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Mitigating the Risk of Failure: Legal Accountability for International Carbon Markets

COLLECTION: MANAGING RESPONSIBILITIES FOR CLIMATE CHANGE RISKS

ARTICLE

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ABSTRACT

International carbon markets are core features of climate mitigation policy. They include the Kyoto Protocol's Clean Development Mechanism, the Paris Agreement's Sustainable Development Mechanism, and the International Civil Aviation Organization's Carbon Offsetting Reduction Scheme for International Aviation. Yet, studies suggest that large quantities of international carbon offsets may not result in additional reductions in greenhouse gas emissions. This article examines these markets' legal accountability; in other words, the extent to which their performance can be independently assessed against legal standards, and the potential for consequences if those standards are not met. Specifically, it looks at the markets' internal appeal and grievance processes – or lack thereof – and hypothetical domestic litigation related to the markets' environmental integrity. Drawing on recent climate change cases and law on the immunity of international organizations, the article explores whether courts in Canada and Germany could hold these international markets to account and mitigate the risk that they do not fulfil their purpose of reducing greenhouse gas emissions.

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INTRODUCTION

Central to efforts to mitigate climate change are carbon 'cap and trade' markets. These markets define limits or 'caps' for emissions, and give polluters flexibility to either choose to stay below caps by investing in greenhouse gas (GHG) emission reductions; trade or purchase allowances with other polluters; or, alternatively, obtain an instrument – often called an offset – that represents reduced, avoided, or captured emissions from another entity. By providing a variety of compliance options, these markets theoretically harness efficiencies by incentivizing low-cost pollution reduction.[1]

For a market to accomplish its purpose of mitigating climate change, the GHG emissions reductions, avoidance, or capture represented by an offset must be additional to what would have otherwise occurred as measured against a hypothetical baseline. This is a standard known as additionality.[2] The European Union, states, and local governments have established carbon markets with widely varying degrees of additionality and environmental effectiveness.[3] So have the state parties of the Kyoto Protocol and the Paris Agreement, and the member states of the International Civil Aviation Organization (ICAO).[4] These markets are increasingly linked to each other, meaning that an offset certified in one market can be used to satisfy obligations in another.[5] Thus, a lack of additionality in one market can have carry over effects that ultimately increase GHG emissions on a global scale.

To illustrate, imagine a large hydroelectric project. The project was certified by an international institution created by the Kyoto Protocol, the Clean Development Mechanism (CDM), to sell carbon credits representing millions of metric tons of carbon dioxide emissions per year that were theoretically avoided by the dam's operation.[6] ICAO approves some of those credits for use by airlines in its Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).[7] Other credits are transitioned from the CDM to the Paris Agreement's new Sustainable

1 See Bruce Ackerman and Richard B Stewart, 'Reforming Environmental Law' (1985) 37 Stanford Law Review 1333 (discussing how market-based mechanisms can reduce the cost of providing environmental 'goods').

2 The environmental integrity of carbon offsets can be impacted by additionality and a variety of other standards used in offsetting regimes. (Michael Wara, 'Measuring the Clean Development Mechanism's Performance and Potential' (2008) 55 UCLA Law Review 1759, 1768; see also Joelle De Sepibus, 'The CDM: A Critique of Its Environmental Integrity' in Michael Melling, Amy Merrill, Karl Upston-Hooper (eds), *Improving the Clean Development Mechanism: Options and Challenges post-2012* (Brill 2011) 10.)

3 Up to 85 percent of Clean Development Mechanism credits certified for use in the European Union's Emission Trading System did not achieve additional emissions reductions. (Michael Cames et al., 'How Additional is the Clean Development Mechanism?' Oko Institute (March 2016) <www.oeko.de> accessed 29 October 2022) Yet, 'multiple lines of evidence suggest' that forest offsets certified for California's carbon market result 'in additional emissions reductions, beyond reductions that would have occurred in the absence of the program.' (Christa Anderson et. al. 'Forest Offsets Partner Climate Change Mitigation with Conservation' (2017) 15(7) Frontiers in Ecology 359, 361.)

4 See Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, UN Doc FCCC/CP/1997/7/Add.1, (1998) 37 International Legal Materials 22, Art 12(5); Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, TIAS No. 16–1104, Art 6; International Civil Aviation Organization, ICAO Assembly Resolutions In Force (as of 4 October 2013), Doc. 10022, Resolution 38-18. The Paris Agreement established two exchanges; one under Art 6(2)-6(3) that allows cooperative transfer between states, and another under Art 6(4) that creates a centralized activity-based measure that I refer to as the Sustainable Development Mechanism (SDM). (See Paris Agreement, Art 6; UNFCCC, 'Decision -/CMA.3, Rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement' (3 March 2022) FCCC/PA/CMA/2021/10/Add.1, p 25 (SDM Rules); see generally Lisa Benjamin and David A Wirth, 'From Marrakesh to Glasgow: Looking Backward to Move Forward on Emissions Trading' (2021) 11(3) Climate Law 245, 257–258.)

5 ICAO's offsetting system has only recently become functional and the Paris Agreement's is not yet operational, although their rules contemplate linkage with other markets. (See ICAO Resolution 38–18, n 4; SDM Rules, n 4; David Rossati, 'A Question of Value: On the Legality of Using Kyoto Protocol Units under the Paris Agreement' (2021) 11(3) Climate Law 298; Axel Michaelowa et al 'Evolution of International Carbon Markets: Lessons for the Paris Agreement' (2019) 10(6) WIREs Climate Change 613. The Paris Agreement does not use the term 'market' but as discussed in section 1 below, its Art 6.4 mechanism will function as one. (See Charlotte Streck, 'Strengthening the Paris Agreement by Holding Non-State Actors Accountable: Establishing Normative Links between Transnational Partnerships and Treaty Implementation' (2021) 10(3) Transnational Environmental Law 497–498 (discussing involvement of non-state actors as participants in Art 6.4 mechanism).)

6 This hypothetical scenario is not far-fetched, as shown with the credits issued for a project dubbed 'Operation Carwash.' (See 'Brazil's Amazon Hydroelectrics in the United Nations Clean Development Mechanism (CDM): Defrauding Investors, Cheating the Atmosphere?' Environmental Defense Fund et al (November 2017) <http://www.edf.org/sites/default/files/brazil_cdm_report.pdf> accessed 29 October 2022.)

7 See section 1.2 below discussing ICAO's CORSIA rules.

Development Mechanism (SDM), and are purchased by a party to the Paris Agreement and counted towards its nationally-determined contribution to mitigate climate change under the Agreement.[8] The airline's offset purchases allow it to continue polluting while claiming it had lowered its emissions, and the SDM purchasing party reported reduced national emissions consistent with its obligations under the Paris Agreement. Yet, it comes to light that the dam project would have been built even without the CDM financing, therefore the emission reductions represented by its credits were not 'additional'. Consequently, in this hypothetical project, the three international markets in effect provided false value for emissions reductions and failed to meet their purpose of mitigating climate change.[9]

In this article, I use this hypothetical dam project as a case study to examine the CDM, SDM, and ICAO's legal accountability.[10] I thereby demonstrate how legal accountability for international carbon markets can address not only the risk that the markets do not effectively mitigate climate change, but also the risk that participating states, private entities, and the public do not perceive them as legitimate. I employ Brunee's definition of legal accountability as 'the legal justification of an international actor's performance vis-à-vis others, the assessment or judgment of that performance against international legal standards, and the possible imposition of consequences if the actor fails to live up to applicable legal standards'.[11] I do not focus on internal accountability processes, as scholars have already written about the CDM's lack of accountability mechanisms and need for reform.[12] Instead, I evaluate whether domestic courts could fill the accountability gaps within these institutions by enforcing environmental integrity standards, in particular the additionality criterion.

To do so, I first provide an overview of how these institutions' markets function and also how their rules, requiring that offsets used within them be additional, operate (section 1). In section 2, I show how recent climate cases and tort cases against international organizations could provide a template for claims based on a breach of these rules and certification of faulty offsets. Although I will situate hypothetical claims in Canada and Germany, because those are the host countries for ICAO, the CDM, and SDM, this article is grounded in international law. It therefore does not comparatively analyse Canadian and German law, and instead seeks only to demonstrate the plausibility of such claims against these international institutions. I next turn to jurisdictional immunity law, which is the crux of filling the accountability gap (section 3). I explain how in Canada and Germany internal accountability mechanisms – or the lack thereof – could directly impact these institutions' assertion of immunity in domestic courts.[13] I conclude by reflecting on how a domestic case might provide an avenue for legal accountability for the markets' environmental integrity, and how even the potential for such a suit could encourage these international institutions to adopt robust internal appeal or grievance procedures.

8 See Paris Agreement, note 4, Art 6(4); Asian Development Bank, 'Decoding Article 6 of the Paris Agreement, Version II' (December 2020).

9 Kyoto Protocol, note 4, Art 12(5); ICAO Assembly Resolutions In Force (as of 4 October 2013), Doc. 10022, Resolution 38-18; Paris Agreement, note 4, Art 6(4).

10 As discussed in section 2 below, other scholars have examined the CDM's legal accountability. See generally Christina Voigt, 'Responsibility for Environmental Integrity of the CDM: Judicial Review of Executive Board Decisions' in David Freestone and Charlotte Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (OUP 2009) 278–279; Charlotte Streck and Jolene Lin, 'Making Markets Work, a Review of CDM Performance and the Need for Reform' (2008) 19(2) European Journal of International Law 409, 417; Ernestine Meijer, 'The International Institutions of the Clean Development Mechanism Brought Before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice' (2007) 39 International Law and Politics 874.

11 Jutta Brunee, 'International Legal Accountability Through the Lens of State Responsibility' (2005) 36 Netherlands Yearbook of International Law 6. Accountability can be legal, political, administrative, financial, institutional, or reputational (Andre Nollkaemper and Deirdre Curtin, 'Conceptualizing Accountability in International and European Law' (2007) 36 Netherlands Yearbook of International Law 12). Legal accountability can be measured in terms of structural conditions, processes, or outcomes. (Damilola S Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge 2016) 283–288.) Although the apparent lack of additionality contextualizes its inquiry, this article evaluates structural conditions for accountability, rather than how the markets are functioning in practice or outcomes from accountability processes.

12 See sources cited at n 10.

13 See section 2.2 below. The SDM is not yet operational, but the Paris Agreement parties resolved that the UNFCCC Secretariat would be the secretariat for the SDM. (See SDM Rules, note 4, 8.) This paper therefore assumes that the SDM will be headquartered at the UNFCCC in Germany.

1. ADDITIONALITY AND ACCOUNTABILITY IN THE INTERNATIONAL CARBON MARKETS

As discussed in this section, the CDM, ICAO, and SDM each require that the offset projects or programmes they certify have environmental integrity. But only the SDM will have an accountability mechanism, and its rules are unclear.

1.1 The Clean Development Mechanism and Sustainable Development Mechanism

The CDM 'certifies GHG emission-reduction credits generated by projects in the developing world that can be sold to emitting developed countries facing compliance obligations' under the Kyoto Protocol.[14] The Protocol expressly provides that CDM offsets will be additional:

> emission reductions resulting from each project activity shall be certified by operational entities … on the basis of … (b) Real, measurable, and long-term benefits related to the mitigation of climate change; and (c) Reductions in emissions that are additional to any that would occur in the absence of the certified project activity.[15]

That requirement was reiterated in the Marrakesh Accords, where the Kyoto Protocol COP recognized 'the need for guidance for project participants and designated operational entities, in particular for establishing reliable, transparent and conservative baselines, to assess whether clean development mechanism project activities are in accordance with the additionality criterion' set forth in the Protocol.[16] Those Accords also established a CDM Executive Board to supervise the CDM, set its technical rules, and designate the operational entities that would accredit CDM projects' additionality.[17]

The importance of additionality was interwoven with the process for how CDM projects are approved.[18] The Kyoto Protocol COP decided CDM projects would be validated and registered by the CDM Executive Board only if 'the project activity is expected to result in a reduction in anthropogenic emissions by sources of greenhouse gases that are additional to any that would occur in the absence of the proposed project activity', and defined additionality as occurring 'if anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity'.[19]

As Michaelowa explains, even though the Kyoto Protocol and the Marrakesh Accords call for additionality, because the COP was unable to decide on the technical requirements to make an additionality showing, the CDM Executive Board was left to make that determination.[20] The CDM Executive Board has broad authority to approve or reject methodologies for baselines and regulate certification entities and offset providers.[21] At the time of writing this article, the CDM Executive Board and its agents have certified over 3,400 projects representing more than 5.6 billion metric tons of CO_2 equivalent; the tradable units the Board approves are called 'certified emission reductions' (CERs).[22]

14 Wara (n 2) 1761. See also Maria Netto, Kai-Uwe Barani Schmidt, 'The CDM Project Cycle and the Role of the UNFCCC Secretariat' in Freestone and Streck (n 9) 213.

15 Kyoto Protocol, note 4, Art 12(5)(c) (emphasis added).

16 See UNFCCC, '7th Meeting of the Conference of the Parties, Decision 17/CP.7, Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol' (10 November 2001), Doc. FCCC/CP/2001/13/Add.2 (Marrakesh Accords). The Marrakesh Accords were a series of UNFCCC COP draft decisions that were confirmed and given full effect at the first meeting of the Kyoto Protocol COP. See UNFCCC, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005,' (30 March 2006), Doc. FCCC/KP/CMP/2005/8/Add.1. 20.

17 Marrakesh Accords (n 16).

18 See generally Jessica Green, 'Delegation and Accountability in the Clean Development Mechanism' (2008) 4(2) Journal of International Law and International Relations 29–30.

19 Marrakesh Accords (n 16), 34, 36.

20 Axel Michaelowa, 'Interpreting the Additionality of CDM Projects: Changes in Additionality Definitions and Regulatory Practices over Time,' in Freestone and Streck (n 9) 251–252.

21 Voigt (n 10) 272–294, 278–279.

22 CDM Statistics for 30 June 2022 <https://cdm.unfccc.int/Statistics/Public/CDMinsights/index.html>; see also Streck and Lin (n 10) 417.

A recent study found that up to 85 percent of CERs may not represent additional reductions in GHG emissions; and numerous other studies made similar findings.[23] In other words, there is substantial evidence that the CDM does not effectively mitigate climate change. De Sepibus traces a potential lack of additionality and other shortcomings to the CDM's structure where all parties to a transaction – providers, certifiers, and purchasers – are financially interested in project approval and the cheapest possible reductions in emissions, and also to the inherent difficulty in assessing additionality.[24] As noted above, the CDM Executive Board is appointed by Kyoto Protocol member states and approved by the COP.[25] Although Board members are bound by a financial conflict of interest code, they can be politically conflicted in that they also represent national authorities that approve host country projects or purchase CERs.[26]

The CDM lacks an internal accountability mechanism. Within the CDM project cycle there are several points at which a project's host country or at least three CDM Executive Board members can make a 'request for review' asking for more information about projects' additionality, but there is no procedure to appeal Board decisions or obtain independent review of them.[27] After non-governmental organizations and member states called for reform in 2010, the UNFCCC's Subsidiary Body for Implementation began considering an appeal process for Board decisions.[28] Such a process has not been implemented.[29] Thus, project participants and interested parties cannot challenge Board decisions, and the Board is the sole entity positioned to protect offsets' environmental integrity. As noted above, the integrity of approved projects is very much in doubt.[30]

Like the Kyoto Protocol, the Paris Agreement's Article 6(4) created a market-based mechanism, the Sustainable Development Mechanism (SDM), to support climate change mitigation and sustainable development for use by the parties on a voluntary basis.[31] The Agreement states that the SDM is established under the authority and guidance of the Agreement's conference of parties – called the CMA – and will be supervised by a body designated by the CMA.[32] The Agreement mandates that the SDM must aim to 'deliver an overall mitigation in global emissions', and instructs the CMA to adopt rules, modalities, and procedures for the SDM.[33]

Those rules were adopted by the CMA in 2021. The SDM will be a centralized authority that approves projects, registers activities, and establishes requirements and processes that ensure the delivery of an overall mitigation of global emissions.[34] It thus will allow host parties to

23 Cames (n 3); Voigt (n 10) 278–279 (citing studies).

24 De Sepibus (n 2) 10–11; see also Voigt (n 10) 280–281 (discussing how the CDM's governance structure is connected to problems with additionality). See also Henry Fearnehough et al 'Discussion paper: Marginal Cost of CER Supply and Implications of Demand Sources' German Emissions Trading Authority (January 2018) < https://newclimate.org/sites/default/files/2018/03/Marginal-cost-of-CER-supply.pdf> accessed 29 October 2022 (discussing CDM price stability problems).

25 Marrakesh Accords (n 16) 20–21; FCCC/KP/CMP/2005/8/Add.1 (n 16) 8.

26 FCCC/KP/CMP/2005/8/Add.1 (n 16) 9–10; De Sepibus (n 2) 21 (citing Charlotte Streck, 'The Governance of the Clean Development Mechanism: the Case for Strength and Stability' (2007) 15 Environmental Liability 91, 95); Emily Lund 'Dysfunctional delegation: why the design of the CDM's supervisory system is fundamentally flawed' (2010) 10(3) Climate Policy 277; Cecilia Nardenelli, 'Trust, but Verify: Ensuring the Accuracy of Carbon Credits Registered Under the Clean-Development Mechanism' (2012) 30 George Washington University Journal of Environmental Law 202.

27 See Clean Development Mechanism, 'CDM project cycle procedure for project activities 3.0', UNFCCC Doc. CDM-EB93-A06-PROC; Krey Matthias and Santen Heike, 'Trying to Catch up with the Executive Board: Regulatory Decision-Making and its Impact on CDM Performance' in Freestone and Streck (n 9) 231.

28 See Clean Development Mechanism, 'CDM Watch, Earthjustice and Transparency International's views on Procedures for appeals in accordance with the CMP requests in paragraphs 42–43 of Decision 2/CMP.5' (23 April 2010) <https://cdm.unfccc.int/public_inputs/2010/cmp5_para42_43/index.html> accessed 29 October 2022

29 UNFCCC, 'Joint annual report of the Technology Executive Committee and the Climate Technology Centre and Network for 2014' (5 December 2014), FCCC/SBI/2014/L.5, para 2; UNFCCC, 'Procedures, mechanisms and institutional arrangements for appeals against decisions of the Executive Board of the clean development mechanism' (10 June 2015) Doc. FCCC/SBI/2015/L.12; UNFCCC, 'Report of the Subsidiary Body for Implementation on its fifty-first session, held in Madrid from 2 to 9 December 2019' (16 March 2020), Doc. FCCC/SBI/2019/20, 11.

30 The CDM also suffers from significant financial problems, with the price of CERs so low that many funded projects are at risk of insolvency; see Fernehough (n 24).

31 Paris Agreement (n 4) Art 6(4).

32 ibid.

33 ibid Art. 6(4)(d); 6(7).

34 SDM Rules (n 4); see generally Benjamin and Wirth (n 4).

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conduct mitigation activities such as renewable energy projects that can issue credits that would be purchased by another party and counted towards the purchaser's nationally-determined contribution under Article 4 of the Paris Agreement.[35] The Asian Development Bank estimates that the SDM could provide the basis for $1 trillion per year in carbon credit exchanges by 2050.[36]

The SDM rules provide that the SDM will be governed by a Supervisory Body appointed by the Paris Agreement parties.[37] The Supervisory Body will be geographically balanced and its members will be term-limited. The rules require Body members' recusal where there is a 'potential, actual, or perceived' conflict of interest in a decision.[38]

The SDM rules have detailed provisions on the environmental integrity of SDM credits. Parties to the Paris Agreement, stakeholders, activity participants, and the Supervisory Body may develop mechanism methodologies, but additionality 'shall be demonstrated using a robust assessment that shows the activity would not have occurred in the absence of the incentives from the mechanism', taking into account national policies and using a conservative approach.[39] Host party countries for SDM projects may propose methodologies for measuring additionality to the Body, and SDM projects must incorporate additionality methodologies that have been approved by the Body.[40] The SDM allows CDM credits to transition to the SDM subject to certain conditions, including that CDM credits can use CDM-approved methodologies until the end of its crediting period or the end of 2025, after which it must use SDM methodologies.[41]

Unlike the CDM, the SDM will have an internal legal accountability process. Its rules provide that 'Stakeholders, activity participants and participating Parties may appeal decisions of the Supervisory Body or request that a grievance be addressed by an independent grievance process'.[42] The rules do not specify the procedures for appealing decisions or lodging grievances; instead, it appears that as the mechanism begins operation those important processes will be finalized.

1.2 The Carbon Offsetting Reduction Scheme for International Aviation

Following its adoption of a sectoral GHG emissions cap for international aviation in 2013, the ICAO Assembly in 2016 resolved that ICAO would implement a market-based measure to reduce emissions in the form of CORSIA, and directed that this measure support the mitigation of climate change caused by aviation.[43] The Assembly requested that the ICAO Council adopt standards and guidance 'to support the purchase of appropriate emissions units by aircraft operators under the scheme, taking into account relevant developments in the UNFCCC and Article 6 of the Paris Agreement'.[44] The Assembly decided that emissions units generated from mechanisms established under the UNFCCC and Paris Agreement would be eligible for use in CORSIA, provided that they align with decisions by the ICAO Council.[45] It requested that the Council 'oversee the functioning of CORSIA'.[46]

35 See Paris Agreement, (n 4) Art 4.

36 Asian Development Bank (n 8); Sha Yu et al, 'The Potential Role of Article 6 Compatible Carbon Markets in Reaching Net-Zero' Working Paper, University of Maryland and International Emissions Trading Association (15 October 2021).

37 SDM Rules (n 4).

38 ibid 6.

39 ibid 11.

40 ibid 9-10.

41 ibid 8-9; see generally Rossati (n 5).

42 SDM Rules (n 4) 14.

43 International Civil Aviation Organization, Assembly Resolutions In Force (as of 6 October 2016), Doc. 10075, Resolution 39-2, para 106; Annex.

44 International Civil Aviation Organization, Assembly Resolutions In Force (as of 6 October 2016), Doc. 10075, Resolution 39-3, para 19.

45 ibid para 21.

46 ibid para 19.

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In 2018 and 2019, the ICAO Council adopted rules requiring that CORSIA offsets be additional.[47] ICAO decided to assess eligibility criteria at a programme level rather than implement additionality methodologies at a project level as the CDM does.[48] The Council also created a Technical Advisory Body (TAB) to consider and recommend international, national, and non-governmental offset programmes for inclusion in CORSIA.[49] In August 2020, following TAB's recommendation, the ICAO Council certified six offset providers as eligible to participate in CORSIA, including certain 'vintages' of CDM credits; additional providers were approved by the ICAO Council in November 2020 and March 2021.[50] As with the CDM Board, TAB members are bound by a financial conflict of interest policy but are otherwise free to perform other functions in connection with ICAO and CORSIA.[51] TAB members are ICAO member state representatives.[52]

Unlike the parties to the Paris Agreement, ICAO did not create an independent accountability mechanism that would allow project participants and stakeholders to challenge whether certified offset programmes meet ICAO's environmental standards, including its additionality criterion. Instead, it appears that the Council will rely on the TAB for oversight.[53]

2. LEGAL ACCOUNTABILITY BEFORE DOMESTIC COURTS: POTENTIAL CLAIMS AND CLAIMANTS

Accepting that these mechanisms bear obligations to ensure that approved projects are additional, what legal accountability exists to enforce those duties? Consider again the hypothetical dam scenario, where a project applied to the CDM Board for certification and registration of CERs, but would have gone ahead regardless of the CERs and thus did not represent 'additional' emission reductions. If ICAO approved the CERs to satisfy CORSIA obligations, or the SDM Supervisory Body transitioned them for use in that market, any of the three entities could be in breach of their respective rules requiring that projects be additional.[54] While state parties to the Kyoto Protocol, the Paris Agreement, or the Chicago Convention could challenge the institutions' decisions diplomatically – or even initiate dispute settlement against project host countries under those treaties alleging that the flawed offsets violated CDM, SDM or CORSIA rules[55] – those procedures would not be open to individuals or entities affected by flawed offsets such as offset purchasers or those suffering climate harm.[56] Only the SDM would have an internal mechanism that could provide legal accountability for its participants and stakeholders, and the form and structure of the SDM's appeal and grievance procedures are unclear.

47 Convention on International Civil Aviation, 7 December 1944 15 UNTS 295, (Chicago Convention), Annex 16, Vol 4 (CORSIA SARP), s 4.2.1; International Civil Aviation Organization: ICAO Document CORSIA Emissions Unit Eligibility Criteria (9 March 2019) <https://www.icao.int/environmental-protection/CORSIA/Pages/CORSIA-Emissions-Units.aspx> accessed 29 October 2022 (CORSIA Offset Criteria) 1-3. See generally Baine Kerr, 'Regulating the Environmental Integrity of Carbon Offsets for Aviation: the International Civil Aviation Organization's Additionality Rule as International Law' (2020) 4(1) Carbon and Climate Law Review 255.

48 CORSIA Offset Criteria (n 47) 2.

49 See 'Technical Advisory Body' (International Civil Aviation Organization <https://www.icao.int/environmental-protection/CORSIA/Pages/TAB.aspx> accessed 29 October 2022.

50 'CORSIA Eligible Emissions Units' March 2022 (International Civil Aviation Organization) <https://www.icao.int/environmental-protection/CORSIA/Pages/CORSIA-Emissions-Units.aspx> accessed 29 October 2022; International Civil Aviation Organization, 'Technical Advisory Body (TAB) Recommendations on CORSIA Eligible Emissions Units' (October 2020) <https://www.icao.int/environmental-protection/CORSIA/Documents/TAB/TAB%202020/TAB_October2020Report_Excerpt_Section4_EN.pdf> accessed 29 October 2022; International Civil Aviation Organization, 'Order of Business for the Tenth and Eleventh Meetings, 221st Session of ICAO Council' Doc. C-O/B 221/10.

51 See TAB Terms of Reference Version 2.0, para. 4.1 <https://www.icao.int/environmental-protection/CORSIA/Documents/TAB/TAB%202020/TOR_of_TAB_2020_Approved_by_Council.pdf> accessed 29 October 2022.

52 See Technical Advisory Body Members <List_of_TAB_Members_2022.pdf (icao.int)> accessed 29 October 2022.

53 Technical Advisory Body (n 49).

54 Brazil has advocated that CERs for its existing hydroelectric projects, including those involved in Operation Carwash, be eligible for CORSIA and the SDM. (See n 6.)

55 See Kyoto Protocol (n 4) Art 19; Paris Agreement (n 4) Art 24; Chicago Convention (n 47) Art 84; International Law Commission, 'Draft Articles on the Responsibility of International Organizations' *Yearbook of the International Law Commission* (2011) vol II, Part Two, Art 2(b) ('"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization').

56 See, e.g., Chicago Convention (n 47) Arts 84–85.

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This section maps out potential tort claims and claimants for a case in Canadian or German courts against the CDM, SDM, or ICAO, challenging those institutions' compliance with their additionality rules. In doing so, it discusses and draws analogies from claims that have been raised, albeit unsuccessfully, against international organizations for environmental damage and cases against GHG emitters. In section 3, I evaluate how the institutions might respond to such a suit by asserting jurisdictional immunity, and how the lack of an internal accountability mechanism – or a mechanism that does not comply with international due process standards – could affect that defence in Canadian or German courts.

Numerous cases have been brought in domestic courts alleging tortious conduct by international organizations. Documenting and analysing them, Reinisch explains that organizations have 'infringed personal property rights of private persons', they 'might be accused of libel or slander, false imprisonment, infringing other property rights, of causing harm violating competition (antitrust) rules', or be subject to 'domestic employment litigation'.[57] He noted that 'sometimes lawsuits, styled as tort actions, have been brought against international organizations or individuals acting on their behalf to challenge the organization's activities'.[58]

Consistent with Reinisch's observation, in 2019 the United States Supreme Court considered *Jam v International Financial Corporation*, where the International Financial Corporation (IFC) – an international organization headquartered in Washington, DC – was sued by a group of farmers and fishermen in India who suffered environmental harm caused by a power plant funded by the IFC.[59] Alleging that the IFC violated its own standards when approving the plant's loan, 'plaintiffs sought several forms of equitable relief, or, alternatively, compensatory and punitive damages for negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract'.[60] The IFC successfully asserted jurisdictional immunity before American courts because the gravamen of the case – i.e., the 'elements of a claim, that if proven, would entitle a plaintiff to relief under his theory of the case', – were not 'based upon a commercial activity carried on in the United States'.[61] Yet, the case illustrates the potential for environmental claims against international organizations, at least in the United States. And the issuance of a loan by an international organization resembles the registration and approval of carbon offsets by the international institutions discussed here: both are financial actions undertaken with private actors that may or may not comply with applicable standards.

Turning to the CDM, soon after it began operating in 2006, scholars considered whether environmental claims could be made against it based on harms caused by funded projects.[62] Werksman pointed out similarities between claims about the environmental integrity of CERs and human rights claims for individuals affected by projects funded by multilateral financial institutions, but he also noted that financial institutions have consistently argued that no legal privity exists between affected individuals and the institutions.[63] Applying that reasoning to the CDM, he remarked that 'governmental officials, international civil servants and academics appear to have embraced the notion of private rights and public duties under the climate change regime with disturbing ease'.[64] Meijer provided a detailed account of how the CDM's administrative decisions directly impact private entities, in particular offset providers, and argued why jurisdictional immunity law should allow claims to be brought by such entities in

57 August Reinisch, *International Organizations Before National Courts* (2nd edn, Cambridge 2009) 28, notes 124-130 (listing and discussing cases). A tort is 'an action that is wrong but can be dealt with in a civil court rather than a criminal court'. Cambridge Dictionary Online <https://dictionary.cambridge.org/dictionary/english/tort> accessed 29 October 2022.

58 Reinisch (n 57) 29.

59 *Jam v International Finance Corp*, 586 US __ (2019) 5-6. See Clemens Treichl and August Reinisch, 'Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals: The Case of *Jam v International Finance Corporation*' (2019) 16 International Organizations Law Review 133.

60 Treichl and Reinisch (n 59) 126.

61 *Jam v International Finance Corporation*, Case No. 20–7092 (DC Cir.) 6–7 (quoting US Code s 1605(a)(2)).

62 Meijer (n 10); Streck and Lin (n 10).

63 JD Werksman, 'The Legitimate Expectations of Investors and the CDM: Balancing Public Goods and Private Rights under the Climate Change Regime' (2008) 95 Carbon and Climate Law Review 103.

64 ibid.

national courts.[65] Voigt discussed problems with CDM projects' additionality, the institution's lack of accountability, and potential environmentally negative side effects from CDM projects impacting local communities and stakeholders – such as water or air pollution. She suggested that such local harms could be the basis for a case in domestic courts, but did not elaborate how a project's additionality could be litigated.[66]

How would such a claim work here? Although the elements of tort vary considerably between Canada and Germany,[67] establishing an enforceable duty in either system would require a claimant to identify a standard of care.[68] In Canada, under common law, the standard of care is an objectively reasonable person standard, and under Quebec's civil code, every person has a 'duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another'.[69] Pursuant to German doctrine, 'a person acts negligently if he fails to exercise reasonable care'.[70] As discussed above, the CDM, SDM, and ICAO rules all require that offsets used within their respective markets be additional. In *Jam v IFC*, the IFC's internal performance standards for loans were styled by the plaintiffs as standards of care for its alleged wrongdoing,[71] and as Treichel and Reinisch argue, such policies 'should be treated as genuinely legal frameworks for purposes of their interpretation and application'.[72] Thus, a claimant might argue that the ICAO's additionality rules are part of the circumstances relevant to the determination of the standard of care in Canada, and the CDM and SDM's rules could inform the reasonable care that must be applied by those entities in Germany.

A claimant would also need to articulate an actionable injury and demonstrate that it was reasonably foreseeable. In Canada, a defendant 'is liable only for the damages that might have been foreseen'.[73] Likewise in Germany, 'the defendant is only obliged to compensate harmful consequences that were reasonably expected'.[74]

At least two different types of harms arguably arise from flawed offsets. First, faulty offsets indirectly cause climate change and the harms associated with it through the mechanics of cap and trade. By certifying a false offset and allowing obligatory credits to be claimed against it, or by allowing environmentally ineffective offsets to be transitioned into their markets, international institutions in effect license emissions that would not otherwise occur.[75] As in the hypothetical example, if they certified false carbon credits for the hydroelectric dam to be used within their market, and an oil refinery purchased those credits and continued polluting, the refinery's emissions would not be offset. The damage would be comparable to other climate cases: a CDM project which has been widely criticized as non-additional was approved to issue 6.1 million CERs annually, which represents more emissions than the five oil refineries unsuccessfully sued in the American case of *Washington Environmental Council v Bellon*.[76]

65 Meijer (n 10) 881, 907–925.

66 Voigt (n 10) 290–292.

67 Compare Allan Beever, *A Theory of Tort Liability* (Oxford 2016) 179–181 (describing elements of tort under common law); Ariste Brossard, 'A Synopsis of Torts in Quebec and a Parallel Between Some Provisions of the Common Law and the Code' (1945) 23(1) Canadian Bar Review 1; Quebec Civil Code ss 1457–1478, with Cees van Daam, *European Tort Law* (Oxford 2013) 232–233 (discussing German tort law system).

68 See van Daam (n 67) 228; Beever (n 67) 183–184.

69 Beever (n 67) 183–184 (citing *Vaughan v Menlove* (1837) 3 Hodges 51, 132 ER 490); Quebec Civil Code s 1457. As shown in Section 3.1, many of the cases filed thus far against ICAO originated in Quebec.

70 German Civil Code s 276 English Translation, German Federal Ministry of Justice <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0832> accessed 29 October 2022. In Germany, 'the violation of a codified normative rule (*Tatbestandswidrigkeit*) also has to be established' (van Daam (n 67) 79.) These rules include liability for 'a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person' (German Civil Code ss 823, 826).

71 *Jam v International Finance Corporation* (n 61) 3.

72 Treichel and Reinisch (n 59) 133.

73 Brossard (n 67) 5 (analogizing Quebec civil code to common law); Quebec Civil Code s 1613.

74 Van Daam (n 67) 252, 313.

75 Even though ICAO certifies offset 'programmes' rather than projects, by allowing airlines to purchase certain vintages and types of offsets it appears that TAB is engaging in project-level additionality review. (See ns 43–45.)

76 See Project 9226 Summary Report <https://cdm.unfccc.int/Registry/index.html> accessed 29 October 2022; *Washington Environmental Council v Bellon*, 732 F3d 1131, 1141 (9th Cir 2013).

Yet, liability based on such damage could be challenging for two separate but interrelated reasons. 'Attribution science is sufficiently robust to establish causal connections between increases in GHG concentrations, global warming, and a broad range of on-the-ground impacts and harms.'[77] Yet, there is still no domestic court judgement where on the ground harms have been attributed to individual emitters.[78] Attribution here would be even more challenging given that a claimant would seek to impute offset purchasers' emissions and the associated climate harms to the institutions responsible for offset providers' carbon credits. For the same reason, it would be difficult to show that harm was reasonably foreseeable: a claimant would need to show that the institutions' boards should have foreseen the alleged harms. Nevertheless, the evolving nature of climate science and litigation indicates that a novel theory of attribution and foreseeability could be asserted by an enterprising claimant in Canadian or German courts.[79]

A claim for economic damages tied to the purchase of non-additional offsets – as opposed to their effects on the climate system – could be easier to sustain. Individuals and companies buy CERs through commercial platforms for altruistic or marketing reasons, and thus have a tangible interest in their environmental effectiveness.[80] CORSIA imposes administrative requirements on airlines to report their emissions and obtain ICAO-approved offsets in order to satisfy their GHG abatement obligations.[81] Thus, an airline such as KLM – which promotes itself as an industry leader on reducing GHG emissions from aviation – arguably has a direct interest in the environmental integrity of offsets it is required to purchase.[82] The public and private entities that will participate in the SDM, which presumably will include non-state actors fulfilling climate pledges, likewise would have a financial or reputational interest in offsets they purchase.[83] Therefore, it is reasonably foreseeable that a false offset would injure these entities economically. Thus, a tort action based on harm from ineffective offsets may very well provide a legal nexus between private rights and international institutions' public duties to mitigate climate change that has so far been lacking.[84]

Given the structure of the carbon markets, the approval of carbon offset credits for fraudulent or unscrupulous projects would only be an indirect cause of offset purchasers' economic harm.[85] The CDM and SDM's reliance on designated national authorities and third-party auditors for verifying additionality could further diminish their liability. But, widespread criticism of the reliability and objectivity of verification systems might negate that argument.[86] A claim against ICAO would be even more inchoate because it purposefully chose to certify offset 'programmes' to avoid having to decide complex questions on individual projects' additionality.[87] Nevertheless, if there was evidence that a prior decision to approve a project was made in error and project or programme certification was not revisited, a claimant could potentially show that the requisite standard of care to ensure additionality was breached.[88]

77 Michael Burger et al, 'The Law and Science of Climate Change Attribution' (2020) 45(1) Columbia Journal of Environmental Law 209, 235–239.

78 See *Bellon* (n 76); *Smith v Fronterra Co-Operative Group Limited* [2020] NZHC 419, para 103 (attribution science might eventually allow adjudication of claim for damages against GHG emitter).

79 See generally Rupert F Stuart Smith et al, 'Filling the Evidentiary Gap in Climate Litigation' (2021) 11 Nature Climate Change 651; Columbia University, Climate Attribution Database (<https://climateattribution.org> accessed 29 October 2022).

80 One such company is Climatetrade, which according to its website 'works with projects verified by organizations with the highest international reputation standards such as the United Nations CDM Registry'. (<https://www.climatetrade.com/projects/>).

81 CORSIA SARP (n 47) Part II, Chapter 1, Chapter 3. Airlines may also use ICAO-approved sustainable fuels in lieu of offsets. See CORSIA SARP (n 47), s 2.3.3; 'CORSIA Frequently Asked Questions' <https://www.icao.int/environmental-protection/CORSIA/Pages/CORSIA-FAQs.aspx>.

82 See 'All About Sustainable Travel' KLM Royal Dutch Airlines (<https://www.klm.com/travel/us_en/prepare_for_travel/fly_co2_neutral/all_about_sustainable_travel/index.htm> accessed 31 October 2022).

83 Streck (n 5). As Benjamin and Wirth explain, polluting industries might favour undervalued Art 6 offsets because meeting climate obligations would be cheaper (Benjamin and Wirth (n 4) 259).

84 See Werksman (n 63).

85 Treichl and Reinisch (n 59) 133.

86 See generally De Sepibus (n 2); SDM Rules (n 4) 8–9.

87 CORSIA Offset Criteria (n 47) 2.

88 See, e.g., material cited at n 6.

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3. IMMUNITY AND ACCOUNTABILITY

As discussed above, there is no legal accountability for ICAO and the CDM for their important international roles in mitigating climate change through the carbon markets they administer, and the SDM's appeal and grievance mechanism's rules are not yet determined. Assuming that a legally-cognizable claim is pleaded in domestic courts along the lines set out in section 2, a claimant would still have to overcome the jurisdictional immunity that international organizations typically enjoy.[89] This section discusses immunity aspects of a hypothetical case against ICAO in Canada or the CDM and SDM in Germany, and explains how the presence or absence of internal accountability mechanisms would relate to assertions of immunity by those institutions.[90]

3.1 The International Civil Aviation Organization in Canada

ICAO is entitled to immunity in Canadian courts, but that immunity has limits. The Chicago Convention, ICAO's constituent treaty, does not grant the organization immunity, although it provides that each member state must grant ICAO's personnel the same immunities and privileges as those held by 'corresponding personnel of other public international organizations'.[91] ICAO's Headquarters Agreement with Canada provides that ICAO is entitled to the same immunity as a foreign state, and its officials are granted diplomatic immunity.[92] The Agreement requires that ICAO 'make adequate provision for appropriate modes of settlement of disputes arising out of contracts or other disputes to which the organization is a party'.[93] And, 'the Secretary General of the Organization shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organization'.[94] As I discuss here, these provisions and CORSIA's lack of an accountability mechanism could impact ICAO's immunity in a Canadian court.

The Canadian government issued an 'ICAO Privileges and Immunities Order' incorporating the ICAO Headquarters Agreement into domestic law. It states that ICAO is entitled to the privileges and immunities set out in Articles II and III of the Convention on Privileges and Immunities of the United Nations 'to the extent specified' in the ICAO Headquarters Agreement.[95] Canada's treatment of ICAO thus differs from other international organizations in Canada that are entitled to the privileges and immunities set forth in the General Convention 'to such extent as may be required for the performance' of their functions.[96]

Canadian courts assessing ICAO's immunity apply the Order, ICAO Headquarters Agreement, and Canadian principles of sovereign immunity, in particular by evaluating whether the

89 See generally Reinisch (n 57) 327.

90 Although a domestic case against ICAO, the CDM, or SDM could theoretically be brought in an offset project's host country, or even in a third country, international law as applied in Canada or Germany could nevertheless be relevant to effective service of process and immunity issues. (See, e.g., *Prewitt Enterprises v OPEC* 353 F3d 916 (11th Cir 2003) (in a case against OPEC, a US court determined the standard for effective service of process in Austria under OPEC's Headquarters Agreement.)

91 Chicago Convention (n 47) Art 60.

92 Headquarters Agreement Between the Government of Canada and the International Civil Aviation Organization, E101905 – Canadian Treaty Series 1992 No. 7 (ICAO Headquarters Agreement) Arts 3, 19, 20, 21. See generally Phillip M Saunders, 'Canada' in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford 2013) 73 (discussing Canadian courts' interpretation of the immunity of international organizations).

93 ICAO Headquarters Agreement (n 92) Art 33(1).

94 ibid Art 21(1).

95 Government of Canada ICAO Privileges and Immunities Order, Regulation SOR/94-563 <ICAO Privileges and Immunities Order (justice.gc.ca)> accessed 29 October 2022.

96 See Government of Canada International Commission for the Northwest Atlantic Fisheries Privileges and Immunities Order, Regulation CRC 1314 <International Commission for the Northwest Atlantic Fisheries Privileges and Immunities Order (justice.gc.ca)> accessed 29 October 2022; Government of Canada United Nations Framework Convention on Climate Change Privileges and Immunities Order, Regulation SOR/2005-291 <United Nations Framework Convention on Climate Change Privileges and Immunities Order (justice.gc.ca)> accessed 29 October 2022. As discussed in section 3.2 below in connection with the UNFCCC bodies, the 'functional necessity' approach to organizational immunity is 'commonly used by national courts'. (Meijer (n 10) 903–904 (citing Reinisch (n 57)).

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commercial exception to immunity applies.[97] In one of the cases against it, ICAO claimed it was entitled to 'absolute immunity from judicial process of any kind', but argued in the alternative that the activity at issue was not commercial.[98] The court did not resolve the question, but contemplated whether absolute immunity should be abandoned as a principle of international law.[99] Another case against ICAO reached a similar conclusion.[100]

Although Canada's Sovereign Immunity Act defines commercial activities according to their 'nature', the Canadian Supreme Court held that the entire context of the activity should be considered, including its purpose and assessing the impact of upholding jurisdiction on a foreign state.[101] Canadian courts have denied sovereign immunity to arms of foreign governments that are involved in solely commercial activities, noting that such activities do not touch on states' internal affairs or sovereign diplomatic functions.[102] Foreign states also are 'not immune from the jurisdiction of any court jurisdiction of a court in any proceedings that relate to … any damage to or loss of property that occurs in Canada'.[103]

In a case against ICAO for breaching its duty to ensure the additionality of CORSIA offsets, a claimant could argue ICAO's certification decision was a 'commercial activity' based on CORSIA's market structure and commercial nature where airlines are required to purchase ICAO-approved offsets to mitigate their emissions.[104] But CORSIA's purpose is to mitigate climate change caused by international aviation, and it is not a profit-making venture.[105] It is therefore unclear whether the commercial activity exception to immunity would apply.[106] A case could potentially be made based on the immunity exception for damage or loss of property in Canada. As discussed in the preceding section, other jurisdictions recognize sea-level rise as a legally-cognizable climate injury. Although such a case would expand the boundaries of climate law and present novel immunity issues, it would be a plausible path to legal accountability for ICAO's compliance with its additionality obligation.

CORSIA's lack of an accountability mechanism could be relevant. In *Amartunga v Northwest Atlantic Fisheries Organization*, the Canadian Supreme Court held that the defendant's absence of a grievance mechanism did not revoke that international organization's immunity. The defendant in that case, NAFO, was entitled to immunity on the basis of a Canadian order that incorporated elements – but not the totality – of the General Convention on the Immunities of the United Nations.[107] Examining NAFO's immunity under the order and domestic and international law, the court reasoned that the Canadian Bill of Rights does not provide for a substantive right to a hearing, and the International Covenant on Political and Civil Rights does

97 See *Ferrada v International Civil Aviation Organization* [2015] QCCS 3121, para 36 (ICAO entitled to immunity concerning employment dispute); *International Civil Aviation Organization v Tripal Systems Ltd* [1994] RJQ 2560, para 8.

98 International Civil Aviation Organization v. Tripal (n 97) para 16.

99 ibid para 17.

100 Saunders (n 92) 91 (discussing *Trempe c Canada (Procurer général)* 2005 CanLII 1031 (QCCA)).

101 Canadian State Immunity Act, RSC 1985 s 5, s 2; *Re Canada Labour Code* [1992] 2 SCR 3 at 73–74. See Ross Hornby, 'State Immunity – Re Canada Labour Code: A Common Sense Solution to the Commercial Activity Exception'(1992) 30 Canadian Yearbook of International Law 301 , 302.

102 *Ferguson v Arctic Transportation* [1995] 3 FC 656, paras 5–6 (commercial activity exception does not apply to Panama Canal Commission); *Gilligan v Ontario (Ministry of Labor)* [1998] OESAD No 5, para 28; *Dorais c Saudi Arabian General Investment Authority* [2013] QCCS 4498, paras 37–39.

103 Canadian State Immunity Act (n 101) s. 6(b).

104 See section 1.2 above.

105 See Christopher Lyle, 'Beyond the ICAO's CORSIA: Towards a More Climatically Effective Strategy for Mitigation of Civil-Aviation Emissions' (2018) 8 Climate Law 1–2 (discussing ICAO's remit of reducing GHG emissions from international aviation); Baine P Kerr, 'Clear Skies or Turbulence Ahead: The International Civil Aviation Organization's Obligation to Mitigate Climate Change' (2020) 16(1) Utrecht Law Review 101 (arguing ICAO has a legal duty to mitigate climate change).

106 Reinisch (n 57) 260 (discussing the position of Peter Henri Fredericus Bekker, in *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Dordrecht, Boston and London 1994) that the commercial activity exception should only apply to international organizations engaged in profit-making ventures).

107 Amartunga v Northwest Atlantic Fisheries Organization [2013] SCC 66, para 47–49.

not provide a right to a tribunal that abrogates immunities recognized by international law.[108] It also declined to consider 'European cases' that applied the European Convention on Human Rights because they arose in a different 'legal context.[109]

Unlike NAFO, ICAO is party to a treaty with Canada, its Headquarters Agreement, that is partially incorporated into Canadian law by the ICAO Privileges and Immunity Order.[110] As noted above, Article 33(1) of the Agreement requires that ICAO provide 'appropriate' modes to settle disputes to which it is a party, although that Article is not enumerated in Canada's order.[111] Yet, Canadian courts have nonetheless referred to Article 33 and the Agreement more broadly when adjudicating ICAO's immunity.[112] Thus, ICAO's compliance with its obligation under Article 33 could form part of the legal 'context' within which its immunity would be interpreted.[113] Scholars have argued that similar language in the Convention on the Privileges and Immunities of Specialized Agencies is limited to organizations' incidental rather than constitutional functions, but as Treichel and Reinisch point out, that distinction is unclear, particularly with respect to third-party claims for damages.[114]

Nevertheless, domestic courts are often predisposed to uphold international organizations' immunity.[115] And Canada's government has intervened in litigation to do so, noting that Parliament intended to provide organizations with immunity in order to enhance Canada's role within them, and make Canada an attractive location for their headquarters.[116] Thus, while Canadian courts could theoretically provide legal accountability for CORSIA's environmental integrity, a claimant would need to overcome that reasoning as well as the legal hurdles discussed here.

3.2 The CDM Board and SDM Supervisory Body's Immunity in Germany

In contrast with ICAO, the CDM Board and SDM Supervisory Body are not specialized agencies of the United Nations, and it is unclear whether they would qualify as international organizations.[117] As Voigt writes, the Kyoto Protocol COP could be classified as an international organization, but the CDM does not appear to have international legal personality.[118] The same analysis would apply to the Paris Agreement CMA and SDM. Instead, like other UNFCCC institutions and institutions created by multilateral environmental treaties, they are 'constituted bodies' controlled by and accountable to states.[119] CDM officials are employed by the UNFCCC Secretariat, and the Secretariat institutionally houses the CDM and maintains its registry of

108 ibid para. 60.

109 ibid.

110 Regulation SOR/94-563 (n 95).

111 ICAO Headquarters Agreement (n 92) Art 33(1); Saunders (n 92) 92–93.

112 See Saunders (n 92) 92.

113 See *Amartunga v Northwest Atlantic Fisheries Organization* (n 107) para. 37 (interpreting words of the Northwest Atlantic Fisheries Organization Order 'in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the [Foreign Missions and International Organizations] Act, and in light of the grant of authority and the intention of Parliament').

114 Treichel and Reinisch (n 59) 112–113.

115 See Thore Neumann and Anne Peters, 'Commentary: Beer and Regan, Waite and Kennedy v. Germany' in Cedric Ryngaert et al (eds), *Judicial Decisions on the Law of International Organizations* (Oxford 2016) 398–399.

116 *Amartunga v Northwest Atlantic Fisheries Commission* (n 107) paras 43–44.

117 Voigt (n 10) 290-291 (discussing Meijer (n 10) 899). See UN Doc FCCC/SBI/1996/7, para 11(2) (UNFCCC Secretariat and other bodies created by the Convention 'have certain distinctive elements attributable to international organizations. However, it is clear that none of these bodies is de jure an international organization').

118 Voigt (n 10) 292. See Robin Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: a Little Noticed Phenomenon in International Law' (2000) 94 American Journal of International Law 293 (discussing legal character of UNFCCC COP and subsidiary bodies); UN Doc A/AC.237/50, 6; UN Doc A/AC.237/74 Annex, para 1 (UNFCCC COP had legal capacity to conclude international agreements).

119 Kyoto Protocol (n 4) Art 12; Paris Agreement (n 4) Art 6.4. See Green (n 18).

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approved projects.[120] Although the SDM is not yet operational, it is likely that it will have similar institutional arrangements.[121]

Given the CDM and SDM's indeterminate legal character and complex institutional architecture, a claimant seeking to challenge their offset approval decisions in a domestic court would face a threshold decision of which institution or persons to sue. Possibilities include the institutions' boards, the UNFCCC Secretariat, or the institutions' parent conferences of states. Each could plausibly be accountable for environmentally ineffective offsets: the boards are charged with approving offset projects and ensuring additionality; the Secretariat institutionally houses the boards and provides them with staff and administrative support; and the conferences of parties that created the Boards are ultimately responsible for their subsidiary bodies.

Although the UNFCCC Secretariat could be named as a defendant and accept process, it is entitled to the immunity necessary to discharge its functions, and its functions with regard to the CDM and SDM are administrative, not substantive.[122] CDM Board members and other officials are entitled to diplomatic privileges and immunities for decisions taken in Germany, and it is likely that SDM Board members will be granted similar diplomatic status.[123] And, while the conferences of parties appear to have some measure of international legal personality, they do not have juridical personality in Germany, and therefore cannot be sued.[124]

Even though the CDM Board does not have international personality, it has attributes of legal personality because of its legal relationships with private entities, in particular through the accreditation of designated operational entities.[125] It appears that the SDM Supervisory Body will have similar relationships as its rulebook envisions that public and private entities will be 'activity participants'.[126] As Voigt notes, 'the doubt surrounding the qualification' of the CDM Board as an international organization could cause a court to deny it immunity on that basis while still recognizing it as a legal person.[127] And non-qualification as an international organization has previously defeated immunity claims in national courts.[128]

What is the legal relevance of internal accountability mechanisms – or the lack thereof – at these institutions? In *Waite and Kennedy v Germany* the European Court of Human Rights (ECtHR) examined whether international organizations' immunity conflicted with an individual's right to a tribunal to hear civil matters under Article 6 of the European Convention on Human Rights.[129] In that case, two contractors with the European Space Agency filed an action for declaratory relief in a German court based on an employment dispute with the Agency; the Agency did not have any internal dispute resolution mechanism where they could bring their

120 UNFCCC, 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005' (30 March 2006), Doc FCCC/KP/CMP/2005/8/Add.1.

121 The Kyoto Protocol parties have repeatedly called for a 'smooth transition' from the CDM to the SDM, indicating that there will be institutional as well as substantive carry-over. (See e.g., UNFCCC, 'Guidance Relating to the Clean Development Mechanism' Decision 2/CMP.16, Doc FCCC/KP/CMP/2021/8/Add.1; see SDM Rules (n 4) Annex Chapter XI.).

122 The United Nations Volunteer Headquarters Agreement applies *mutatis mutandis* to the UNFCCC Secretariat, and thereby grants the Secretariat juridical personality and 'privileges and immunities as are necessary for the effective discharge of its functions under the Convention'. (UNFCCC, 'Legal Arrangements for the Discharge of the Functions of the Secretariat with the Federal Republic of Germany' (20 June 1996), Doc FCCC/CP/1996/6/Add.1, 2; UNFCCC, 'Legal Arrangements for the Discharge of the Functions of the Secretariat with the Federal Republic of Germany, Note by the Secretariat' (3 July 1996), Doc UNFCCC/CP/1996/MISC.1, Art 4.) The Secretariat and its officials are to enjoy immunity 'from all forms of legal process'. (FCCC/CP/1996/MISC.1 (attachment), Arts 9, 14.)

123 Voigt (n 10) 292. Board members' lack of immunity outside Germany was discussed by the Kyoto Protocol COP, but no action was taken (ibid).

124 See sources cited at n 118.

125 Netto and Barani-Schmidt (note 14) 217–28; Green (n 18) 36–38.

126 SDM Rules (n 4).

127 Voigt (n 10) 291.

128 Reinisch (n 57) 170 (discussing *Steinberg v International Criminal Police Organization* 672 F2d 927 (DC Cir 1981); *YY v UNWRA* cited at Annual Report of the Director of UNRWA, 12 UN GAOR, Supp. (No. 14) 47, note 34, UN Doc. A/3686 (1957) (1957 Egyptian case where court denied that UNWRA was an organ of the United Nations).

129 *Waite and Kennedy v Germany* ECHR 1999-I, para 68. See Meijer (n 10) 904-905 (under *Waite and Kennedy v Germany*, CDM's administrative decisions implicating the rights of private parties should be reviewable by German courts).

claim. The court rejected their claim on the basis of the Agency's immunity.[130] Following the contractors' unsuccessful appeal to the European Commission on Human Rights, the ECtHR found that, under the Convention, a material factor in determining whether Germany should grant immunity to an international organization was whether the applicants 'had available to them reasonable alternative means to protect effectively their rights under the Convention', in other words whether the organization afforded the applicants a mechanism to vindicate their claims.[131]

As Pasquet explains, the *Waite and Kennedy* alternative-means test has been applied by some European national courts to evaluate whether organizations have dispute settlement procedures, and whether those procedures provide due process.[132] But other courts have upheld immunity, reasoning that claimants could proceed against states rather than international organizations as an alternative means of vindicating their claims, or narrowing *Waite and Kennedy*'s scope to labour disputes and avoiding politically-charged cases.[133]

Under either approach, German courts' evaluation of the CDM Board or SDM Supervisory Body's immunity would be likely to turn on whether claimants had alternative means to pursue their case. If the alternative-means test is applied strictly, the CDM Board's lack of a dispute resolution process could lead a German court to reject immunity on that basis, and in a case against the SDM Supervisory Body, a court could evaluate whether the SDM's yet-to-be-developed appeal and grievance process complies with international due process standards.[134] Both outcomes would create new avenues for legal accountability for international carbon markets – in the case of the CDM for the additionality of its credits, and for the SDM, accountability for its governance structure.

Alternatively, a German court might find that a 'reasonable alternative means' for claimants would be to pursue their cases in offset projects' host countries, or that the *Waite and Kennedy* principle cannot extend to highly technical and politically sensitive questions of whether offsets are environmentally ineffective and cause climate change.[135] Yet, the German Constitutional Court in the past has been amenable to hearing suits regarding 'supranational acts' by international organizations, and assessing due process standards afforded by internal dispute mechanisms.[136] Moreover, such an assertion of jurisdiction would be consistent with the maxim that the European Union 'is based on the rule of law'.[137] Thus, a case against the CDM Board or SDM Supervisory Body could address novel questions about those institutions' governance and decision-making through an adjudication of their immunity.

CONCLUSION

As I discuss in this article, the important task of maintaining international carbon markets' environmental integrity is largely left to institutions that do not have internal accountability mechanisms, in the case of the CDM or ICAO, or are not yet established, in the case of the SDM. Domestic courts in Canada and Germany offer plausible, albeit challenging, venues for legal accountability. Recent developments in climate law offer new ways to conceptualize harm and liability, and immunity rules indicate that the lack of robust accountability mechanisms could put these institutions at risk of a lawsuit. Domestic judicial review, or even the potential

130 See Neumann and Peters (n 115).

131 *Waite and Kennedy* (n 129) para 68.

132 Luca Pasquet, 'Litigating the Immunities of International Organizations in Europe: The "Alternative-Remedy" Approach and its "Humanizing" Function' (2021) 36(2) Utrecht Journal of International and European Law 192.

133 See ibid (discussing variety of approaches to alternative-means test and citing cases).

134 See *Gasparini v Italy and Belgium* App no 10750/03 (ECHR, 12 May 2009).

135 See *El Hamidi and Chlih v North Atlantic Treaty Organization* (NATO) and Belgium (intervening), Belgium, Brussels Court of Appeals, appeal judgment of 23 November 2017, ILDC 3043 (BE 2017), JT 6772, para 33; Pasquet (n 132) 199.

136 Bardo Fassbender, 'Germany' in August Reinisch (ed), *The Privileges and Immunities of International Organizations* (Oxford 2013) 129 (Constitutional Court 'can assess "supranational" legal acts of an international organization against the yardstick of the fundamental rights' guarantees of the German Constitution'); *Waite and Kennedy* (n 129) para 50.

137 Joined cases C-402/05 and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paras 81, 281, 316.

of such review, could improve decision-making by incentivizing the institutions to follow their environmental integrity rules, and implement internal accountability mechanisms.[138]

Ultimately, the scope of relief that a domestic court could provide would be limited. Given difficulties with enforcing a money judgement or injunction, a court could be left to offer only declaratory relief.[139] Nevertheless, a domestic court's declaration that these institutions failed to comply with their obligations to ensure offsets' environmental integrity would provide a measure of legal accountability that is currently lacking.[140] And a finding – or even the spectre of a finding – that they should not be entitled to immunity might encourage the adoption and implementation of robust internal accountability mechanisms. Thus, like other climate litigation against states and emitters, a case related to the additionality of carbon markets such as that described in this article has both direct and indirect regulatory potential, and provides a potentially effective means of managing the risk that international climate mitigation efforts do not succeed.[141]

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The author has no competing interests to declare.

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138 See Meijer (n 10) 917–918 (CDM decision-making likely to improve from national review of administrative decisions).

139 See FCCC/CP/1996/MISC.1 (n 122) Art 3(1) (UNFCCC Secretariat's funds and assets immune from all forms of judicial process); ICAO Headquarters Agreement (n 92) Arts 3, 4 (ICAO's property and assets immune from any form of judicial interference).

140 See Nollkaemper and Curtin (n 11) (discussing forms of legal accountability).

141 See Jaqueline Peel and Harry M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge 2015) 311-312 (climate litigation has direct and indirect pro-regulatory effects).

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