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# THE WORLD BANK CLEAN TECHNOLOGY FUND: FRIEND OR FOE TO THE UNFCCC?

by Addie Haughey\*

## INTRODUCTION

In response to the Bali Action Plan's calls for an expanded international response to climate change, the World Bank created a series of Climate Investment Funds ("CIFs") to provide "immediate financial resources" to respond to global climate challenge.<sup>1</sup> Since the creation of the funds last year, more than \$6 billion has been pledged to CIF programs by donor countries<sup>2</sup> and the CIFs have quickly become leaders in international climate investment, at least in terms dollar amount.<sup>3</sup>

The Clean Technology Fund ("CTF")<sup>4</sup> is one of the more advanced CIFs, and began providing large-scale financial resources for low-carbon technology projects in developing countries in early 2009.<sup>5</sup> This article examines whether the CTF is an instrument through which donor countries can fulfill their international climate change funding obligations under the UN Framework Con-

vention on Climate Change ("UNFCCC"). First, background for answering this question is provided. Then it is argued that inconsistencies between the CTF and the UNFCCC should prevent CTF donations from fulfilling UNFCCC obligations.

## BACKGROUND

In response to the imminent threat of climate change, the international community came together at the Rio Earth Summit in 1992 to create a framework convention to combat climate change.<sup>6</sup> The objective of the UN Framework Convention on Climate Change is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."<sup>7</sup> The UNFCCC was created to organize and coordinate efforts to fight climate change as well as to build political will and accountability. The convention's Conference of the Parties ("CoP") is the primary mechanism for the world to address climate issues and solutions.<sup>8</sup>

The framework created by the convention obligates country parties to meet "common but differentiated" standards,<sup>9</sup> a

compromise meant to acknowledge that industrialized nations in the global north are the primary cause of anthropogenic climate change, but that all nations have a role to play in the solution.<sup>10</sup> One key difference in obligations is that wealthier, developed nations are responsible for funding climate change initiatives

around the globe by providing "new and additional financial resources" for developing countries.<sup>11</sup> In order to facilitate this funding responsibility, the UNFCCC established the Global Environment Facility ("GEF") as its official financial arm, responsible for aiding countries in meeting their obligations to the Convention.<sup>12</sup>

The Kyoto Protocol to the UNFCCC went into effect in 2005.<sup>13</sup> It is the first instrument produced by the UNFCCC with legally binding emission reduction targets and timetables.<sup>14</sup> The Protocol includes flexible market mechanisms giving parties multiple paths through which to meet their binding targets.<sup>15</sup> One

such path is the Clean Development Mechanism ("CDM"),<sup>16</sup> which allows investment in emission reducing projects in developing countries to generate "carbon emission reductions" ("CERs") that can then be traded on the market to developed countries for use in their compliance with Kyoto.<sup>17</sup>

The market for carbon emission reduction credit trading grew exponentially in the two years after the Kyoto Protocol came into effect, reaching an estimated \$30 billion.<sup>18</sup> There are now at least fifty-eight carbon funds in the market,<sup>19</sup> which purchase carbon credits on behalf of countries and private entities that cannot meet their Kyoto obligations through emission reductions alone.<sup>20</sup>

## THE WORLD BANK

The World Bank has played a significant role in the development of the carbon market through its creation of the Prototype Carbon Fund<sup>21</sup> and its extensive involvement in carbon emission

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\*Addie Haughey is a J.D. candidate, May 2010, at American University, Washington College of Law.

trading.<sup>22</sup> The Bank's involvement in the international climate regime began with its prototype permit purchasing,<sup>23</sup> and was solidified when it was selected to serve as the trustee for the UNFCCC's financial arm, the Global Environment Facility.<sup>24</sup>

The World Bank is considered the "pre-eminent multilateral institution providing assistance to developing countries."<sup>25</sup> Established in 1945 after the Bretton Woods Conference,<sup>26</sup> the Bank has served as an intermediary between its powerful shareholders, wealthy developed nations, and developing countries. In this role, the Bank provides financial assistance, technical assistance, risk guarantees, and policy advice to public and private sector parties in developing countries.<sup>27</sup> This history of development assistance serves as a backdrop to the Bank's involvement in climate change finance, focusing its efforts on development goals that are linked to carbon emission reduction and the transition to low carbon economies.<sup>28</sup>

### THE CLEAN TECHNOLOGY FUND

The World Bank's Clean Technology Fund is a Climate Investment Fund that works by pooling donations from industrialized countries and investing those funds in carbon emission reducing projects in developing countries.<sup>29</sup> Through the CTF, the Bank focuses its financial expertise on scaling-up<sup>30</sup> proven low carbon technologies by expanding them to full sector scale, or at least demonstrating that the technologies could be expanded to such a wide scale.<sup>31</sup>

The Trust Fund Committee ("TFC"), the Clean Technology Fund's governing body, is responsible for approving programs and project pipelines, establishing project criteria, determining what financing products will be available, and ensuring consistency between CTF practices and the UNFCCC.<sup>32</sup> The Committee is comprised of eight representatives from donor countries and eight from countries eligible to receive CTF financing.<sup>33</sup> TFC representatives are selected by consultation with the parties eligible to serve.<sup>34</sup>

The CTF is structured so that Multilateral Development Banks ("MDBs") work with partner countries to develop country-specific investment plans.<sup>35</sup> These plans incorporate CTF financed projects and programs<sup>36</sup> into the country's existing climate change reduction strategies. Recipients of CTF funds can be public or private, though private recipients must demonstrate their place within a broader public climate change plan.<sup>37</sup> Once developed, projects are sent to the Trust Fund Committee for approval, after which funds are transferred in the form of grants, concessional loans, and guarantees.<sup>38</sup> Projects are examined based on established standards, including greenhouse gas ("GHG") emission savings,<sup>39</sup> demonstration potential,<sup>40</sup> development impact,<sup>41</sup> implementation potential,<sup>42</sup> and additional cost and risk premium.<sup>43</sup>

### ANALYSIS OF THE CLEAN TECHNOLOGY FUND

The founding document of the Clean Technology Fund goes to great lengths to demonstrate consistency and collaboration with the UNFCCC,<sup>44</sup> but that consistency does not extend far beyond rhetorical principles. This is evidenced by significant

criticisms of the CTF's motives, the World Bank's record on climate change, the Bank's "technology neutral" approach to carbon emission, and more.<sup>45</sup> Beneath the layers of policy disagreement, even the CTF founding document<sup>46</sup> itself demonstrates at least three areas where the CTF is inconsistent with the UNFCCC. First, circular language in the document absolves the CTF of responsibility for ensuring "new and additional" funding to its recipient countries. Second, measures put in place to ensure equitable governance of the CTF do not achieve this purpose. Finally, the so-called "sunset clause," intended to prevent undermining of the UNFCCC process by the CTF, is drafted poorly, with a major loophole that allows the CTF to avoid sunset.

### NEW AND ADDITIONAL FINANCIAL RESOURCES ARE NOT GUARANTEED BY THE CTF

Article 4 of the UNFCCC lays out the commitments of the party countries, including paragraph 3, which requires "new and additional financial resources to meet the agreed full costs incurred by developing country parties in complying with their obligations."<sup>47</sup> Similarly, the Clean Technology Fund founding document uses the phrase "new and additional" in its principles.<sup>48</sup> It is telling, however, that the document neglects to cite to the provision of the UNFCCC in which that terminology originated, despite extensive citation to other UNFCCC provisions.

Undoubtedly, all donor countries consider their donations "new and additional" and intend to report their CTF donations to the UNFCCC as part of meeting their Article 4 commitments.<sup>49</sup> The CTF, however, has absolved itself of responsibility for ensuring that obligations are met by placing the responsibility on the donor country, not the CTF, to "ensure that contributions are new and additional resources supplementing existing [Official Development Aid] flows otherwise available for developing countries."<sup>50</sup>

Even if some of the \$6 billion donated into the CIFs so far is new and additional, money donated to the CTF is comingled and combined with other sources of funding.<sup>51</sup> This is problematic because the UNFCCC reporting process requires that countries demonstrate that their individual contributions to climate change are new and additional.<sup>52</sup> Under this system it will be difficult for a country to demonstrate this,<sup>53</sup> and equally difficult for a UNFCCC body to determine whether funds are new and additional if they are mixed with other funding sources from the outset.

In the midst of confusion and disagreement over exactly what is new and additional funding and where the responsibility for it lies, it appears that the CTF has used its founding document to pass responsibility on to its donor countries. This creates a conflict; the system makes it difficult to ensure that funds are new and additional and demonstrates that the World Bank is either not prepared or not willing to meet UNFCCC standards for climate change financing.

The Bank still has the opportunity to tighten up this loose provision by not just asking donor countries to ensure that funding is new and additional, but by requiring them to demonstrate that it is. In addition, the CTF could include an analysis of

whether or not funding is new and additional in their donation acceptance process, and/or incorporate new and additional status into the investment criteria for projects.<sup>54</sup> This has potential to be complicated administratively,<sup>55</sup> but may be required if donor countries are to report donations as “new and additional” to the UNFCCC. The CTF has multiple opportunities to ensure that “new and additional” funding is used, and it should do so.

#### EQUITABLE GOVERNANCE IS NOT GUARANTEED BY THE CTF

Under the current international climate regime, each party has an equal vote in all UNFCCC decisions,<sup>56</sup> ensuring that developed countries cannot use their superior political and financial circumstances to overpower the developing countries of the global south.<sup>57</sup> In the context of financing, this was a battle hard fought, and won, by developing countries to ensure their equal say in the distribution of financial resources coming from the global north.<sup>58</sup> Unfortunately, the CTF has demonstrated inconsistencies with this principle since its creation.

The G8, an organization that lacks representation and input from developing nations,<sup>59</sup> made the initial request to the World Bank to establish the Climate Investment Funds.<sup>60</sup> This means that even if developing countries have subsequently been included, they were not involved at the outset in determining what international body should house and administer the fund, the fund structure, or fund goals and objectives.

In its attempt to have equal representation of developing countries, the CTF included an equal number of donor and recipient country members on its governing board.<sup>61</sup> It also established decision-making by consensus, allowing an unsatisfied board member to block decisions entirely or to abstain.<sup>62</sup>

In reality, however, the CTF governance structure does not involve developing countries in the decision-making process in a meaningful way. The consequences of this are potentially dire in terms of the legitimacy of CTF projects. The inconsistency between the CTF’s governing body and the governance principles of the UNFCCC is twofold.

First, Membership on the Trust Fund Committee (“TFC”) is acquired through a “consultation” with an undefined group of stakeholders.<sup>63</sup> The CTF founding document is loose in its instructions on the selection of Trust Fund Committee membership and unclear as to how the consultation among those parties should work.<sup>64</sup> A footnote says that the “selection of donor

country representatives is to be primarily guided by total contributions to the CTF,”<sup>65</sup> which implies less of a “consultation” and more of a selection process based on the highest dollar donation. What is more disconcerting is that no such instructions are given regarding the recipient country representation on the committee; the document simply instructs that a consultation will occur among the interested countries.<sup>66</sup> This leaves interested countries to wonder how to ensure fair representation—or any representation at all—on the Committee.

The first Trust Fund Committee membership selection process took place behind closed doors at a meeting in Washington, DC in October of 2008.<sup>67</sup> The “recipient” countries that will serve on the committee include Brazil, China, Egypt, India, Mexico, South Africa, and Turkey.<sup>68</sup> While these countries are vital to solving climate change, they represent emerging economic superpowers that are unlikely to share the concerns of a vast number of smaller, less developed recipient nations, which may now have inadequate and ineffective representation on the CTF committee.

The Trust Fund Committee is charged with decision making authority regarding which programs and projects will receive funding from the CTF.<sup>69</sup> This vital role should be given to a body that equitably represents all parties involved.<sup>70</sup> The current system does not guarantee fairness or equity in selection for the Committee and is inconsistent with the UNFCCC’s principles of equity.<sup>71</sup>

The World Bank should clarify the founding document’s language that lays out the involved parties and defines “consultation.” Alternatively, the Bank should give more power to the “Partnership Forum,” a body established to encourage

dialogue about the Climate Investment Funds among diverse interested parties.<sup>72</sup> The role of the forum could be increased to something more like the UN’s Global Environment Facility (“GEF”) Assembly, which has some decision-making power over GEF activities.<sup>73</sup> Involving more stakeholders in actual decision-making, beyond the current Partnership Forum role of “dialogue and consultation,”<sup>74</sup> would create a model much more in line with the principles of the UNFCCC.<sup>75</sup>

Second, the committee is given little, if any, real power. The board of the World Bank maintains control over all actions of the bank, potentially including actions of the CTF as well.<sup>76</sup> In addition, the MDBs maintain implementing power over CTF projects after the TFC approves them,<sup>77</sup> and the CTF founding document provides only weak language to ensure that consistency with the

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UNFCCC is maintained outside the scope of Trust Fund Committee responsibilities.<sup>78</sup>

The Trust Fund Committee is affirmatively given some power over the Multilateral Development Banks that administer CTF projects: it is charged with “ensuring monitoring and periodic independent evaluation of performance and financial accountability of MDBs.”<sup>79</sup> The CTF document also, however, specifies that MDBs “rely on their own policies and procedures in developing and managing activities the [CTF] funds will finance,”<sup>80</sup> including fiduciary standards and environmental and social safeguards.<sup>81</sup> This structure implies that projects voted on by the Trust Fund Committee will be passed down to MDB boards to control.

The CTF should ensure separation between the CTF’s Trust Fund Committee and the World Bank Board by making it explicitly clear how the CTF’s decisions might, or might not, be subject to oversight from the World Bank Board and the Boards of the MDBs. This would bring the actual practices at the World Bank into compliance with the CTF’s claims of Trust Fund Committee leadership.<sup>82</sup> In addition, the CTF founding documents should set firm guidelines for MDB administration of projects and should require MDBs to incorporate UNFCCC principles into their standards and into their reporting to the Trust Fund Committee.

#### THE CTF SUNSET CLAUSE DOES NOT EFFECTIVELY PREVENT UNDERMINING OF THE UNFCCC PROCESS

The World Bank calls the CTF an “interim measure” to provide funding for climate change projects during the negotiations of the successor to the Kyoto Protocol.<sup>83</sup> The Bank claims that the CTF’s “sunset clause”<sup>84</sup> is sufficient to limit it to this temporary goal and prevent diversion from or preemption of UNFCCC negotiations.<sup>85</sup> However, diversion and preemption are possible if the CTF operates as a parallel structure to already existing UNFCCC mechanisms, and in so doing creates a channel for climate related financing to bypass existing mechanisms and flow through the CTF instead.<sup>86</sup> The idea of having a sunset for the Fund after its “interim” purpose has been served is a logical way to prevent this potential problem. The language of the actual sunset clause, however, lacks a guaranteed ending for the fund. A built-in loophole allows the CTF to remain operational if UNFCCC negotiations so indicate, thus rendering the clause ineffective and creating a strong incentive for heavy Bank involvement in the UN negotiations.<sup>87</sup>

The sunset clause states that “if the outcome of the UNFCCC negotiations so indicates, the Trust Fund Committee . . . may take necessary steps to continue the operations of the CTF.”<sup>88</sup>

On its face, then, it appears to offer up the CTF’s fate to the UNFCCC’s Conference of the Parties, but this language is problematic. The World Bank will have strong motivation to ensure that the UNFCCC negotiations leave room for the CTF to continue.

This motivation comes from the Bank’s pronounced desire to be at the forefront of climate change funding and carbon finance. The Bank also has a strong case to make—the CTF has already demonstrated interest from big league donors to the tune of over \$6 billion,<sup>89</sup> a number no doubt envied by other players in the climate change field.<sup>90</sup>

The sunset clause loophole leaves room for the Bank to use its clout to keep the CTF alive.<sup>91</sup> It is unclear that the CoP will be able to take strong

enough action to counteract political pressures coming from the Bank and donor countries, which may be fonder of the CTF than more regulated UNFCCC climate funding mechanisms.<sup>92</sup>

Indeed there are strong arguments that the CTF loophole should remain in place to allow the Fund to continue beyond the current climate negotiations. Proponents argue that World Bank involvement in long-term projects could create market stability because many climate change related investments occur on longer timelines than the UNFCCC or the Kyoto Protocol has provided for thus far.<sup>93</sup> The CTF could offer ongoing and guaranteed financial support for such projects. It is also predicted that tens of billions more dollars will be needed to finance emission reducing projects if the global community is going to successfully combat long-term climate change.<sup>94</sup> It may be unwise to remove any avenue for funding from the market until that target amount of investment is reached.

These arguments, however, do not change the ineffectiveness of the sunset clause as a tool to insulate the UNFCCC negotiations and do not change the possibility that the term “interim” was used only to make the CTF easier for doubters to swallow. The sunset clause was a politically shrewd addition, couched as a compromise, which required little concession from the Bank.

The sunset clause leaves a gap between what the World Bank claims the CTF does—prevent the undermining of future UNFCCC negotiations—and what is likely, or even probable, to do in Copenhagen. Even if the UNFCCC negotiations result in the end of the CTF, the World Bank will ultimately have gained experience, capacity, and connections in climate change finance that will allow it to continue operations (similar to the CTF or otherwise) in the field. It is possible that the CTF itself will sunset only to be replaced by a similar program under another name. The World Bank has successfully placed itself at the forefront of climate change finance with little or no input from the UNFCCC.

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## *Steps must be taken in good faith to address the inconsistencies between the Clean Technology Fund and the UN Framework Convention on Climate Change.*


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## CONCLUSION

Analyzing the Clean Technology Fund governance structure and founding documents provides a broader picture of the international financing of climate change solutions. It is valuable to the extent that it provides new ideas and new models for future finance structures, which will need to generate and invest an unprecedented amount of funding in order to meet the challenge that global climate change presents. Advocates may be hesitant to endorse and foster non-UN programs, but as the CTF demonstrates, major donors do not feel the same hesitation. As such, it is vital that the UN find ways to make sure that even non-UN programs that are working towards climate change goals meet the necessary standards of quality and integrity in all facets of their operations.

Steps must be taken in good faith to address the inconsistencies between the Clean Technology Fund and the UN Framework Convention on Climate Change. Efforts can and should come from both sides: the World Bank and the UNFCCC. The World Bank must show that it can play nice when international “soft law”<sup>95</sup> conventions regulate its investment targets. The UN must manage the reality that the CTF and CTF-like instruments are here to stay and will have to be dealt with within the existing framework.

Ultimately, the global goal is to slow climate change before it causes permanent damage. Clean Technology Fund projects will no doubt contribute to a global reduction in GHG emissions and an increase in low carbon economies around the world, but these benefits come at a cost. The world spoke with one voice when it established the UNFCCC, and success in the battle to slow climate change requires that the voice of the UNFCCC be respected and maintained in the international community.

The UNFCCC secretariat continues to call for a “political answer” to the scientific community’s increasing knowledge on the threat of climate change,<sup>96</sup> and it has been asserted that the 2009 Copenhagen negotiations may be the last chance for this political answer. It is vital that the UNFCCC and those working for its success learn from the current state of climate change finance. In Copenhagen, the CTF’s governance structure, financial success, and environmental effectiveness will each need to be scrutinized and analyzed to learn more effective paths forward and for the UNFCCC and to generate the political will for the Conference of the Parties to utilize the sunset clause freely and based on results, without the undue influence of politics. 

## Endnotes: The World Bank Clean Technology Fund

<sup>1</sup> See Press Release, The World Bank Group [World Bank], World Bank Board Approves Climate Investment Funds (July 1, 2008) (on file with author) [hereinafter Board Approves CIF].

<sup>2</sup> See Press Release, World Bank, Donor Nations Pledge Over \$6.1 Billion to Climate Investment Funds (Sept. 26, 2008) (on file with author).

<sup>3</sup> See, e.g., WORLD BANK, WORLD BANK PROJECT IMPLEMENTATION REVIEW FY07 2 (2008) (reporting that the World Bank’s Global Environment Facility, the financial arm of the UNFCCC, had a portfolio of \$3.9 billion in 2007, more than \$2 billion less than the CIFs).

<sup>4</sup> See generally WORLD BANK, CLEAN TECHNOLOGY FUND (2008) [hereinafter CLEAN TECHNOLOGY FUND], available at [http://siteresources.worldbank.org/INTCC/Resources/Clean\\_Technology\\_Fund\\_paper\\_June\\_9\\_final.pdf](http://siteresources.worldbank.org/INTCC/Resources/Clean_Technology_Fund_paper_June_9_final.pdf) (last visited Feb. 26, 2009).

<sup>5</sup> See Press Release, Board Approves CIFs, *supra* note 1; and Press Release, World Bank, Climate Investment Funds: Countries Selected for Governing Bodies (Oct. 17, 2008) (on file with author) [hereinafter Countries Selected].

<sup>6</sup> See, e.g., DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 667-69 (3<sup>rd</sup> ed. 2007).

<sup>7</sup> UN Framework Convention on Climate Change [UNFCCC], art. 2, May 9, 1992, 1771 U.N.T.S. 165.

<sup>8</sup> See *id.* art. 7 (establishing the Conference of the Parties as the “supreme body of this Convention”); UNFCCC, STATUS OF RATIFICATION 1-7 (2007) (exemplifying the near universal ratification of the Convention by 195 countries as of Aug. 22, 2007).

<sup>9</sup> *Id.* art. 3, ¶ 1.

<sup>10</sup> See e.g., Michael McKenzie, *Climate Change and the Generalized System of Preferences*, 11 J. INT’L ECON. L. 679, 680-82 (2008) (discussing that developing countries “are less culpable for [climate change], and less capable of dealing with it, than developed countries”); Anita M. Halvorssen, *Global Response to Climate Change – From Stockholm to Copenhagen*, 85 DENV. U. L. REV. 841, 847-49 (2008) (discussing that even though the UN Charter gives all countries equal rights and obligations, “developing countries have not historically

had the same economic growth and social benefits” and have contributed less to global environmental problems).

<sup>11</sup> See Halvorssen, *supra* note 10, at 849 (citing PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW & THE ENVIRONMENT 101 (2d ed. 2002)) (stating that common but differentiated responsibilities can be “seen as requiring obligations of solidarity assistance in the form of technology transfer and financial assistance”); see also MICHAEL BOTHE & ECKARD REHBINDER, CLIMATE CHANGE POLICY 4-5 (2005) (“For all practical purposes, the developed countries should bear the actual compliance costs of the developing countries,” attributing the smooth ratification process of the UNFCCC to this “soft approach”).

<sup>12</sup> See UNFCCC, *supra* note 7, art. 11 (establishing the Global Environment Facility).

<sup>13</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto]. See also HUNTER ET AL., *supra* note 6, at 679-80.

<sup>14</sup> See WARWICK J. MCKIBBIN & PETER J. WILCOXEN, CLIMATE CHANGE POLICY AFTER KYOTO: BLUEPRINT FOR A REALISTIC APPROACH 43 (2002) (describing Kyoto as the “treaty that formalized the targets and timetables approach that had been taking shape since COP 1. The protocol set explicit emission targets for the thirty-nine countries listed in its Annex B, which included essentially all industrialized countries that were signatories”).

<sup>15</sup> See BOTHE & REHBINDER, *supra* note 11, at 6-7 (describing each of the four flexible mechanisms in the Kyoto Protocol).

<sup>16</sup> See generally Kyoto, *supra* note 13, art. 12 (establishing the Clean Development Mechanism).

<sup>17</sup> See *id.* art. 12, ¶ 3.

<sup>18</sup> See Christopher Carr & Flavia Rosembuj, *Flexible Mechanisms for Climate Change Compliance: Emissions Offset Purchases Under the Clean Development Mechanism*, 16 N.Y.U. ENVTL. L.J. 44, 50 (2008).

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<sup>19</sup> See Charlotte Streck, *Making Markets Work: A Review of CDM Performance and the Need for Reform*, 19 EUR. J. INT'L L. 409, 420 (2008).

<sup>20</sup> See *id.*

<sup>21</sup> See generally Carbon Finance at the World Bank: Prototype Carbon Fund, <http://carbonfinance.org/Router.cfm?Page=PCF> (last visited Nov. 11, 2008) (describing the Prototype Carbon Fund as the first carbon fund, with the “mission . . . to pioneer the market for project-based greenhouse gas emission reductions while promoting sustainable development and offering a learning-by-doing opportunity to its stakeholders”) [hereinafter Prototype Carbon Fund].

<sup>22</sup> See Carr & Rosembuj, *supra* note 18, at 51, 55 (discussing the World Bank’s prototype purchasing of emission reductions five years prior to the entry into force of the Kyoto Protocol and the Bank’s “learning-by-doing”).

<sup>23</sup> See Prototype Carbon Fund, *supra* note 21.

<sup>24</sup> UNFCCC, *supra* note 7, art. 21, ¶ 3 (declaring the International Bank for Reconstruction and Development (World Bank) as the international entity entrusted with the operation of the GEF).

<sup>25</sup> JOZEF RITZEN, A CHANCE FOR THE WORLD BANK xvii (2005).

<sup>26</sup> See generally Diane Stone & Christopher Wright, *The Currency of Change: World Bank Lending and Learning in the Wolfensohn Era*, in THE WORLD BANK AND GOVERNANCE: A DECADE OF REFORM AND REACTION (Diane Stone & Christopher Wright eds., 2007).

<sup>27</sup> See *id.*; RITZEN, *supra* note 25.

<sup>28</sup> See, e.g., WORLD BANK, DEVELOPMENT AND CLIMATE CHANGE: A STRATEGIC FRAMEWORK FOR THE WORLD BANK GROUP 9-10 (2008) (“In line with its core mandate of growth and poverty reduction, the [World Bank] sees its primary role and comparative strength in helping its developing country partners . . . grow their economies under climate constraints.”).

<sup>29</sup> See Press Release, Board Approves CIF, *supra* note 1 (“The Clean Technology Fund will provide new, large-scale financial resources to invest in projects and programs in developing countries which contribute to the demonstration, deployment, and transfer of low-carbon technologies.”). See also CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 14 (establishing investment criteria); *id.* ¶ 17 (establishing country eligibility based on “ODA-eligibility (according to OECD/DAC guidelines)” and “an active MDB country program,” which occurs where an MDB has “a lending program and/or an on-going policy dialogue with the country”); *id.* ¶¶ 45-49 (establishing contribution guidelines).

<sup>30</sup> See, e.g., World Bank, *Private Sector Operational Guidelines*, ¶ 3, World Bank Doc. CTF/TFC.1/5 (Nov. 3, 2008) (defining “scale-up” as “a significant proliferation of the types of projects being supported—without a subsidy”) [hereinafter *Private Sector Guidelines*].

<sup>31</sup> See CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 13 (establishing the objectives of the CTF).

<sup>32</sup> See *id.* ¶¶ 27-34 (laying out the specifics of the Trust Fund Committee including “ensuring that the strategic orientation of the CTF is guided by the principles of the UNFCCC” in the Trust Fund Committee’s responsibilities).

<sup>33</sup> See *id.* ¶ 28(a) (laying out the composition of the Trust Fund Committee).

<sup>34</sup> See *id.* (“The Trust fund committee will consist of eight representatives from donor countries . . . identified through a consultation among such donors, and eight representatives from eligible recipient countries or groups of such countries identified through a consultation among interested recipient countries”).

<sup>35</sup> See CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 18 (laying out the process for and MDB “joint mission,” involving additional stakeholders, that results in an investment plan that should “build on existing country-owned strategies,” which then goes to the Trust Fund Committee for plan approval and prioritization of projects). See also World Bank, *Clean Technology Fund Guidelines for Investment Plans*, World Bank Doc. CTF/TFC.1/2 (Nov. 3, 2008) (expanding on the standards set forth in the CTF founding document) [hereinafter *Guidelines for IPs*].

<sup>36</sup> See, e.g., *Private Sector Guidelines*, *supra* note 30, ¶ 5 (defining “projects” as using “more than \$50 million of CTF funds” and defining “programs” as “envelopes which aggregate several small and medium sized projects each utilizing less than \$50 million of CTF funds and all having a shared focus and objective”).

<sup>37</sup> See *id.* ¶ 6 (requiring that private sector proposals be “consistent with country investment plans”). See also *id.* ¶ 1 (describing the “significant” role the private sector has to play in GHG emission reduction).

<sup>38</sup> See World Bank, *Clean Technology Fund Financing Products, Terms, and Review Procedures for Public Sector Operations*, ¶¶ 10-24, World Bank Doc. CTF/TFC.1/4 (Nov. 3, 2008) (establishing a limited use of grants for “focused economic and sector work” and for “preparation grants” to increase the quality of the CTF’s investment portfolio. Such grants could support “feasibility studies, analytic work to inform a country’s policies and programs, environmental and social impact assessment,” and more, but not beyond \$1 million; establishing the CTF concessional lending program and splitting it into “harder” loans for projects with rates of return near the market threshold, but below risk premium for the project type, and “softer” loans that provide more favorable terms for projects with negative rates of return or rates below the market threshold; and “Guarantee instruments are used to improve conditions for investment in, or lending to, projects by mitigating risks that lenders and investors would not be willing or able to accept.”) [hereinafter *CTF Financing*].

<sup>39</sup> See World Bank, *Clean Technology Fund Investment Criteria for Public Sector Operations*, ¶¶ 9-12, World Bank Doc. CTF/TFC.1/3 (Nov. 3, 2008) (establishing that priority will be given to proposals with higher GHG reduction potential and laying out a “technology development status” classification that looks at factors of technical viability, commercial availability, and mitigation potential to determine which low carbon technologies are “at, or approaching, the ‘market takeoff’ phase”) [hereinafter *Public Sector Operations*].

<sup>40</sup> See *id.* ¶¶ 13-17 (requiring each proposal to include a baseline trajectory of GHG emissions in the relevant sector, a trajectory of reduced emissions with the proposed project, and a trajectory of reduced emissions if the proposed project were replicated throughout the relevant sector in order to show the potential “demonstration” effect the project could have on the sector).

<sup>41</sup> See *id.* ¶¶ 18-21 (addressing the connection between the CTF and the contribution of low carbon technologies to the achievement of the UN’s Millennium Development Goals and citing efficiency gains, access to energy and transportation to the world’s poorest, and environmental co-benefits as important factors to be considered with CTF projects).

<sup>42</sup> See *id.* ¶¶ 22-25 (offering three dimensions related to implementation to be assessed: Public policies and institutions, like sector regulatory institutions, to support implementation; “Ease of Doing Business” ranking from the International Finance Corporation, which measures various business indicators; and domestic public and private sector resources with the potential to be mobilized).



<sup>43</sup> See *id.* ¶¶ 26-29 (“CTF will finance the identifiable additional cost of an investment, or the risk premium required, in order to make the investment viable”); see also *Private Sector Guidelines*, *supra* note 47, ¶ 9 (noting that “investment criteria for private sector proposals are generally the same as those for public sector; however, the performance indicators for each may be different in certain cases”).

<sup>44</sup> See, e.g., CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 2 (citing UNFCCC, *supra* note 7, art. 3, ¶ 1); *id.* ¶ 4 (citing UNFCCC, *supra* note 7, art. 11); *id.* ¶ 5 (citing UNFCCC, *supra* note 7, art. 11, ¶ 5); *id.* ¶ 6 (citing UNFCCC, *supra* note 7, art. 4, ¶ 1(c)); *id.* ¶ 7 (citing UNFCCC, *supra* note 7, art. 4, ¶ 7); *id.* ¶ 8 (describing the CTF as “consistent with the provisions of the UNFCCC” and proceeding to quote the majority of the *Bali Action Plan*), and *id.* ¶ 12(e) (referring to the UN as “the appropriate body for broad policy setting on climate change” and requiring MDBs to not “preempt” the results of climate change negotiations).

<sup>45</sup> See, e.g., *Greens Criticize World Bank Climate Funds*, REUTERS, June 5, 2008 (“Some 121 environment and development groups . . . questioned the credibility of proposed World Bank funds to help the poor fight global warming”); *Examining the Administration’s Proposal to Establish a Multilateral Clean Technology Fund Before the H. Comm. On Financial Services*, 110th Cong. (2008) (statement of Brent Blackwelder, President, Friends of the Earth US) (noting two concerns with the World Bank’s involvement in the CTF: first, that the bank does not define what it means by “clean” technology, and second, that the banks “mandate and track record” mean that it is not the right institution to control the CTF); and SMITA NAKHOODA, WORLD RES. INST., CORRECTING THE WORLD’S GREATEST MARKET FAILURE: CLIMATE CHANGE AND THE MULTILATERAL DEVELOPMENT BANKS 9 (2008) (noting that in 2007, nearly fifty percent of the World Bank’s energy lending was made without any attention to climate change factors).

<sup>46</sup> See generally CLEAN TECHNOLOGY FUND, *supra* note 4.

<sup>47</sup> UNFCCC, *supra* note 7, art. 4, ¶ 3.

<sup>48</sup> CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 12(c).

<sup>49</sup> See UNFCCC, *Review of the Implementation of Commitments and of Other Provisions of the Convention*, at 91-96, UN Doc. FCCC/CP/1999/7 (Feb. 16, 2000) (providing guidelines that countries “shall indicate what ‘new and additional’ financial resources they have provided” pursuant to Article 4, para. 3, and “shall clarify how they have determined such resources as being ‘new and additional’ in their national communications”) [hereinafter *Implementation of Commitments*].

<sup>50</sup> CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 48.

<sup>51</sup> See *CTF Financing*, *supra* note 38, ¶ 3(f) (requiring that “all sources of funds will be co-mingled for administrative and investment purposes”).

<sup>52</sup> See *Implementation of Commitments*, *supra* note 49, at 91 (requiring parties to clarify how they determined funds to be new and additional).

<sup>53</sup> See, e.g., AUSTRALIAN GOV’T, DEP’T OF ENV’T AND HERITAGE, AUSTRALIAN GREENHOUSE OFFICE, AUSTRALIA’S FOURTH NATIONAL COMMUNICATION ON CLIMATE CHANGE 90-107 (2005) (exemplifying a report on financial resources and transfer of technology to the UNFCCC).

<sup>54</sup> See *Public Sector Operations*, *supra* note 39 (establishing investment criteria).

<sup>55</sup> Cf. *Clean Technology Fund*, *supra* note 4, ¶ 39 (setting the objective of following MDB processes “instead of establishing separate institutional structures” as a way to keep transaction costs low).

<sup>56</sup> UNFCCC, *supra* note 7, art. 18, ¶ 1 (“each party to the Convention shall have one vote”).

<sup>57</sup> Cf. Ved P. Nanda, *Selected Aspects of International Trade and the World Trade Organization’s Doha Round: Overview and Introduction*, 36 DENV. J. INT’L L. & POL’Y 255, 257 (2008) (discussing that in previous World Trade Organization negotiations, developed nations engaged in separate negotiations in which they made decisions that impacted all members).

<sup>58</sup> See, e.g., GLOBAL ENVIRONMENT FACILITY, INSTRUMENT FOR THE ESTABLISHMENT OF THE RESTRUCTURED GLOBAL ENVIRONMENT FACILITY 12-15 (2004) (establishing the governance structure of the Global Environment Facility, including an Assembly consisting of representatives from all participants, a council of thirty-two members equally representing developed and developing countries and appointed the “participants” from each constituency, and laying out term limitations) [hereinafter GEF INSTRUMENT]; and UNFCCC, *Modalities and Procedures for a Clean Development Mechanism*, Annex, UN Doc. FCCC/KP/CMP/2005/8/Add.1, at 8 (Dec. 10, 2008) (establishing the Executive Board of the CDM, including ten members from Kyoto party countries: “one mem-

ber from each of the five United Nations regional groups, two other members from the Parties included in Annex I, two other members from the Parties not included in Annex I, and one representative of the Small Island Developing States”) [hereinafter *CDM Modalities*].

<sup>59</sup> See, e.g., *Profile: G8*, BBC NEWS, Sept. 17, 2008, [http://news.bbc.co.uk/2/hi/americas/country\\_profiles/3777557.stm](http://news.bbc.co.uk/2/hi/americas/country_profiles/3777557.stm) (last visited Nov. 14, 2008) (profiling the G8 membership as the “world’s leading industrialized nations” and noting that “there are no African or Latin American members”).

<sup>60</sup> G8, Climate Change, Clean Energy, and Sustainable Development, <http://www.g7.utoronto.ca/summit/2005g8/eagles/climatechange.pdf> (last visited Feb. 27, 2009).

<sup>61</sup> See CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 28 (establishing the make-up of the Trust Fund Committee).

<sup>62</sup> See *id.* ¶ 32 (“Consensus does not necessarily imply unanimity. A dissenting decision maker, who does not wish to block a decision, may state an objection by attaching a statement or note to the decision.”).

<sup>63</sup> See *id.* ¶ 28(a) (establishing that members are “identified through consultation among such donors, and . . . among interested recipient countries”).

<sup>64</sup> See *id.* (using only the word “consultation” to describe the member selection process).

<sup>65</sup> *Id.*, ¶ 9 n.7.

<sup>66</sup> CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 28(a).

<sup>67</sup> See Press Release, Countries Selected, *supra* note 5 (describing the process as the finalizing of choices for representatives by donor and developing countries).

<sup>68</sup> *Id.*

<sup>69</sup> See CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 33(a) (establishing approval of “programming and pipeline priorities” as a responsibility of the Trust Fund Committee).

<sup>70</sup> See, e.g., *US Contributions to a World Bank Administered Clean Technology Fund Before the H. Comm. On Financial Services*, 110th Cong. (2008) (statement of Jacob Werksman, Director, Institutions and Governance Program, World Resources Inst.) (noting the importance of ensuring “that developing country perspectives are adequately represented in decision-making on how to use the funds”).

<sup>71</sup> See, e.g., UNFCCC, *supra* note 7, art. 3, ¶ 1 (“on the basis of equity”).

<sup>72</sup> See CLEAN TECHNOLOGY FUND, *supra* note 4, ¶¶ 36-38 (establishing the Partnership Forum as a meeting of stakeholders to provide “dialogue on the strategic directions, results and impacts of the [Climate Invest Funds],” but also establishing that the forum “will not lead to written outcomes, such as agreed texts or declarations”).

<sup>73</sup> Compare *id.*, with GEF INSTRUMENT, *supra* note 58, at 13 (establishing that the GEF Assembly “shall (a) review the general policies of the Facility; (b) review and evaluate the operation of the Facility on the basis of reports submitted by the Council; (c) keep under review the membership of the Facility; and (d) consider, for the approval by consensus, amendments to the present Instrument on the basis of recommendations by the Council”).

<sup>74</sup> See CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 36.

<sup>75</sup> See generally UNFCCC, *supra* note 7, prmb.

<sup>76</sup> Int’l Bank for Reconstruction and Development [World Bank], *IBRD Articles of Agreement*, art. V, sec. 2 (Feb. 16, 1989) (establishing the Board of Governors of the World Bank and vesting in them “all powers of the Bank,” including to “adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank”) [hereinafter *Articles of Agreement*].

<sup>77</sup> See CLEAN TECHNOLOGY FUND, *supra* note 4, ¶ 12(g) (“each MDB should remain accountable to its governing body”); and *id.* ¶ 19 (“further processing of a program or project will follow the MDB’s policies and procedures for appraisal, MDB board approval and supervision”); see also *CTF Financing*, *supra* note 38, ¶ 27 (reaffirming the same assertion, that MDBs will follow their own policies).

<sup>78</sup> Compare *Clean Technology Fund*, *supra* note 4, ¶ 33(g) (including monitoring and evaluation of MDB “performance and financial accountability” in the responsibilities of the Trust Fund Committee), and *id.* ¶ 33(b) (obligating the Trust Fund Committee to ensure the CTF is guided by the principles of the UNFCCC), with *CTF Financing*, *supra* note 38, ¶ 27 (establishing that MDBs will follow their own fiduciary standards and environmental and social safeguards).

<sup>79</sup> *Clean Technology Fund*, *supra* note 4, ¶ 33(g). See also *id.* ¶ 35.

<sup>80</sup> *Id.* ¶ 40.

<sup>81</sup> See *id.* Annex A, ¶ 14 (proposing that each operation “follow the investment lending policies and procedures of the MDB, including its fiduciary standards and environmental and social safeguards”).

<sup>82</sup> See *Clean Technology Fund*, *supra* note 4, ¶ 27 (“a CTF Trust Fund Committee will be established to oversee the operations and activities of the trust fund”).

<sup>83</sup> See *id.*, ¶ 11 (“Recognizing that UNFCCC deliberations on the future of the climate change regime include discussions on a future financial architecture and funding strategy for climate change, this fund is an interim measure for the MDBs to fill an immediate financing gap”).

<sup>84</sup> See *id.*, ¶¶ 56-57.

<sup>85</sup> See *id.*, ¶ 11 (referencing the sunset clause as included in the CTF founding document because of the recognition that the UNFCCC is working to establish a new financial architecture and funding strategy for climate change).

<sup>86</sup> See Martin Kohr, *World Bank Climate Funds Under Fire from G77 and China*, THIRD WORLD NETWORK, Apr. 4, 2008 (quoting Berneditas Muller, coordinator for the G77 and China in the UNFCCC’s ad hoc working group on long-term cooperative action, as remarking “that the resources for climate funds outside the Convention come from the same developed country parties that could have given those resources to the financial mechanism under the Convention to enable developing countries to implement mitigation and adaptation measures and contribute to achieving the objectives of the Convention”).

<sup>87</sup> See *CLEAN TECHNOLOGY FUND*, *supra* note 4, ¶ 57.

<sup>88</sup> *Id.*

<sup>89</sup> See World Bank, Summary of the CIF Pledging Meeting Annex B (Sept. 29, 2008) (listing Australia, France, Germany, Japan, Netherlands, Norway, Sweden, Switzerland, United Kingdom, and the United States as donor countries and reporting that \$6.141 billion was donated to the CTF at a meeting of donors held on Sept. 29, 2008) [hereinafter Pledging Summary].

<sup>90</sup> See Kohr, *supra* note 86 (quoting Bernarditas Muller as saying “the amounts [of CTF funding] are so huge they would dwarf the funds under the UNFCCC”).

<sup>91</sup> Such power playing would not be a new addition to the UNFCCC negotiating process. See, e.g., HUNTER ET AL., *supra* note 6, at 679-80 (examining the negotiation process which eventually led to the Kyoto Protocol. The US pushed for lower standards, which were agreed to despite the fact that the US would never ratify the Protocol.).

<sup>92</sup> Compare Pledging Summary, *supra* note 89 (reporting that the United States has donated \$2 billion to the Climate Investment Funds), with UNFCCC, KYOTO PROTOCOL STATUS OF RATIFICATION (reporting that the United States is not among the 185 countries to have signed onto the Kyoto Protocol, which also means that the United States does not participate in the funding mechanisms associated with the protocol, including the Clean Development Mechanism).

<sup>93</sup> Cf. Carr & Rosebuj, *supra* note 18, at 57 (discussing the World Bank’s purchasing of “post-2012” emission credits as a way to contribute to market stability for projects that need revenue beyond the Kyoto Protocol’s commitment period). See also *id.*, at 61 (discussing the relevance of market continuity in the context of the CDM).

<sup>94</sup> Juliet Eilperin, *Next Climate Summit May Turn on Rich Nations’ Approach to Poor Ones*, WASH. POST, Dec. 14, 2008, at A08.

<sup>95</sup> See, e.g., Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420, 420-35 (1991) (discussing the evolution of soft law in international environmental protection, asserting that soft law defines “the standards of good behavior” in the international field).

<sup>96</sup> Yvo de Boer, Executive Sec’y, UNFCCC, Summary of Daily Press Briefing (Dec. 2, 2007) (video available at [http://unfccc.int/meetings/cop\\_13/items/4231.php](http://unfccc.int/meetings/cop_13/items/4231.php) (follow hyperlink to video under “2 December”)) (“What we need is political will. The big question for me is: ‘Ministers, what is your political answer to what the scientific community is telling you so very clearly?’”).