.

One suggestion to improve the CDM governance structure and secure due process and administrative rights to non-state entities is to implement a review procedure or mechanism, through which aggrieved entities may appeal for a review of a decision for the CDM. While the Executive Board is effectively a regulatory body whose decisions have significant legal and financial consequences for private sector participants in the CDM, it is currently not subject to the usual political and legal controls common to domestic regulatory agencies.

In the context of the Kyoto Protocol Article 9 review, numerous proposals were put forward to promoting clear procedural rights to entities participating in the CDM. That included, among other aspects: (i) the right to be heard before a final decision is taken; (ii) the right to petition, or



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pronouncement, and unrestricted access to Executive Board meetings; and (iii) the right of access to an independent review process which guarantees a full review of the decisions of the constituted bodies.

The need for reform of the CDM governance has recently been acknowledged by the COP/MOP and first steps in this respect were made at its last meeting in Poznan, where it requested the Board to “adhere to the principle that any decision, guidance, tool and rule shall not apply retroactively”.¹⁹

Moreover, similar calls for transparency and the inclusion of due process elements have also been made in relation to JI and the work of the JI Supervisory Committee (“JISC”).

As it will be detailed in the sections to follow, such calls for additional procedural rights, in particular the establishment of a review mechanism, can be extended to safeguard the interests of non-state actors operating under a future REDD agreement.

2. How can procedural rights be included in an emerging REDD agreement?

There are broadly two ways through which procedural rights to indigenous peoples and other non-state actors could be included in an international REDD agreement: (i) through the introduction, and express acknowledgement by Parties, of guiding procedural principles of international environmental law (referred to in this analysis as the ‘indirect approach’); and (ii) through the adoption of procedural rights to safeguard the interests and needs non-state actors at the international level (referred to as the ‘direct approach’).

Indirect Approach: Establishing Guiding Principles for REDD

Procedural principles under international environmental regimes

Anchoring a future REDD agreement on principles of international law is one way of promoting the integration of basic procedural rights in the overall REDD design. In general, legal principles emphasizing procedural rights gather ample support from the international community and have been widely referenced under international environmental agreements. These legal principles work as a tool to promote important changes at the national level, where the affected entities have means of enforcing their rights. In addition, while these principles are interpreted, applied and achieved primarily at the domestic level, they may also serve as reference to assess performance of individual Parties’ commitments at the international level.

Examples for principles dealing with procedural rights have been laid down in the Rio Declaration on Environment and Development. Principle 10 of the Rio Declaration states that:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information

¹⁹ See further guidance relating to the clean development mechanism, COP/MOP 4.



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concerning the environment that is held by public authorities, including information on hazardous materials and activities”.²⁰

Along the same lines, Principle 22 of the Rio Declaration stresses the need for effective participation of indigenous people in achieving sustainable development:

“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”²¹

These principles have been reflected in important multilateral treaties such as the Convention on Biological Diversity (“CBD”), the Ramsar Convention on Wetlands and the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (“Aarhus Convention”). Under the CBD, a detailed ‘programme of work’ has been adopted to ensure full and effective participation of indigenous “at all stages and levels” in the implementation of article 8(j).²² In addition, the CBD’s programme of work has also made specific reference to the principle of ‘free, prior and informed’ consent, by calling upon the state-parties to:

“[...] take measures to enhance and strengthen the capacity of indigenous and local communities to be effectively involved in decision-making related to the use of their traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity subject to their prior informed approval and effective involvement”.²³

Similarly, the Ramsar Convention has adopted the “Guidelines for establishing and strengthening local communities’ and indigenous people’s participation in the management of wetlands”, which aims at assisting parties to this convention in involving local and indigenous people in wetland management (the “Ramsar Guidelines on Participatory Management”).²⁴ The Aarhus Convention, in turn, is generally deemed as the most far-reaching regime for giving effect to Principle 10 of the Rio Declaration and contains detailed provisions on access to information, public participation in decision-making and access to justice to challenge breaches of national law on environmental matters.²⁵

The need to promote full and effective participation of indigenous peoples and local communities has also been recognized under the UNFCCC regime, during the meeting of the

²⁰ See Principle 10 of the Rio Declaration, available at

<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>

²¹ Ibid., Principle 22.

²² See Annex to the CBD COP 5 Decision V/16, available at <http://www.cbd.int/decisions/?m=COP-05&id=7158&lg=0>.

²³ Ibid., Task 2.

²⁴ The Guidelines were adopted as an Annex to Resolution VII.8 of the San Jose Conference and is available at http://www.ramsar.org/key_guide_indigenous.htm

²⁵ The text of the Aarhus Convention is available at <http://www.unece.org/env/pp/treatytext.htm>.



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Subsidiary Body for Scientific and Technological Advice (“SBSTA”), held together with the 14th COP, in the context of methodological guidance on REED.²⁶

Integrating procedural principles in a REDD agreement

Clearly spelling out principles that guarantee procedural rights to non-state actors, including specific reference to local communities and indigenous peoples, is a first and important step to shape national laws and policies in REDD. These principles could aim at establishing general goals and steering the future action of the Parties vis-à-vis the assignment of procedural rights to non-state entities at the national level. On the other hand, while general guiding principles are necessary to lay down the foundation for further development of the regime, their inherently ‘soft’ legal status require that complementary and more concrete guidelines be developed at a later stage. As complementary guidelines imply giving some concrete content to the agreed principles, their negotiation in the international arena is often more complex and time consuming, requiring a sequence of official meetings and backstage discussions. One alternative to ease negotiations and endorsement of guidelines is to make their adoption by state-parties voluntary.²⁷

An international incentive system rewarding REDD is likely to be linked to a financial mechanism that approves Parties’ national implementation plans (if REDD follows an international fund approach), or reference and target scenarios (if REDD adopts a market-linked system). In this context, the REDD guiding principles could be complemented by internationally agreed guidelines that emphasize procedural elements to allow non-state stakeholders to be heard in the domestic decision-making and implementation process.

Again, examples can be drawn from the CBD and the Ramsar Convention, in which the principle of full and effective participation of indigenous peoples has been further advanced through the adoption of the ‘programme of work’ under the CBD and ‘Ramsar Guidelines on Participatory Management’, respectively. Along these lines and borrowing from such experiences, the REDD guidelines could provide for:

- the establishment of public consultation procedures at the national and international level;
- the implementation of capacity-building initiatives where stakeholders can learn how to effectively interact with local governmental agencies, negotiate and contribute to decision-making, apply technical aspects of REDD, and elaborate and design project proposals to obtain funding;
- the strengthening of local organizations and groups that represent the interests of indigenous peoples and local communities;

²⁶ See Methodological Guidance by the Subsidiary Body for Scientific and Technological Advice, paragraph 1(c), document FCCC/SBSTA/2008/L.23, available at www.unfccc.int.

²⁷ See for instance the “Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities”, endorsed during COP 7, Decision VII/16, of the Convention on Biological Diversity, available at <http://www.cbd.int/decisions/?m=COP-07&id=7753&lg=o>.



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- the training of staff in local regulatory and funding agencies so that they are aware of and strive to effectively implement the REDD guidelines;
- the nomination of focal points within local governmental agencies to liaise with indigenous peoples and local communities;
- the periodic confirmation that stakeholders are in agreement with the objectives of the REDD initiative;
- the development of cultural, social and environmental impact assessments in relation to REED activities; and
- the involvement of local communities and indigenous peoples in the elaboration of the above-mentioned impact assessments and in the periodic monitoring process.

Demonstrating that REDD procedural principles and guidelines are being respected and effectively implemented at the national level could be made an essential requirement for a Party to obtain (and maintain) the approval of its national implementation plan or reference scenario under the REED agreement. International supervision of a Party's performance and monitoring of compliance could be implemented, for instance, through the creation of expert panels charged with the task of regularly assessing fulfilment of these procedural guidelines. Such assessments could be made publicly available and open for comments of other Parties and stakeholders.

It is important to bear in mind, however, that any attempt to assign such a broad supervisory role to an international body runs the risk of triggering opposition by Parties unwilling to accept any interference with their domestic policies and strategic decisions at the national level. In addition, directly associating the provisions of REDD funds to the effective implementation of principles and guidelines at the national level is likely to be interpreted as another form of conditionality imposed on developing countries and thus generate opposition.

A similar problem is likely come up if an attempt is made to create a review mechanism empowered to hear complaints by non-state entities against Parties that purportedly failed to meet the standards set out in the guiding principles and guidelines. This issue is considered in more detail with respect to the third question below.

Direct Approach: Including Procedural Rights at the International Level

Introducing procedural rules which sets out a roster of participatory rights to non-state entities at the international level is another way through which rights of indigenous peoples, local communities and other non-state actors can be integrated under a REDD agreement. Such procedural rights would be assigned directly to all non-state actors participating in REDD, either as project participants or as stakeholders, by integrating due process standards into the REDD regime in a similar fashion to the current and future reformed CDM and JI mechanisms. Enforcement of such rights would thus become a matter of international rather than domestic law. While not necessarily exclusively focused on indigenous peoples and local communities, these procedural rights would benefit this group of the civil society as much as they would benefit private companies and NGOs.

Whilst under the CDM and JI frameworks it is more likely that the rights of project participants, DOEs, and stakeholders be negatively affected by arbitrary actions and biased decisions taken by international constituted bodies, under REDD violation of indigenous peoples' rights are more



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likely to be committed by governmental agencies responsible for REDD policies or programs at the national level or by actors implementing discrete activities at the non-state level. Displacement of local communities, loss of access to natural resources, land expropriation, and little or no access to benefits and compensation, are examples of types of conflicts that could arise from REDD schemes.

Even though these conflicts are born in a domestic setting and must be dealt with internally pursuant to each Party's national laws and regulatory institutions, the inclusion of certain procedural elements in the international REDD agreement can improve the quality and degree of the participation of non-state actors in domestic REDD initiatives and, to some extent, secure that their interests and rights are brought to the attention of the relevant international bodies supervising the implementation of the REDD mechanism.

As the example of the Kyoto flexible mechanisms shows, it is generally easier to integrate procedural rights for non-state actors into sub-national mechanisms administered on the international level, provided that these actors take an active role in the implementation of the mechanism. The establishment of such mechanism can thus be one means to empower non-state actors assigning them an active role in the promotion and implementation of REDD activities. Any participation in such mechanism would be conditional of the relevant Party state's authorization.

Procedural rights in the context of sub-national REDD activities

Subjecting sub-national REDD activities to the direct approval of international constituted bodies, in a process analogous to the current (and future reformed) Kyoto project-based mechanisms, is thus a way of securing procedural rights to non-state stakeholders. Projects and initiatives validated, registered and verified by independent entities accredited or constituted at international level could provide for a more objective and transparent assessment of the merits and qualities of a certain undertaking.

In the event that a REDD agreement authorizes Parties to approve sub-national REDD programs for which credits are issued on the international plane, procedural rights could be based on the rights established under the CDM and JI frameworks and expanded from the recent calls and proposals for the integration of due process rules under those mechanisms.

Non-state actors involved either as project participants or as local stakeholders in a sub-national REDD activity could thus be endowed with administrative and due process rights in relation to acts and decisions of international bodies. Indigenous peoples and local communities could feature as project participants in a REDD activity or as local stakeholders affected by REDD. Normally indigenous peoples and local inhabitants will become a project participant through an organization, syndicate or local association. This is because forestry projects can have hundreds (or even thousands) of individuals with a direct interest over the forest and the carbon rights and revenues associated with the forestry resource. For practical reasons it is often easier to group these individuals under the umbrella of local constituted entities, rather than listing them all as project participants in the project documentation.

It is expected that indigenous peoples who have a direct interest or ownership over the carbon rights embedded in a forested land will become project participants (unless they opt to



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contractually transfer those rights to other entities). The national legislation of each host country will determine the legal capacity of indigenous peoples to enter into private legal arrangements and dispose of their rights (this may include the need for indigenous peoples to be legally assisted in the performance of civil acts).

The objective of the inclusion of such rules would be that any person with a direct and material interest (generally project participants and local stakeholders) in the approval of a REDD project would have a right to participate by:

- expressing an opinion and its reasons;
- having their position considered; and
- having the right to appeal to a review system in the event that his/her rights are disrespected or its interests negatively affected by a decision of an official body or accredited entity.

In addition, procedural rights could be fine-tuned to cater for the particular risks ill-formulated (or implemented) REDD activities can entail to indigenous people and local communities. Examples of such rights include:

- For non-state entities involved as a project participant or local stakeholder in a REDD program:
 - the right to request a temporary suspension of (or interruption) of the project approval process at the international level (for instance, suspension of the registration process or the issuance of credits) whenever a conflict among project participants or between project participants and stakeholders arises. Such request for suspension would remain effective until the dispute is resolved at the domestic level.
- For local stakeholders:
 - the right to be fully informed with the respect to nature and purpose of the REDD initiative; and
 - the right to express their concerns and opinions in respect to the project and have those concerns adequately addressed.

In sum, assigning direct procedural rights to non-state actors on the international stage and ensuring that these actors are given standing before the appropriate international institutions could be another way through which the interests of indigenous peoples and local communities could be preserved in a future REDD agreement. The table below summarizes the different scenarios under a direct and indirect procedural rights' approach to REDD.



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Entity/Rights	Procedural Rights		Enforceability
	Project Participants	Local Stakeholders	
Indirect Approach	Based on international procedural principles and guidelines transposed into national law.	Based on international procedural principles and guidelines transposed into national law.	Through national judicial and administrative courts
Direct Approach	Based on direct procedural rights at the international level, such as: (i) the right to be heard or to petition; (ii) the right to request temporary suspension of the project approval process; (iii) the right to appeal from a decision of an international body.	Based on direct procedural rights at the international level, such as: (i) the right to be fully informed and have its comments fully taken into account; (ii) the right to request temporary suspension of the project approval process; (iii) the right to appeal from a decision of an international body.	Through a dedicated international appeal system

3. What could be the potential role of the Compliance Committee or an appellate body hearing cases under the CDM and JI under a REDD mechanism?

The Role of the Compliance Committee and Possible Scenarios for a Review Mechanism

The Compliance Committee and the Multilateral Consultative Process

The Compliance Committee has the mandate to promote, facilitate and enforce compliance by Parties with the commitments under the Kyoto Protocol. Its current role is limited to hear cases of non-compliance by Parties related to emissions targets, methodological and reporting requirements for greenhouse gas inventories, and the eligibility requirements to use the flexible mechanisms as established under the Protocol and subsequent rules.²⁸ Only Parties and the expert review teams (a team of international experts nominated by the Parties to conduct technical reviews pursuant to Article 8 of the Kyoto Protocol) can thus bring cases of non-compliance to the Committee and only Parties can be affected by its decisions.

In order for the Compliance Committee to play any role under a future REDD agreement its mandate would have to be expanded also to address cases of non-compliance under such agreement.

An alternative option to the use of the Compliance Committee would be to re-start discussions on and put into operation the Multilateral Consultative Process (“MCP”) under the UNFCCC.

²⁸ See Rules of Procedure of the Compliance Committee of the Kyoto Protocol, available at http://unfccc.int/kyoto_protocol/compliance/background/items/3026.php



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The MCP comprises a set of procedures developed to settle questions regarding the implementation of the Convention. It is advisory and non-judicial in character and aims at promoting co-operation and understanding between the Parties.²⁹ The basic framework of the MCP was approved at COP 4, but it was never adopted.³⁰

Possible scenarios for a review mechanism

It is possible to foresee two alternative scenarios in which a review mechanism could play a role in hearing cases of violation of rights of non-state entities involved in a REDD mechanism: (i) one which the necessary structural changes are made to the Compliance Committee's or the MCP's mandate so as to expand it to hear cases brought by aggrieved non-state entities with rights under the REDD agreement; (ii) one which creates a dedicated international review mechanism to receive complaints and act upon these, while the Compliance Committee or the MCP either (A) remain substantially with its current format and role, or (B) have their mandate expanded to include the possibility of a Party to bring cases of non-compliance of REDD procedural principles and guidelines against another Party .

We believe that there is higher likelihood that a post-2012 climate regime will pursue the second alternative rather than the first one. This is because it is unlikely that Parties will forego a share of their sovereignty and consent to the possibility of being brought directly by a private entity to an international court capable of issuing binding decisions. In addition, the Kyoto Protocol non-compliance system draws heavily from the positive experience obtained with the non-compliance procedures created under the Montreal Protocol on Substances that Deplete the Ozone Layer and replicated widely to other multilateral environmental agreements. To date no major structural problems have been identified with such types of conflict resolution mechanisms.

It is therefore more realistic and politically feasible to devise a dedicated review mechanism that works as a specific forum for non-state entities to seek redress in the event that their rights, as set out under the Convention regime (including under the Kyoto Protocol and the REDD agreement), are infringed. Below we consider how this dedicated review mechanism could play a role in securing the rights of non-state actors, both in the case of an 'indirect approach', as well as in case of a 'direct approach' to procedural rights.

Note that this section does not attempt to cover all the aspects and rules that would govern the operation of such a review system, but merely to provide a snapshot of the potential role that the review system could play under REDD, the type of complaints it could be competent to hear and nature of its decisions.

Role of the Review Mechanism under the Indirect Approach

As observed in the response to question 2 above, procedural rights may be indirectly assigned to non-state entities through REDD principles and complementary guidelines agreed by the Parties. The question of whether a dedicated review mechanism could be empowered to hear complaints brought by non-state entities against Parties that fail to abide by the international standards agreed under a REDD agreement is however a more complex one.

²⁹ See UNFCCC, Article 13 and Report on the Ad Hoc Group on Article 13, FCCC/AG13/1998/2.

³⁰ See Decision 10/CP.4.



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International adjudication between individuals and sovereign states is a striking feature of contemporary human rights law, which, with a very few exceptions, has not yet made its way into international environmental regimes. One such exception is the North American Agreement on Environmental Cooperation. Such agreement seems to be one of the most comprehensive environmental agreements in terms of the procedural guarantees offered to NGOs and individuals. Through articles 14 and 15, this agreement opens the opportunity for non-state actors to submit a claim to the secretariat that a state-party is failing to effectively enforce its environmental law. Upon receipt of the submission, the secretariat may decide to initiate a formal investigation that can lead to the elaboration of a ‘factual record’ against the concerned state-party. The council may decide to adopt and make the factual record public by a two-thirds vote.³¹

In theory, a comparable international appeals system could be designed under the Convention. In order to minimize political resistance by states regarding their sovereignty over its internal policies and affairs, decisions of this appeal body could be made merely recommendatory. The appeal body could thus be mainly charged with the task of analyzing the admissibility of the complaint and, provided that it has been presented with (or has obtained through other fact-finding means) enough evidence that one or more of the REDD guiding principles have been disrespected by the concerned Party, refer the complaint to the Compliance Committee. Before the appeal body refers the complaint to the Compliance Committee, the Party involved would be allowed the opportunity to give an explanation of how the REDD principles are being taken into account under its domestic policy. The Compliance Committee, or the MCP, would at its discretion decide whether to initiate non-compliance procedures against that Party.

It is important to note, however, that while the model provided by North American Agreement on Environmental Cooperation is bold, it is also restricted in participation to only three states.³² It is doubtful whether such a review system would gain the necessary political endorsement under a multilateral environmental regime such as the climate regime with more than 180 parties to it.

If the above proposed review system proves not to be politically feasible, non-state entities would likely have to rely on the sympathy and willingness of a Party to raise a question of implementation against another Party who is allegedly failing to implement and abide by the procedural principles agreed under the international REDD agreement. Still, in this case the mandate of the Compliance Committee or of the MCP would need to be broadened so as to allow for questions of implementation related to non-compliance under REDD.

Role of the Review Mechanism under the Direct Approach

Under the direct approach, non-state entities are bestowed with procedural rights that are protected directly at international level. In this case, the design of a review mechanism for non-

³¹ See the North American Agreement on Environmental Cooperation available at:
http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english

³² The state-parties to the North American Agreement on Environmental Cooperation are Mexico, Canada and United States.



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state entities seeking some level of redress under REDD can be modelled on other existing experiences in the international arena. Particularly, we suggest an approach which draws from some of the positive features of the World Bank Inspection Panel and the European Ombudsman.

Some existing models

The Inspection Panel is a fact-finding body established by the World Bank in response to the widespread criticism generated by civil society and stakeholders with respect to the abidance by the Bank to its own policies in the support for infra-structure projects in developing countries. The Panel is charged with the mandate to hear complaints from non-state actors harmed or threatened to be harmed by the implementation of any such projects. Only those non-state actors whose interests have been affected by Bank's failure to follow its own policies are qualified to file complaints. The Panel is composed by three members and has specific rules designed to ensure its independency from the Bank's Management. The Panel, however, does not have the power to issue binding rulings or to make recommendations.³³

The European Ombudsman, in turn, is endowed with the competence to receive and address individual complaints over acts of 'maladministration' from Community institutions and bodies. In order to be given effect, a complaint has to meet the formal requirements of admissibility. Once the Ombudsman decides that a case is admissible, it invites the concerned institution to submit its views. Notably, the European Ombudsman enjoys both the power to investigate (by requiring further information and inspecting files when necessary) as well to issue recommendations. If maladministration is uncovered by the Ombudsman, it will co-operate with the institution seeking to reach a friendly solution that addresses the issue. However, in the event that such friendly solution can not be achieved, the Ombudsman may make recommendations. Ultimately, if such recommendations are ignored or not properly considered by the institution, the Ombudsman may refer the case to the European Parliament.³⁴

The Review Mechanism – mandate and scope

A review mechanism for non-state actors under the Convention could learn and borrow from the World Bank Inspection Panel and European Ombudsman experience. Affected participants and stakeholders involved in the Kyoto flexible mechanisms and REDD initiatives would be given an opportunity of recourse to the Convention's appeal body and to seek appropriate remedies within the limits and powers granted to such body. The appeal body's mandate should be clearly set out in its constitutive document (preferably, and likely to be, a COP decision). The terms of reference for the operation of the appeal mechanism should be clearly set out in the constitutive document.

The appeal body should exercise a quasi-judicial adjudicatory role and be empowered with the ability to install fact-finding procedures, including, when appropriate, on-site inspections. In

³³ The World Bank Inspection Panel was adopted by the Bank's Board of Executive Directors on September 22, 1993 through IBRD Resolution 93-10 and IDA Resolution 93-6. Also see the "About Us" section on the Inspection Panel website at www.worldbank.org/inspectionpanel.

³⁴ See the European Ombudsman Statute, adopted by Parliament on 9 March 1994 (OJ 1994 L 113) and amended by its decision of 14 March 2002 deleting Articles 12 and 16 (OJ 2002 L 92).



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sum, such body should have the competence to examine cases brought to its attention by non-state entities and use its fact-finding capacity to ensure that facts are independently assessed and go through ample public scrutiny. Most importantly, the proceedings established under the review mechanism would have to be open and equitable and conform to standards of due process. The appeal body should be constituted as a stand-free international body that is independent from the political influence of the Parties.

Finally, the review mechanism should be able to cater not only for infringements of rights by constituted bodies under the Convention regime (which are more likely to affect project participants seeking registration of their projects and issuance of credits), but also for violations of procedural rights of stakeholders with a direct interest in the activity being implemented under a domestic regulatory framework. Below we present some of the general aspects and features of to the proposed review mechanism.

Qualifying non-state actors

Any non-state entity (including stakeholders such as local communities, indigenous peoples groups) directly affected by a particular REDD activity could, in general terms, be entitled to file a complaint to the appeal body. At a minimum, however, such person or group would have to demonstrate that their rights have been violated by a national or sub-national, internationally processed or approved, REDD activity (for instance, by being associated with its direct implementation on the ground or by having a particular interest in the way a REDD policy is conceived and implemented at the national or sub-national level). As it seems undisputable that indigenous peoples and local communities are intrinsically associated with REDD initiatives, these groups could be granted 'automatic' standing to submit complaints with respect to project and/or programs developed in the area where they reside.

Admissible complaints and nature of decisions

The nature of complaints related to REED initiatives that could be brought before the appeal body would be restricted to alleged violations of procedural rights of non-state actors as set out and protected under the REDD agreement. The following are the potential types of complaints (non-exhaustive list) which could be submitted to the appeal body in connection with a REED initiative:

- Complaints against a violation of a procedural right by a constituted international body. These types of complaints would refer to a direct infringement of a participatory right (such as proper and ample stakeholder consultation, access to information, right to petition and to an adequate and timely response) by an accredited entity or official international body, such as independent verifiers and a regulatory body responsible for supervising and approving REDD projects at the international level; and
- Request for temporary suspension of the project approval process. This type of complaint creates the possibility for a unilateral request for temporary interruption of the REDD project if a dispute arises among project participants or between project participants and local stakeholders until such dispute has been resolved.



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The nature of the decisions of the appeal body should be final and binding. In the event that the commission finds that a certain procedural right of qualifying non-state actor has been breached by an official or accredited body, it will determine that such right be re-established immediately, taking into consideration other appropriate measures necessary to make sure that the remedy proposed is adequate and effective.