



THE KYOTO MECHANISMS: HOW TO RECONCILE CDM AND JI IN A NEW, INTERNATIONAL AGREEMENT

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Abstract

The future roles for the Clean Development Mechanism ('CDM') and Joint Implementation ('JI') within the second Kyoto commitment period, and a future international agreement, is considered. The CDM has played a vital role in delivering climate-related finance and technology transfer to developing nations, incorporating the developing world into the solution for this global issue. However, there are fundamental issues with the mechanism that must be addressed; concepts such as sustainability, additionality and governance need to be reformed and improved. Moreover, the CDM operates as an offsetting mechanism that, without a global emission cap binding on all parties, allows for actual greenhouse gas emission increases. JI offers a solution as to how the CDM's benefits can be continued under an agreement where parties assume binding caps; it has been significantly undervalued. A future international climate agreement should maintain and extend JI to incorporate the concerns levelled against the CDM, and thereby continue the positive benefits that the CDM has delivered.

Introduction

In 2011, at the seventeenth Conference of the Parties to the United Nations Framework Convention on Climate Change ('UNFCCC'), parties agreed to the 'Durban Platform for Enhanced Action'. This decision, established a Working Group with a mandate to draft a new international agreement by 2015 that will have 'legal force' over 'all Parties'.¹ Christiana Figueres, the Executive Secretary of the UNFCCC, stated that the current regime is at 'an aggressive Redesign and Reconstruct phase'.² This is due to the expiry of the Kyoto Protocol at the end of 2012, with only a limited number of countries agreeing to a second commitment period, and recognition that current international mitigation efforts are not adequate to stabilise global emissions and keep global temperatures to a maximum rise of two degrees Celsius. The Kyoto Protocol provided Parties with three flexible mechanisms to meet their reduction targets – Emissions Trading,³ the Clean Development Mechanism⁴ ('CDM') and Joint Implementation⁵ ('JI'). There is a general consensus that emissions trading will be heavily utilised in any future international agreement; indeed, the Australian Minister for Climate Change and Energy Efficiency, Greg Combet, indicated in Durban that Australia and the international community should link emission trading schemes and 'continue to develop the carbon markets that will enable countries everywhere to meet their pollution reduction targets at least cost'.⁶

Despite this, the futures of the remaining two Kyoto mechanisms are in doubt with strong calls for reform. Nevertheless, as Figueres and Streck have pointed out, their 'conceptual underpinnings are strong and it is likely that the idea of mechanisms, in fact the mechanisms themselves, will survive in

¹ Decision -/CP.17, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, Advance unedited edition, paragraph 4.

² C Figueres, 'Statement by the Executive Secretary, United Nations Framework Convention on Climate Change', presented to the Carbon Forum North America, Washington DC, USA, 2012, p. 2.

³ Article 17.

⁴ Article 12.

⁵ Article 6.

⁶ G Combet, AM MP, Minister for Climate Change and Energy Efficiency, 'Durban and Beyond: Building a Comprehensive Climate Change Regime', Address to the Crawford School of Economics and Governance at the Australian National University, 25 November 2011, p. 16.

a post-2012 climate regime'.⁷ The conceptual underpinning of these mechanisms is not just international equity, but clearly that of economic efficiency as well; that is, emissions reductions should occur where it is cheapest and most cost-effective.⁸ Therefore, the mechanisms will likely remain both in the second commitment period of the Kyoto Protocol, and in a future climate agreement; the remaining question that must be answered is, in what form should they remain? This paper will answer this question by first examining how the CDM currently operates and its benefits as well as its criticisms. Second, the impact of the Durban Platform on the future of the CDM will be analysed, and thirdly how JI has been utilised as a mechanism will be investigated. From this, it will be determined that JI offers a solution to the criticisms levelled against the CDM, and thereby offers a path forward for these mechanisms if a binding, global emission cap is established in the new agreement.

Part I - The CDM: Benefits and Criticisms

The CDM was established through Article 12 of the Kyoto Protocol with the dual purpose to 'assist Parties not included in Annex I in achieving sustainable development' and 'to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3'.⁹ An Annex I country receives certified emission reductions ('CERs') for CDM projects, and these CERs can be used to meet their assigned amount commitment under Article 3.¹⁰ Therefore, it is clear that the basis for the CDM is not to reduce emissions *per se*, but rather to offset emissions where it is most economically efficient to do so. This has led to substantial criticism of the mechanism that it does not effectively reduce global emissions; indeed this mechanism allows for an increase in global emissions in real terms.¹¹ In this part, the major attributes of the CDM will be identified as well as areas that need to be reformed and addressed in a future, internationally binding agreement.

The CDM – Encouraging Developing Countries to Participate in the Solution

The CDM has generally been considered at the international level as a 'win-win' situation whereby both developing and developed countries receive economic benefits and greenhouse gases are, in theory, reduced.¹² The CDM is 'the only market mechanism between developed and developing countries'¹³ and this is a significant, international achievement. Moreover, it is the vital source of climate-related finance for developing countries and has facilitated the transfer of clean technologies that will likely reduce emissions in these countries in the future.¹⁴ These benefits are

⁷ C Figueres and C Streck, 'A Post-2012 Vision for the Clean Development Mechanism', in *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond*, Freestone, D and Streck, C (eds), Oxford University Press, Oxford, 2009, p. 562.

⁸ J Hoogzaak, and C Streck, 'A Mechanism with a Bright Future: Joint Implementation', in *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond*, Freestone, D and Streck, C (eds), Oxford University Press, Oxford, 2009, p. 176.

⁹ Article 12, paragraph 2.

¹⁰ Article 3.

¹¹ S Bakker, C Haug, H Asselt, J Gupta and R Saidi, 'The future of the CDM: same same, but differentiated?' *Climate Policy*, vol. 11, 2011, p. 753.

¹² Shin, S, 'The domestic side of the clean development mechanism: the case of China' (2010) 19 *Environmental Politics* 237 at 238.

¹³ Figueres, *op. cit.*, p. 2.

¹⁴ J Strand and K Rosendahl, 'Global emissions effects of CDM projects with relative baselines', *Resource and Energy Economics*, vol. 34, 2012, p. 534.

substantial, and form the basis of why the CDM, in some form, must continue in a new international agreement.

Achieving Sustainable Development

As noted above, one of the dual purposes of the CDM is to ‘assist Parties not included in Annex I in achieving sustainable development’. This has been a contentious issue as ecological sustainable development is not a defined concept and as such open to various interpretations. Nevertheless, it has been viewed as encompassing economic, environmental and social impacts.¹⁵ Han and Han argue that there is a strong possibility that the ‘cheapest measure for abatement’ will be the option adopted in CDM projects, and that this may be leading to a widespread issue of ‘low-hanging fruits’ where the developing country will be left with the cost of repairing the damage of the project in the future.¹⁶ There is very little empirical evidence to support this argument.¹⁷

Nevertheless, there are no entrenched minimum standards of sustainability that a CDM project must demonstrate, and this is a significant problem. Indeed, this has led some commentators to suggest that far from having a beneficial impact on sustainability, the projects exacerbate and have a harmful impact on the environment and local communities. This is because, it is argued, host countries “lack the capacity to make assessments effectively” and are thereby granting approval to projects that are not sustainable due to the desire for foreign investment.¹⁸ To overcome this issue, a new agreement should entrench minimum standards for sustainable development to provide guidance on what needs to be proven in order for a project to be approved.¹⁹ It is important to note that defining a minimum threshold was rejected at the seventh COP²⁰, but it is advisable to reconsider that decision. Nevertheless, evidence suggests that the positive sustainable development impacts of CDM far outweigh any of its negative effects.²¹

Additionality – A Need for Objectivity

Article 12 provides that a CDM project requires emission reduction to be ‘real, measurable, and long term’²² as well as ‘additional to any that would occur in the absence of the certified project activity’²³ – this is known as the requirement for additionality. Parties have agreed that ‘[a] CDM project activity is additional 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’.²⁴ The essential element that must be proven is that the project would not have occurred under a

¹⁵ High-Level Panel on the CDM Policy Dialogue, ‘Climate Change, Carbon Markets and the CDM: A Call to Action’, Luxembourg, 2012, p. 41.

¹⁶ Y Han and X Han, ‘The Clean Development Mechanism and its implementation in China: an economic analysis’, *Energy Procedia*, vol. 5, 2011, p. 2279.

¹⁷ Ibid.

¹⁸ High-Level Panel on the CDM Policy Dialogue, *op. cit.*, p. 42.

¹⁹ Bakker, *op. cit.*, p. 761.

²⁰ Ibid.

²¹ High-Level Panel on the CDM Policy Dialogue, *op. cit.*, p. 43.

²² Article 12, Kyoto Protocol, paragraph 5(b).

²³ Article 12, Kyoto Protocol paragraph 5(c).

²⁴ Decision 3/CMP. Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.1, 30 March 2006 at paragraph 43.

‘business-as-usual’ scenario.²⁵ In 2011, the Executive Board established the High-Level Panel on the CDM Policy Dialogue (‘the Panel’) to ‘help ensure the readiness and positioning of the CDM to meet the challenges of the post-2012 period’.²⁶ In its report, the Panel made a number of findings and recommendations about the path forward. A major area that the Panel identified as needing reform is that of the requirement for additionality. Currently, to determine additionality is on case-by-case approach, where the non-factual is hypothesised.²⁷ This has led to significant inconsistencies between projects of a ‘similar type’, where one is accepted and the other rejected.²⁸

There is a pressing need for an establishment of ‘objective, stable, and unambiguous rules for determining additionality’.²⁹ There is a possibility (and likely always will be) that the additionality requirement can be manipulated by the host country; that is, in a ‘worst case’ scenario, a host country is incentivised to establish a high ‘startout’ rate as the baseline for the project.³⁰ Arguably, host countries would be happy with ‘lax baselines since it does not give away assets due to the lack of an emission target’.³¹ This is an important point, and it illustrates the need for strong scrutiny of the environmental integrity of the CDM projects and supports the adoption of standardised baselines which utilise an energy efficiency model that is determined by an ‘industry average’.³² This would effectively alleviate the concern that emission estimations are manipulated.

Governance and the Rule of Law

To ensure the environmental integrity of the CDM, an extensive system of governance has been established. The Kyoto Protocol created a supervisory body known as the Executive Board, which is subject to the Conference of the Parties.³³ It is, in essence, the institutional entity of the CDM. The Executive Board determines the technical rules for each project, as well as being responsible for the registration of projects and the issuance of CERs and the approval of new methodologies.³⁴ The Executive Board has also been given the authority to appoint and suspend a Designated Operational Entity (‘DOE’). A DOE, once accredited, can perform two important functions. First, the DOE is responsible for validating and requesting registration of projects.³⁵ Second, it verifies emission reductions of projects that have been registered with the Executive Board, and requests that the CER is transferred.³⁶ In addition, to be eligible for a CDM project, both parties need to have established a Designated National Authority (‘DNA’). This is usually a government department or agency ‘that reviews, approves and monitors the CDM projects within their countries’³⁷ and in Australia, this

²⁵ A Michaelowa, ‘Interpreting the Additionality of CDM Projects: Changes in Additionality Definitions and Regulatory Practices over Time’, in *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond*, Freestone, D and Streck, C (eds), Oxford University Press, Oxford, 2009, p. 249.

²⁶ ‘Terms of Reference for the Policy Dialogue on the Clean Development Mechanism’, Annex 1 of EB 64 at 1.

²⁷ ‘High-Level Panel on the CDM Policy Dialogue, *op. cit.*, p. 38.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Strand and Rosendahl, *op. cit.*, p. 546.

³¹ S Schmitz and A Michaelowa, ‘Kyoto Institutions: Baselines and Bargaining Under Joint Implementation’, *Environmental Politics*, vol. 14, 2005, p. 88.

³² Strand and Rosendahl, *op. cit.*, p. 546.

³³ Article 12, paragraph 3.

³⁴ Michaelowa, *op. cit.*, p. 248.

³⁵ S Shin, ‘The domestic side of the clean development mechanism: the case of China’, *Environmental Politics*, vol. 19, 2010, p. 242.

³⁶ *Ibid.*

³⁷ *Ibid.*

function is performed by a body within the Department of Climate Change and Energy Efficiency known as Australia's National Authority for the CDM and JI.³⁸

The Executive Board has been given a substantial amount of delegated authority from the parties, and whilst its decisions are not *prima facie* binding on States and non-State participants, they are treated as *de facto* binding.³⁹ In essence, it acts as an international administrative agency. The Executive Board has assumed a large number of responsibilities and its decisions 'have a direct bearing on the interests of non-State entities, such as private banks or companies or entrepreneurs'⁴⁰ as well as local communities, and other affected interests such as NGOs. Despite non-State parties having their interests affected by decisions of the Executive Board, there is no recourse for them to have the decision reviewed or appealed; in essence, the rule of law is absent from the institution as there is no due process and a fundamental lack of legal recourse for affected individuals.⁴¹ This has led to 'mounting complaints about the lack of transparency in the Board's decision-making and the lack of predictability'.⁴² Currently, only State parties who are affected by decisions of the Executive Board can seek redress through the non-compliance mechanism against another State and this evidently excludes a significant amount of individuals who are affected by the decisions.⁴³ Indeed, the Executive Board is not even accountable through the current non-compliance mechanism. This must be addressed in a new treaty and it is with that recognition, in 2011 at Durban, negotiations began on an appeals mechanism.⁴⁴

An appeals or grievances mechanism should be developed for the second commitment period, and this should become entrenched in a new, binding international agreement that provides affected individuals standing to have the decision of the Executive Board reviewed.⁴⁵ The Panel also picked up this criticism of the current regime, and specifically recommended that this problem be addressed. It is important in any administrative appeals setting that there be a method for excluding claims that are vexatious or frivolous and therefore confine appeals to only those matters of procedure or substance.⁴⁶ The powers of review should include confirming, reversing, remanding back to the Executive Board for review, or modifying the decision, and should be allowed on both positive and negative rulings.⁴⁷ Moreover, the review institution should have the authority to declare a decision of the Executive Board as *ultra vires* when it has clearly exceeded its authority. It would be crucial that the review body be independent of the Executive Board so as to uphold the rule of law and be procedurally fair. One contentious issue to be decided by the Parties when drafting the mechanism is who should have standing? For example, should NGOs have standing? Voigi argues that standing should be granted to those who can establish that they are or would likely be affected by a CDM project or a sufficient interest in the environmental integrity of the decision.⁴⁸ This would effectively

³⁸ Department of Climate Change and Energy Efficiency, 'National Authority for the CDM and JI', September 2012, viewed on 15/10/2012 at 1. <<http://www.climatechange.gov.au/nationalauthority.aspx>>.

³⁹ C Voigi, 'Responsibility for the Environmental Integrity of the CDM: Judicial Review of Executive Board Decisions', in *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond*, Freestone, D and Streck, C (eds), Oxford University Press, Oxford, 2009, p. 284.

⁴⁰ Ibid.

⁴¹ Ibid, p.283.

⁴² Figueres and Streck, *op. cit.*, p. 567.

⁴³ Voigi, *op. cit.*, p. 283.

⁴⁴ High-Level Panel on the CDM Policy Dialogue, *op. cit.*, p. 59.

⁴⁵ Figueres and Streck, *op. cit.*, p. 575.

⁴⁶ High-Level Panel on the CDM Policy Dialogue, *op. cit.*, p. 60.

⁴⁷ Ibid.

⁴⁸ Voigi, *op. cit.*, p. 288.

grant standing to NGOs, business parties, and affected individuals – it is very broad in scope. Despite this, it is a good starting point and should be considered as feasible as it would ensure accountability of Executive Board decisions which will ultimately uphold the environmental integrity of the CDM mechanism.

Regional Distribution

The regional distribution of CDM projects is a cause for international concern; the vast majority of projects have been hosted in China and India which comprise two-thirds of the generated CERs.⁴⁹ Moreover, a recent study found that more than 75 percent of registered projects have been hosted in China, India, Brazil and Mexico, whilst sub-Saharan Africa collectively has only hosted two percent.⁵⁰ Therefore, it has become clear that CDM has had the most impact and investment in the 'emerging markets'⁵¹ and this seems to be in contrast to the stated objective of CDM to encourage sustainable development as many developing nations are clearly missing out on the sustainable investments.

To correct this imbalance, a possible solution would be to make the 'emerging markets' ineligible to host CDM projects.⁵² However, this might seem a bit extreme and is unlikely to be agreed to. After all, it is the 'emerging markets' that have high levels of greenhouse gas emissions, and hence why it is important for mitigation in these nations. There has been a move in recent time to create a mandatory 10 percent requirement of CERs to be earned from least-developed countries.⁵³ This has not, as of yet, been adopted, but it could provide a useful starting point for negotiations. A more proactive solution could be for the Executive Board to prioritise CDM projects in underrepresented regions and for institutions such as the newly established Green Climate Fund to be encouraged, and perhaps even obliged to invest a substantial proportion of its funding to projects in least developed countries.

Part II -Durban Platform and the Impact on the CDM

The CDM is due to expire at the end of 2012, as it is a part of the Kyoto Protocol. However, with a small minority of countries, including the European Union and Australia indicating that they will sign onto a second commitment period it is likely that the CDM will continue in some form at least until 2017 (it is still being debated whether the second commitment period will cease in 2017 or 2020). Indeed Australia has made its consent to the second commitment period conditional on the CDM being continued, ensuring Australia's access to this flexible mechanism.⁵⁴ Despite this, there are

⁴⁹ High-Level Panel on the CDM Policy Dialogue, *op. cit.*, p. 50.

⁵⁰ A Winkleman and M Moore, 'Explaining the differential distribution of Clean Development Mechanism projects across host countries', *Energy Policy*, vol. 39, 2011, p. 1132.

⁵¹ *Ibid*, p. 1133.

⁵² Bakker, *op. cit.*, p. 754.

⁵³ UNFCCC, 'Ad Hoc Working Group on further commitments for Annex I parties under the Kyoto Protocol, Draft proposal by the Chair to facilitate preparations for negotiations. Fifteenth session, Cancun,' 5 November 2010. viewed on 15/10/2012. <<http://unfccc.int/resource/docs/2010/awg15/eng/17.pdf>>

⁵⁴ G Combet, AM MP, Minister for Climate Change and Energy Efficiency, 'Australia Ready to Join Kyoto Second Commitment Period', 9 November 2012, p. 1. <http://www.climatechange.gov.au/~media/Files/minister/combet/2012/media/November/Combet-MediaRelease-302-12.pdf> (Accessed on 14 November 2012).

many nations, including Japan, New Zealand, Russia and Canada, that have decided to opt out of Kyoto, deciding not to make an additional commitment.⁵⁵ This raises substantial questions about whether non-Kyoto parties can participate in Kyoto mechanisms post-2012, and this combined with a serious lack of global emission reduction ambition, has seen the CERs market plummet by 85 per cent in the last year.⁵⁶ This could be signalling the death of the CDM. Nevertheless, the second commitment period, established in Durban in 2011 has given a 'temporary lifeline to the CDM, but its longer-term future is far from certain'.⁵⁷

The Durban Platform established the 'Working Group on the Durban Platform for Enhanced Action' and obliges it to 'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties'.⁵⁸ This decision effectively commits 'all Parties' to work towards an internationally binding agreement to be agreed to by 2015, and in force by 2020. Arguably this has "revolutionize[d]" the landscape of climate negotiations⁵⁹ by equally obliging both developed and developing nations to commit to binding obligations, including emission targets, in a new, international agreement. However, some argue that this might be over-stating the impact of the Durban Platform. After all, in their opinion, 'Kyoto could have been considered "applicable" to all countries, except that the treaty which applied to all, asked developed countries to make emission reductions, but did not ask developing countries to do so'.⁶⁰ If this is the political reality of the Durban Platform decision, then it bodes extremely poorly for the world's ability to combat climate change and stabilise global temperatures.

Indeed, this does not seem to be the reality; there is a global trend towards emission caps and reduction targets. Through the Copenhagen Accord, both developed and developing nations were given the opportunity to set emission targets, albeit these targets are voluntary.⁶¹ Through this process, both China and India assumed voluntary emission reduction targets; China pledged to endeavour to 'lower its carbon dioxide emissions per unit of GDP by 40-45% by 2020 compared to the 2005 level'⁶² and India pledged to reduce 'emissions intensity of its GDP by 20-25% by 2020 in comparison to the 2005 level'.⁶³ Whilst these voluntary pledges under the Copenhagen Accord can be strongly criticised for being 'soft' law, they represent a trend within the international community to assume emission targets. It is from this perspective that the Durban Platform decision should be viewed, and it therefore indicates a likelihood that the new, international agreement that is being drafted through this process should be equally obliging on both developed and developing nations.

⁵⁵ D Motaal, 'Durban: A Success or Failure?', *Environmental Policy and Law*, vol. 42, 2012, p. 86.

⁵⁶ P Narayanan and M Carr, 'Clean Development Mechanism Set for Revamp Next Year', *Bloomberg News*, 2 November 2012 <<http://www.businessweek.com/news/2012-10-30/clean-development-mechanism-set-for-revamps-in-2013-unfccc-says>> (Accessed on 3 November 2012).

⁵⁷ B Stephan, and M Paterson, 'The politics of carbon markets: an introduction', *Environmental Politics*, vol. 21 2012 at 546.

⁵⁸ Decision -/CP.17, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, Advance unedited edition, paragraph 2.

⁵⁹ Motaal, *op. cit.*, p. 86.

⁶⁰ Ibid.

⁶¹ Decision 2/CP.15 'Copenhagen Accord', FCCC/CP/2009/11/Add.1, 30 March 2010.

⁶² S Wei, 'Letter including autonomous domestic mitigation actions', 28 January 2010 <http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/chinacphaccord_app2.pdf> (accessed on 20 October 2012).

⁶³ R Rashmi, 'Letter including India's domestic mitigation action', 30 January 2010 <http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/indiacphaccord_app2.pdf> (accessed on 20 October 2012).

In this sense, if both developed and developing nations assume binding targets, the CDM which operates as an offsetting mechanism will become obsolete within that context.

However, this would be a significant loss to the international effort to combat climate change, as it has been extremely useful in delivering climate finance and technology transfer to developing nations. As such, these aspects must be maintained, and indeed the mechanism itself needs to remain both in the second commitment period and in a new, international agreement. Nevertheless, the CDM will likely not remain effective in its current form as it is an offsetting mechanism, and this is especially the case if Parties have assumed binding targets. It is for these reason that JI must be examined, as it may provide a way to maintain the positive impacts of the CDM into a future agreement where offsetting is obsolete.

Part III – Joint Implementation

Joint Implementation ('JI') has been characterised as 'mimicking its much more popular sibling, the CDM'.⁶⁴ This is inaccurate. Article six of the Kyoto Protocol, as expanded under the Marrakesh Accord, establishes the basis for JI. Like CDM, JI is based on the principle of economic efficiency, providing for the emission reductions to occur where it is cheapest to do so.⁶⁵ JI allows an Annex I party to invest in a project that reduces greenhouse gas emissions in another Annex I country, and then sell the difference between the baseline emissions and the project emission.⁶⁶ Inherent in this is the need for the hosting government to approve the project.⁶⁷ In a nutshell, the hosting government converts its AAUs (assigned amount units) into ERUs (emission reduction units) and transfers them to the registry account of the investing country or authorised private entity.⁶⁸

JI is similar to CDM in that a project must produce an emission reduction above that which would have ordinarily occurred.⁶⁹ However, JI does not have the same level of administrative scrutiny as CDM projects have and this is based on the substantial ground that all Annex I countries operate under an emission cap; that is, through JI emissions are traded, whilst in CDM the emissions are offset. Therefore, if a host country were to assign more ERUs to an investing country, it would lose valuable AAUs that it would likely need to meet its commitment under the Protocol.⁷⁰ As such, JI is significantly more effective than CDM – it reduces greenhouse gas emissions in actual terms.

There are two different tracks for JI. Track 1 allows host countries to determine and verify the projects they are hosting independently of an external, impartial institution. This allows the host country to determine the criteria for eligibility as well as the rules for verifying the emission reductions.⁷¹ Due to this, the transaction costs should be significantly lower than CDM projects.⁷² Essentially, a Track 1 JI project provides a great deal of freedom between the parties and allows for

⁶⁴ Hoogzaak and Streck, *op. cit.*, p. 177.

⁶⁵ *Ibid.*, p. 176.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 177.

⁶⁹ Schmitz and Michaelowa, *op. cit.*, p.86.

⁷⁰ A Hobley and C Roberts, 'Joint Implementation Transactions: An Overview', in *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond*, Freestone, D and Streck, C (eds), Oxford University Press, Oxford, 2009, p. 195.

⁷¹ Hoogzaak and Streck, *op. cit.*, p. 178.

⁷² *Ibid.*, p. 179.

the parties to negotiate the agreement in a similar way to bilateral trade negotiations.⁷³ Track 2 is more similar to the bureaucratic CDM, and applies if the parties voluntarily chose it, or the host country does not fulfil the reporting requirement.⁷⁴ Under Track 2, the Joint Implementation Supervisory Committee ('JISC') oversees the agreement in a similar way to the Executive Board. Moreover, it requires that the ERUs are certified by an independent entity.⁷⁵ Inherent in this approach is that there is 'very little leeway for countries to negotiate the amount of emission credits'⁷⁶ and this may be appealing to some parties. Currently, Track 2 has been more utilised than Track 1, although this could likely change in the future.⁷⁷

Part IV – The Future of JI and CDM in a Future International Agreement

By 2015, through the Durban Platform process, a new international agreement with 'legal force' over all parties will hopefully be agreed to, and it is intended that this agreement will be effective from 2020. This decision obliges all parties to reduce emissions, and in this context an offsetting mechanism will be ineffective and obsolete. The trend for voluntary emission targets should be strengthened in a future agreement, so that these become binding obligations. If a global emission cap is established that binds most, if not all major emitters, JI could and should be utilised as a mechanism to deliver the sustainable development in the same manner that CDM has. This would address the substantial criticism that CDM allows actual emissions to increase as Annex I countries are able to offset emissions. Indeed, as Hoogzaak and Streck point out, the JI mechanism 'would allow the rolling over of CDM projects from an uncapped into a capped environment'.⁷⁸

It is important, in a new international agreement that the direction all major emitters are moving in is to assume binding, rather than voluntary emission targets. China and India, as well as a large number of developing nations have already agreed to voluntary emission reduction targets. However, these would be more effective if they became binding. It is in this context, that a JI mechanism or a similar mechanism to JI would become vitally important in incentivising private investment in greenhouse gas abatement projects.⁷⁹ However, this JI or JI-like mechanism address the concerns raised in regards to CDM above.

There is a possibility that in the interests of equity, and under the guiding principle of common but differentiated responsibilities and respective capabilities, as provided for in the UNFCCC, that a new agreement could address the concerns of uneven distribution of CDM projects. If the 'emerging markets' assume binding targets, they would likely become ineligible for CDM projects but eligible for JI projects. There is a possibility, and perhaps a strong argument for, excluding least developed countries such as sub-Saharan African countries from binding emission targets. In this context, a CDM-like mechanism could be maintained to stimulate sustainable development in these poor nations and allow them to remain an integral part of the solution. Therefore, whilst there is scope to keep CDM in place for the least developed countries, JI provides a path forward for the emerging

⁷³ Schmitz and Michaelowa, *op. cit.*, p.85.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Hoogzaak and Streck, *op. cit.*, p. 179.

⁷⁸ Ibid, p. 186.

⁷⁹ Ibid.

markets that must take on binding emission targets. JI has been undervalued; it provides the solution that the international community has been looking for as to how to reform CDM in the context of a binding, global emission cap.

Recommendations

Through the Durban process a new agreement is being negotiated that will have 'legal force' over 'all parties', and as this will supersede the Kyoto Protocol, the future of the mechanisms are in doubt. With this in mind, it is necessary that a new agreement address the following;

- In the interests of economic efficiency, flexible mechanisms should be continued into a new agreement and the second Kyoto commitment period; JI should be utilised as an integral feature of these climate regimes. Through this, private investment will be maintained in developing nations who have assumed binding targets and this will support greenhouse gas abatement projects that result in actual global emission reductions.
- The second Kyoto commitment period and a new climate agreement, should explicitly define the criteria for both sustainability and additionality. This could be delegated to an institution such as the Executive Board or the JISC, provided that the institution supervises the implementation of the project, and makes the criteria clear and publicly accessible.
- Affected individuals must have access to due process and this means having the ability to have the decision of that supervising institution reviewed on grounds of procedure or substance, and for both positive and negative rulings. Standing should be broad enough that NGOs and those with affected interests are able to have decision reviewed. Establishing a strong appeals or grievances mechanism, with wide standing, will ensure the environmental integrity of the projects.

Conclusion

There is consensus amongst the international community about the pressing need to address climate change and inherent in this is the drafting and implementation of a new, legally binding agreement. Moreover, the international community that have committed to the continuance of Kyoto, through a second commitment period, are determining the rules for that agreement at present. The flexible mechanisms within Kyoto are under immense scrutiny, amidst recognition that there are areas that need to be reformed. The CDM is the only mechanism that has included developing countries in the solution of climate change; it provides valuable climate finance to these nations, but allows developed, Annex I countries to offset their emissions. This has led to an increase in actual greenhouse gas emissions in real terms. Moreover, the governance of the CDM is insufficient; decisions of the Executive Board are not appealable, and despite private individuals being affected by decisions, they have no legal recourse. This needs to be addressed, both in the interim within the second Kyoto commitment period, and in a future climate agreement so as to accord affected individuals standing to have their rights enforced. In addition, the concepts of additionality and sustainability need to be defined in more entrenched, specific ways. JI projects, unlike CDM projects, do result in real emission reductions; it is not an offsetting mechanism, rather it is a trading mechanism. JI should be endorsed and utilised in a future agreement as it could incentivise investment in developing nations which have assumed mandatory emission caps. If the global community take on board the criticisms of CDM, and utilise JI in a manner that respects the

rule of law, provides access to due process for affected individuals, and meets the criticisms of sustainability, additionality and regional distribution, the international community would be on track to stabilise temperatures and reduce emissions. This must be a priority at the eighteenth COP in Qatar.

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