

Legal Protection and (the Lack of) Private Party Remedies in International Carbon Emission Reduction Projects

By Sander Simonetti*

The Kyoto Protocol has not only created carbon emission reduction obligations for industrialised countries, but also opportunities for the private sector to participate in its 'flexible mechanisms'. Although the outcome of the Copenhagen Climate Change Conference may not have been what the carbon market was hoping for, market parties are still hopeful that a successor treaty to the Kyoto Protocol will include similar market mechanisms. One of the current Kyoto mechanisms is 'joint implementation', which allows private legal entities to engage in international emission reduction projects that generate tradable emission rights. Private parties can act as verifiers of the emission reductions achieved by such projects, or as buyers of the generated emission rights (such buyers may include utilities, energy and mining companies, as well as banks, traders and private investors). During the joint implementation project cycle, these private parties can become involved in several types of disputes with various counterparties. This article explores the legal remedies available to such private parties. Long-term private sector investment and contribution to the objectives of the Kyoto Protocol are more likely to occur in a stable regulatory environment, which requires a certain degree of legal protection, including proper access to justice in case disputes arise. This should also be taken into account in the post-Kyoto legal framework.

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Introduction

The Kyoto Protocol¹ to the United Nations Framework Convention on Climate Change (UNFCCC)² has introduced the first ever global emissions trading scheme. Parties included in Annex I to the UNFCCC with greenhouse gas emission limitation and reduction commitments inscribed in Annex B to the Kyoto Protocol (Annex I countries) may only emit greenhouse gases into the atmosphere if they have sufficient emission rights to 'justify' (or set-off) their emissions retroactively.³ At the end of the relevant Kyoto commitment period, each country must retire (surrender) a number of emission rights equivalent to the greenhouse gas emissions that have taken place in its territory during that period, to demonstrate its compliance with the Kyoto commitments.⁴ Annex I countries can achieve their commitments not only by taking domestic emission reduction measures, but also by making use of the three flexible mechanisms (or 'flex mechs') of the Kyoto Protocol:

1. international emissions trading;
2. the clean development mechanism; and
3. joint implementation.

International emissions trading

There are four types of tradable emission rights under the Kyoto Protocol: assigned amount units (AAUs); removal units (RMUs); certified emission reductions (CERs); and emission reduction units (ERUs), each representing one metric tonne of CO₂ equivalent.⁵ These emission rights are held in electronic registries. The mechanism of international emissions trading (IET)⁶ governs the international transfer of emission rights between Annex I countries, that is from an account in the national registry of country A to

1 Signed on 11 December 1997 and entered into force on 16 February 2005 (available at <http://unfccc.int/resource/docs/convkp/kpeng.html>).

2 Signed in 1992 and entered into force on 21 March 1994 (available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>).

3 Six greenhouse gases fall within the scope of the Kyoto Protocol: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF₆).

4 Paragraph 13 of the Modalities for accounting of assigned amounts under Art 7, para 4, of the Kyoto Protocol (Decision 13/CMP.1).

5 The concept of global warming potential has been introduced in order to make the six greenhouse gases of the Kyoto Protocol compatible. Each gas has a certain rating based on its power to accelerate global warming. The rating index has been provided by the Intergovernmental Panel on Climate Change (IPCC).

6 Article 17 of the Kyoto Protocol.

an account in the national registry of country B.⁷ Annex I countries may use IET to acquire additional emission rights or dispose of excess emission rights.⁸

Clean development mechanism

CDM is a baseline-and-credit mechanism, which allows Annex I countries to earn emission rights by participating in emission reduction projects in ‘developing countries’, that is non-Annex I countries (which do not have greenhouse gas emission limitation and reduction commitments under the Kyoto Protocol themselves).⁹ The emission rights generated by CDM projects are called CERs. At the start of the relevant CDM project, a baseline is established by calculating the amount of emissions that would occur in the absence of the project (the business-as-usual scenario). The difference between this baseline and the actual (lower) emissions as a result of the project is converted into CERs. The CDM project cycle is supervised and administered by special UNFCCC bodies, the CDM Executive Board and the UNFCCC Secretariat.

Joint implementation

The mechanism of JI¹⁰ is a baseline-and-credit system similar to CDM. However, whereas CDM projects take place in non-Annex I countries, JI projects must be developed in Annex I countries. JI therefore allows an Annex I country to earn emission rights by participating in an emission reduction project in another Annex I country. The emission rights generated by JI projects are called ERUs.¹¹

7 R de Witt Wijnen and S Simonetti, ‘International Emissions Trading and Green Investment Schemes’, in D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (Oxford 2009), p 157 et seq.

8 The Kyoto Protocol has introduced a cap-and-trade scheme. At the beginning of the relevant commitment period, each Annex I country is allocated an emissions cap (assigned amount) in the form of a limited amount of AAUs. The greenhouse gas emissions in such country’s territory during the commitment period may not exceed its assigned amount, unless additional emission rights (AAUs, RMUs, CERs or ERUs) have been acquired through the use of the flexible mechanisms. Countries that emit less than their cap may sell their surplus emission rights and countries whose emissions exceed their cap must buy additional emission rights.

9 Article 12 of the Kyoto Protocol; further elaborated in the Modalities and procedures for a clean development mechanism (Decision 3/CMP.1).

10 Article 6 of the Kyoto Protocol.

11 Unlike CDM, where the generated CERs are newly created emission rights, JI uses the Annex I country’s AAUs as underlying currency. When issuing ERUs, the host country of the JI project actually converts a portion of its AAUs into ERUs. Therefore, JI projects usually (but not necessarily) take place in countries with surplus AAUs. These are mostly countries with economies in transition (in Central and Eastern Europe). As AAUs are allocated to countries on the basis of historic emissions in a baseline year (which is 1990 for most countries) and these countries’ industries have changed dramatically since, they now have large numbers of surplus AAUs (which are not needed to set off their own emissions).

Although the Kyoto Protocol is a treaty between sovereign states, it also creates an opportunity for private parties to play a role in emission reduction projects and carbon emissions trading. The idea is that market mechanisms, and private sector investment and innovation, can help achieve the global emission reduction goals and pave the way to a low-carbon economy in both developed and developing countries.¹² Annex I countries may therefore authorise private parties (legal entities) to participate in the flex mechs; that is, allow them to trade emission rights under IET, and engage in CDM and JI projects to earn CERs and ERUs, respectively. Private parties may use these emission rights either for trading purposes (for example sell them to an Annex I country that needs additional emission rights for its compliance under the Kyoto Protocol) or for their own compliance under national or regional emission trading schemes, such as the European Union Emissions Trading Scheme (EU ETS).¹³ In addition, private parties can act as verifiers of emission reduction projects under CDM and JI.

When participating in the flexible mechanisms of the Kyoto Protocol, and especially in CDM and JI projects, private parties can encounter various types of disputes. Such disputes may involve countries (parties to the Kyoto Protocol), or other private parties. In addition, private parties in CDM and JI are faced with certain special UNFCCC bodies. Under the Kyoto Protocol and the UNFCCC legal framework, these bodies have the authority to make decisions that directly affect the rights and obligations of the participating private parties. However, when a private party disagrees with their decisions, the Kyoto Protocol and the UNFCCC do not seem to provide such party with adequate remedies. This would be contrary to the principle of access to justice, which is a fundamental right of private parties.¹⁴

12 K Kulovesi, 'The Private Sector and the Implementation of the Kyoto Protocol: Experiences, Challenges and Prospects' (2007) 16 *Review of European Community and International Environmental Law* 146.

13 The EU ETS basically mirrors the state-level Kyoto cap-and-trade system to the industry. Pursuant to the EU ETS Directive (2003/87/EC), individual greenhouse gas emitting installations are allocated an emissions cap and must surrender emission rights (so-called EU Allowances or EUAs) to justify their emissions. Operators that emit less than their cap may sell their allocated emission rights to operators with excess emissions. In addition, the Linking Directive (2004/101/EC) connects the EU ETS to the flexible mechanisms of the Kyoto Protocol by providing that Member States may also allow operators to use CERs and ERUs for compliance under the EU ETS (up to a certain maximum percentage).

14 See, eg, Art 10 of the Universal Declaration of Human Rights and Art 6 of the European Convention on Human Rights.

The legal protection of private parties participating in Kyoto projects has attracted considerable attention in the context of CDM.¹⁵ However, to date there has not been much attention for the remedies of private parties active in JI.¹⁶ This may be owing to the fact that, compared to CDM, JI projects are relatively recent.¹⁷ However, although the volume of JI projects is overall smaller than that of CDM, there is a serious market for ERUs and numerous private parties are currently active in JI. This justifies a closer look at their legal protection. Moreover, the Parties to the Kyoto Protocol have recently recognised a potential increase in the number of JI projects.¹⁸

This article will explore the possible disputes that private parties engaging in JI may become involved in and assess the remedies available to such private parties. But first, the main characteristics of the JI legal framework and project cycle are set out.

Joint implementation

Article 6 of the Kyoto Protocol provides that Annex I countries can engage in activities to reduce emissions jointly, by transferring or acquiring ERUs from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases. The rules for JI have been further elaborated in guidelines.

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- 15 See, inter alia, P R Kalas and A Herwig, 'Dispute Resolution under the Kyoto Protocol' (2000) 27 *Ecology Law Quarterly* 119 et seq; C Streck and J Lin, 'Making Markets work: A Review of CDM Performance and the Need for Reform' (2008) 19 *European Journal of International Law* 436; E E Meijer, 'The International Institutions of the Clean Development Mechanisms Brought before National Courts: Limiting Jurisdictional Immunity to Achieve Access to Justice' (2007) 39 *New York University School of Law Journal on International Law and Politics* 873–928; and P Nedergaard and H J Stehr (Copenhagen Business School), *A comparative analysis of the Clean Development Mechanism and other mechanisms comparable in terms of main objectives functions*, report to the International Emissions Trading Association (IETA) dated 29 April 2008, para 8.3.
- 16 cf D Ratliff, 'Arbitration in Flexible-Mechanism Contracts', in Freestone and Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (Oxford, 2005), p 384.
- 17 CDM had a 'jump start' as it was provided in Art 12(10) of the Kyoto Protocol that CERs obtained during the period from the year 2000 can be used for compliance. ERUs, however, can only be issued for a crediting period starting after the beginning of the year 2008 (Decision 9/CMP.1, para 5).
- 18 See the recitals to the Copenhagen CMP.5 Decision 'Guidance on the implementation of article 6 of the Kyoto Protocol'. For a list of JI projects, see http://ji.unfccc.int/JI_Projects/ProjectInfo.html.

JI regulatory framework

At the seventh Conference of the Parties (COP) of the UNFCCC in Marrakesh in 2001, the draft guidelines for JI were adopted, along with those for CDM and IET. These are generally referred to as the Marrakesh Accords.¹⁹ After entry into force of the Kyoto Protocol, further decisions were taken at the first COP serving as the Meeting of the Parties to the Kyoto Protocol (CMP) in Montreal.²⁰ The CMP adopted the JI Guidelines,²¹ confirming and giving effect to actions taken pursuant to the draft JI guidelines, as well as further procedures for implementing JI and establishing the Joint Implementation Supervisory Committee (JISC), thereby setting out modalities for its role in the verification of emissions reductions and its first programme of work.²² At its first meeting, the JISC adopted draft rules of procedure.²³ These were formally adopted by the CMP at its second session and are updated regularly.²⁴ The full text of all decisions of the JISC is made publicly available²⁵ on the JI website of the UNFCCC.²⁶ The JISC is supported by the UNFCCC Secretariat.²⁷

PRIVATE PARTY PARTICIPATION

As in the other flexible mechanisms, IET and CDM, private parties may participate in JI.²⁸ Paragraph 3 of Article 6 of the Kyoto Protocol provides that a party included in Annex I may authorise legal entities to participate, under its responsibility, in actions leading to the generation, transfer or acquisition of ERUs.²⁹ Such authorisation is given by means of a letter of approval (LoA). Private parties wishing to participate in a JI project therefore have to apply for an LoA under applicable national rules and procedures of

19 FCCC/CP/2001/13/Add 2 Decision 16/CP.7.

20 FCCC/KP/CMP/2005/8/Add 2 (30 March 2006).

21 Decision 9/CMP.1, para 2, and the Annex to Decision 9/CMP.1 (the 'JI Guidelines').

22 Decision 10/CMP.1.

23 JISC 1 (2–3 February 2006), Rules of Procedure of the Joint Implementation Supervisory Committee (available from <http://ji.unfccc.int/Ref/Documents/Rules.pdf>).

24 Decision 9/CMP.1. Most recent version: Amex I to FCCC/KP/CMP/2009/18, as adopted by CMP.5.

25 Pursuant to para 16 of the JI Guidelines.

26 At http://ji.unfccc.int/Sup_Committee/Meetings/index.html.

27 Paragraph 19 of the JI Guidelines.

28 For CDM, this is provided in Art 12(9) of the Kyoto Protocol. Private party participation in IET is provided for in the IET Modalities (Decision 11/CMP.1).

29 See also para 3 of the Modalities of communications of project participants with the Joint Implementation Supervisory Committee (Annex 4 to JISC 8), which provides that a project participant may be either a party involved in the JI project or a legal entity authorised by a party involved to participate in the JI project.

the relevant Annex I country.³⁰ This applies to both the project developer (the seller of the ERUs) and the first recipient of the ERUs (the buyer).³¹ If the project developer is a private party, it has to obtain an LoA from the host country of the JI project. And if the recipient of the ERUs is a private party, it has to obtain an LoA from another Annex I country (where it wishes to receive the ERUs). The JI Guidelines make no distinction as to the country of incorporation or domicile of the legal entity. Therefore, an Annex I country may also authorise a private party not incorporated or having its domicile in such country's jurisdiction. An Annex I country that authorises legal entities to participate in JI projects remains responsible for the fulfilment of its obligations under the Kyoto Protocol and must ensure that such participation is consistent with the JI Guidelines.³²

A two-track mechanism

Pursuant to the JI Guidelines, there are two 'tracks' for generating ERUs, which differ in their respective procedures for the verification of the greenhouse gas emission reductions generated by the relevant JI project. Under track 1, project monitoring and verification take place under the responsibility of the host country, whereas under track 2, verification is carried out by a professional independent third-party verifier, hired by the project participants and supervised by a special UN body, the JISC. Track 1 is also known as the 'fast track', because standards are more flexible, external third-party determination is not required and baseline and monitoring procedures are set by the host country.³³ However, the eligibility threshold for countries is higher in track 1 than in track 2.

ELIGIBILITY

Paragraph 21 of the JI Guidelines provides that an Annex I country is eligible to transfer and/or acquire ERUs issued in accordance with the relevant provisions, if it is in compliance with the following eligibility requirements:

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- 30 Actually, the country's LoA contains both its *approval* (ie, confirmation that the country's participation in the relevant JI project is voluntary) and its *authorisation* (ie, consent to the participation of the private entity in such project). Cf R de Witt Wijnen, 'A Better Letter', *Point Carbon CDM Monitor*, March 2008, p 36.
- 31 Once the ERUs have been issued and transferred to the first recipient (ie to an account in the national registry of an Annex I country other than the host country), they can subsequently be traded on the secondary market. If such secondary trades lead to international transfers of ERUs, these are effected under the mechanism of IET (Art 17 of the Kyoto Protocol) and therefore do not require an LoA in respect of the JI project from which they originate.
- 32 Paragraph 29 of the JI Guidelines. This paragraph also provides that legal entities may only transfer or acquire ERUs if the authorising party is eligible to do so at that time.
- 33 Ratliff, note 16 above, at p 57, para 1.2.

1. it is a party to the Kyoto Protocol;
2. its assigned amount³⁴ has been calculated and recorded;³⁵
3. it has a national system in place³⁶ for estimating anthropogenic emissions by sources and anthropogenic removals of greenhouse gases by sinks;
4. it has a national registry in place;³⁷
5. it has annually submitted its most recent required inventory;³⁸ and
6. it has accurate procedures in place for accounting of its assigned amount and submission of information.³⁹

The assessment and monitoring of the eligibility requirements are assigned to the enforcement branch of the Compliance Committee of the UNFCCC.⁴⁰ If a host country is considered to fulfil all of the eligibility requirements, the JI track 1 procedure may be applied. Where a host country does not meet all of the eligibility requirements, track 2 may be applied. However, the host country may only issue and transfer ERUs on meeting at least the requirements mentioned in paragraphs 1, 2 and 4 above.⁴¹ The UNFCCC Secretariat maintains a publicly accessible list⁴² of parties that meet the eligibility requirements and parties whose eligibility has been suspended.⁴³ The eligibility status of parties is regularly updated.

To participate in JI, a country must inform the UNFCCC Secretariat of its national guidelines and procedures for approving JI projects and of its designated focal point (DFP),⁴⁴ that is the office, ministry, or other official entity appointed by that country to give national approval to projects proposed under JI.⁴⁵

34 Pursuant to Art 3(7) and (8) of the Kyoto Protocol.

35 In accordance with Decision 13/CMP.1.

36 In accordance with Art 5(1) of the Kyoto Protocol.

37 In accordance with Art 7(4) of the Kyoto Protocol.

38 In accordance with Art 5(2) and Art 7(1) of the Kyoto Protocol.

39 The party should submit supplementary information on its assigned amount in accordance with Art 7(1) of the Kyoto Protocol and make any additions to, and subtractions from, its assigned amount pursuant to Art 3(7) and (8) of the Kyoto Protocol, including for the activities under Art 3(3) and (4) of the Kyoto Protocol, in accordance with Art 7(4) of the Kyoto Protocol.

40 Paragraph 4(c) of the procedures and mechanisms relating to compliance under the Kyoto Protocol (Decision 27/CMP.1).

41 Paragraph 24 of the JI Guidelines.

42 Pursuant to para 27 of the JI Guidelines. This list is available on the UNFCCC website (see http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/3785.php).

43 A party may be suspended in accordance with relevant provisions contained in Decision 27/CMP.1.

44 Similar to the country's designated national authority (DNA) for CDM projects.

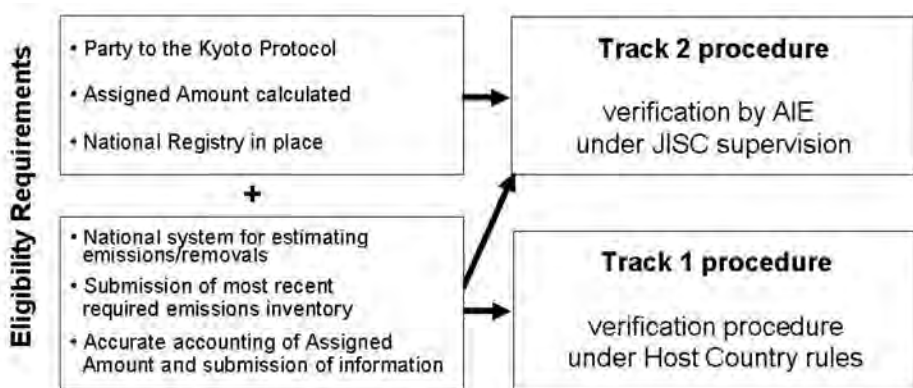
45 Paragraph 20 of the JI Guidelines.

TRACK 1

Under track 1, the host country may verify emission reductions itself,⁴⁶ that is verification can be carried out by a public or private entity under the host country's national JI rules.⁴⁷ On such verification, the host country may issue the appropriate quantity of ERUs.⁴⁸

Even if the host country meets all requirements for track 1, it may still elect to use the verification procedure under track 2.⁴⁹ For (private) project participants, track 2 may be more attractive because the risk to the host country is lower. Furthermore, host countries that might qualify for track 1 may still prefer to try to attract track 2 projects and not incur the costs of implementing measures for meeting track 1 eligibility, as they may expect that the number of track 1 projects they would be hosting will be relatively small.⁵⁰

Figure 1: Eligibility requirements for JI track 1 and track 2



TRACK 2

Under track 2, project determination and verification of emission reductions are carried out by an independent entity under the supervision of the JISC. After verification, the host country⁵¹ may issue and transfer the resulting ERUs.⁵²

46 Paragraph 23 of the JI Guidelines. The UNFCCC JI website contains an overview of both track 1 and track 2 projects.

47 Of course, such national JI rules may provide that verification must be carried out by a third-party verifier (as in track 2). However, this is not required under the JI Guidelines.

48 In accordance with the relevant provisions of Decision 13/CMP.1 (Modalities for the accounting of assigned amounts under Art 7, para 4, of the Kyoto Protocol).

49 Paragraph 25 of the JI Guidelines.

50 Ratliff, note 16 above, at p 58.

51 Subject to its meeting the requirements under 1, 2 and 4.

52 Pursuant to para 41 of the JI Guidelines, any provisions relating to the commitment period reserve or other limitations to transfers of emission rights under Art 17 of the Kyoto Protocol do not apply to transfers by a country of ERUs issued into its national registry that were verified in accordance with the track 2 verification procedure under the supervision of the JISC.

JOINT IMPLEMENTATION SUPERVISORY COMMITTEE

The main functions of the JISC are (1) accrediting independent entities, and (2) supervising the determination of projects and verification of ERUs by these accredited independent entities (AIEs).⁵³ The JISC can draw on external expertise to properly operate its functions mandated by the CMP, at least with regard to accreditation and project baseline and monitoring issues.⁵⁴ For the former, the JISC has established the JI Accreditation Panel, while for the latter, a roster of experts is available from which the JISC can select experts, in particular for the appraisal/review process. The JI Accreditation Panel supports the JISC in accrediting independent entities by providing input and recommendations to the JISC as this task requires experience in accreditation and case-by-case in-depth assessment. The JI Accreditation Panel establishes a joint implementation assessment team on a case-by-case basis, by drawing members from the roster of experts.

As to the composition of the JISC, the JI Guidelines provide that the JISC must comprise ten members from parties to the Kyoto Protocol, including:

1. three members from Annex I countries that are undergoing the process of transition to a market economy;
2. three members from other Annex I countries;
3. three members from non-Annex I countries; and
4. one member from the small island developing states.⁵⁵

Members of the JISC serve in their personal capacities and must have recognised competence relating to climate change issues and in relevant technical and policy fields.⁵⁶ The JISC members are not allowed to have a pecuniary or financial interest in any aspect of a JI project⁵⁷ and have a confidentiality obligation.⁵⁸ They are bound by the JISC Rules of Procedure⁵⁹ and must take a written oath of service witnessed by the Executive Secretary of the UNFCCC.⁶⁰

53 Paragraph 3 of the JI Guidelines.

54 JISC Fourth Meeting Report, Annex 17 (Joint Implementation Management Plan), Chapter V.

55 Paragraph 4 of the JI Guidelines. See also Rule 3 of the JISC Rules of Procedure. The CMP will elect five members and five alternate members for a term of two years and five members and five alternate members for a term of three years. Thereafter, the CMP shall elect, every year, five new members and five alternate members for a term of two years. Members of the JISC may be eligible to serve a maximum of two consecutive terms. Terms as alternate members do not count. See Paragraphs 5 and 6 of the JI Guidelines and Rule 4 of the JISC Rules of Procedure.

56 Paragraph 10(a) of the JI Guidelines. See also Rule 4(3) of the JISC Rules of Procedure.

57 Paragraph 10(b) of the JI Guidelines. See also Rule 9(1) of the JISC Rules of Procedure.

58 Paragraph 10(c) of the JI Guidelines. See also Rule 11(1) of the JISC Rules of Procedure.

59 Paragraph 10(a) of the JI Guidelines. See also Rule 4(3) of the JISC Rules of Procedure.

60 Paragraph 10(d) of the JI Guidelines. See also Rule 4(3) of the JISC Rules of Procedure.

ACCREDITATION OF INDEPENDENT ENTITIES

Pursuant to the standards and procedures for accrediting independent entities contained in the Annex to the JI Guidelines,⁶¹ an independent entity must:

1. be a legal entity (either a domestic legal entity or an international organisation);
2. employ a sufficient number of persons having the necessary competence to perform all necessary functions relevant to the verification of ERUs;
3. have the financial stability, insurance coverage and resources required for its activities;
4. have sufficient arrangements to cover legal and financial liabilities arising from its activities;
5. have documented internal procedures for carrying out its functions including, inter alia, procedures for the allocation of responsibilities within the organisation and for handling complaints (which procedures must be made publicly available);
6. have the necessary expertise to carry out the functions specified in the relevant CMP decisions;⁶²
7. have a management structure that has overall responsibility for performance and implementation of the entity's functions, including quality assurance procedures, and all relevant decisions relating to verification;⁶³ and
8. not have pending any judicial process for malpractice, fraud and/

61 Further elaborated by the JISC in the procedure for accrediting independent entities (latest version: Annex 1 to JISC 9).

62 In particular, have sufficient knowledge and understanding of: 1. the JI Guidelines, and relevant decisions of the CMP and of the JISC; 2. environmental issues relevant to the verification of JI projects; 3. the technical aspects of JI activities relevant to environmental issues, including expertise in the setting of baselines and monitoring of emissions and other environmental impacts; 4. relevant environmental auditing requirements and methodologies; and 5. methodologies for the accounting of anthropogenic emissions by sources and/or anthropogenic removals by sinks (see Annex A to the JI Guidelines).

63 The applicant independent entity must make available: 1. the names, qualifications, experience and terms of reference of the senior executive, board members, senior officers and other relevant personnel; 2. an organisation chart showing lines of authority, responsibility and allocation of functions stemming from the senior executive; 3. its quality assurance policy and procedures; 4. administrative procedures, including document control; 5. its policy and procedures for the recruitment and training of independent entity personnel, for ensuring their competence for all necessary functions and for monitoring their performance; and 6. its procedures for handling complaints, appeals and disputes.

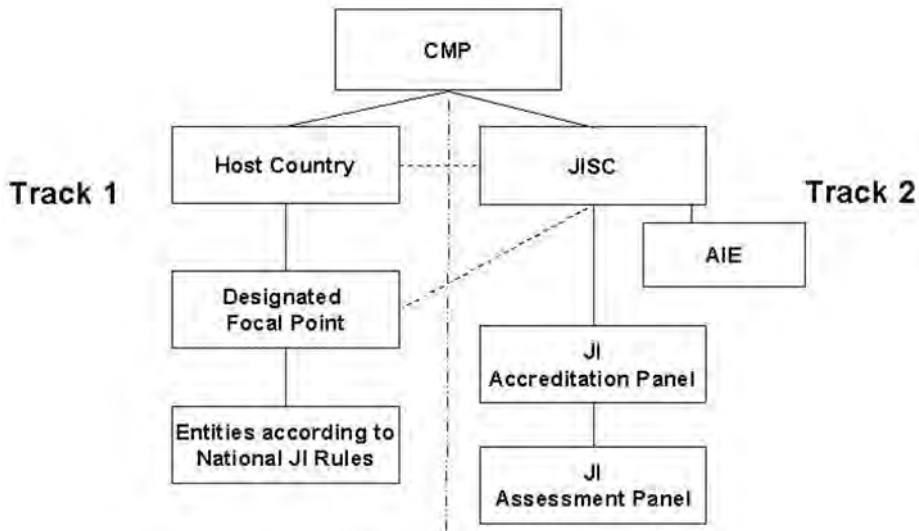
or other activity incompatible with its functions as an accredited independent entity.⁶⁴

Furthermore, an applicant independent entity must meet the following operational requirements:⁶⁵

1. work in a credible, independent, non-discriminatory and transparent manner, complying with applicable national law and meeting, in particular, certain requirements in respect of impartiality and prevention of conflict of interest; and
2. have adequate arrangements to safeguard confidentiality of the information obtained from JI project participants.

These accreditation requirements have been further elaborated by the JISC in the JI Accreditation Procedure.⁶⁶ The JISC accredits independent entities in accordance with these standards and procedures. Its JI Accreditation Panel is responsible for preparing a recommendation to the JISC regarding the accreditation of an applicant independent entity based on the assessment work conducted by a JI Assessment Team.

Figure 2: JI governance structure



The CMP has decided that the third-party verifiers that are authorised to verify CDM projects (designated operational entities or DOEs) may also act provisionally as AIEs under JI, until the JISC has approved its procedures

64 Paragraph 1 of Appendix A to the JI Guidelines.

65 Paragraph 2 of Appendix A to the JI Guidelines.

66 Latest version: Annex 1 to JISC 17.

for accreditation.⁶⁷ Four applicant independent entities have received an ‘indicative letter’ by the JI Accreditation Panel⁶⁸ and 17 applicant independent entities are ‘listed for input’.⁶⁹

The JISC may suspend or withdraw the accreditation of an independent entity if it has carried out a review and found that the entity no longer meets the accreditation standards.⁷⁰ So-called ‘spot checks’ (that is unscheduled surveillance) of AIEs may be carried out at any time.⁷¹ The consideration by the JISC to conduct a spot check may be triggered, for example, by complaints regarding the alleged failure of the AIE to comply with the requirements of its accreditation by another AIE, an NGO accredited by the UNFCCC, or a stakeholder.⁷²

Suspension or withdrawal of accreditation may only take place after the independent entity has had the opportunity of a hearing and, depending on the outcome of that hearing,⁷³ the JISC’s decision to suspend or withdraw the accreditation has immediate effect. The decision must be notified to the independent entity in writing and also made public.

JI project cycle under track 2

The track 2 verification procedure is the determination by an AIE of whether a project and the ensuing reductions of anthropogenic emissions or the enhancements of anthropogenic removals by sinks meet the relevant

67 Paragraph 3 of Decision 10/CMP.1 and JISC 7. The determinations and relevant activities undertaken by these entities will be valid only after their accreditation by the JISC is finalised.

68 In accordance with para 4(b) of the JI Accreditation Procedure, the JI Accreditation Panel issues an ‘indicative letter’ to an applicant independent entity once its desk review and on-site assessment have been successfully completed.

69 In accordance with para 28 of the JI Accreditation Procedure, the JISC publishes the name of the applicant independent entities on the UNFCCC JI website and provides the opportunity to parties, UNFCCC accredited NGOs and stakeholders to provide comments or information input on the applicants.

70 Paragraph 42 of the JI Guidelines. The JI Accreditation Panel is responsible for preparing recommendations regarding unscheduled surveillance, suspension and withdrawal of accreditation, re-accreditation and accreditation for additional sectoral scope(s). A JI Assessment Team, under the guidance of the JI Accreditation Panel, undertakes the detailed assessment of an applicant independent entity and/or AIE, identifies non-conformities, verifies the corrective actions implemented by the applicant independent entity or AIE and reports to the JI Accreditation Panel.

71 Paragraph 5(b) of the JI Accreditation Procedure.

72 Paragraph 109 of the JI Accreditation Procedure. A ‘stakeholder’ means any member of the public, including individuals, groups or communities affected, or likely to be affected, by the project (para 1(e) of the JI Guidelines).

73 Paragraph 42 of the JI Guidelines.

requirements of Article 6 of the Kyoto Protocol and the JI Guidelines.⁷⁴ In the track 2 project cycle, three phases can be discerned:

1. project development,
2. project implementation, and
3. issuance and transfer of ERUs.⁷⁵

Project development

This phase consists of the preparation and publication of the project design document (PDD), the preparation and publication of the determination by the AIE and a possible review by the JISC.

PROJECT DESIGN DOCUMENT

Pursuant to the JI Guidelines,⁷⁶ project participants are required to submit a PDD to an AIE. The PDD should contain all information needed for the determination of whether the project:

1. has been approved by the countries involved (parties to the Kyoto Protocol);
2. would result in a reduction of anthropogenic emissions by sources or an enhancement of anthropogenic removals by sinks that is additional to any that would otherwise occur; and
3. has an appropriate baseline and monitoring plan.

Appendix B to the JI Guidelines lists certain criteria for baseline setting and monitoring.⁷⁷ The baseline is the business-as-usual scenario that describes the

⁷⁴ Paragraph 30 of the JI Guidelines.

⁷⁵ In practice, the JI track 2 project cycle is actually quite similar to CDM. However, some important differences exist, which sometimes confuse market parties experienced in CDM and who wish to engage in JI project activities. This may be because of unfamiliarity with the JI-specific jargon. The following table of vocabulary may be instructive (source: V Luján Gallegos and S Simonetti, JI vs CDM, presentation at IETA Comparative Study Side Event, Carbon Expo, Cologne 2008):

Clean development mechanism (CDM)	Joint implementation (JI) track 2
Certified emission reductions (CERs)	Emission reduction units (ERUs)
CDM Executive Board (CDM EB)	JI Supervisory Committee (JISC)
Registration	Determination
Verification – certification	Determination (verification)
Designated operational entity	Accredited independent entity
Designated national authority	Designated focal point

⁷⁶ Paragraph 31.

⁷⁷ These are further elaborated in the Guidance on criteria for baseline setting and monitoring (Annex 6 to JISC 4).

situation that would occur in the absence of the proposed JI project, on the basis of which the ‘additionality’ of the project can be assessed (that is whether the project fulfils requirement 2 above) and the actual emission reductions can be calculated. Methodologies for CDM baselines and monitoring that are approved by the CDM Executive Board may also be applied by project participants under JI.⁷⁸

The PDD is made publicly available through the UNFCCC Secretariat⁷⁹ by publication on the UNFCCC JI website.⁸⁰ Parties, stakeholders and UNFCCC accredited observers may comment on the PDD for 30 days from the date the PDD is made publicly available.

PROJECT DETERMINATION

The AIE carries out its project determination on the basis of the PDD. In addition to the above-mentioned requirements 1–3 from the PDD, the AIE is also to assess whether the project participants have submitted sufficient documentation on the analysis of the environmental impacts of the project activity.⁸¹

The determination report of the AIE is made publicly available on the UNFCCC JI website,⁸² together with an explanation of its reasons, including a summary of any comments received during the public consultation period and a report of how due account was taken of these.⁸³

The AIE’s determination of the project becomes final 45 days after the date on which the determination is made public, unless a country involved in the JI project (party to the Kyoto Protocol) or three members of the JISC request a review of the determination by the JISC.

78 Paragraph 4(a) of Decision 10/CMP.1. Methodologies approved by the CDM Executive Board are listed in section ‘Methodologies’ of the UNFCCC CDM website (<http://cdm.unfccc.int>).

79 Paragraph 32 of the JI Guidelines. According to the clarification regarding scopes and steps of witnessing activities under the joint implementation accreditation procedure (Annex 5 to JISC 6), also an applicant independent entity can make a PDD publicly available through the Secretariat, but only after the JI Assessment Team has accepted the project as a witnessing activity. The corresponding determination can be made publicly available through the UNFCCC Secretariat in accordance with para 34 of the JI Guidelines only after the independent entity has been accredited for the relevant sectoral scope(s) and function.

80 See also Annex 6 to JISC 8 (clarification regarding the public availability of documents under the verification procedure under the Joint Implementation Supervisory Committee).

81 Including trans-boundary impacts, in accordance with procedures as determined by the host country and, if those impacts are considered significant by the project participants or the host country, whether an environmental impact assessment has been undertaken in accordance with procedures as required by the host country. See para 33 of the JI Guidelines.

82 The JISC has developed a Joint Implementation Determination Report Form (Annex 11 to JISC 4), which AIEs should use to file their determination with the UNFCCC Secretariat.

83 Paragraph 34 of the JI Guidelines.

REVIEW

The JISC Review Procedures⁸⁴ provide that if a review has been requested,⁸⁵ the JISC must consider such request at its next meeting.⁸⁶ At this meeting the JISC may decide:⁸⁷

1. to accept the determination without conditions;
2. to accept the determination subject to certain conditions,⁸⁸ or
3. that a more detailed review is required.

In the last case, the JISC is to decide on the scope of the review based on the considerations in the request(s) for review, and determine the composition of a review team. The review team consists of two JISC members, who will be responsible for supervising the review, and outside experts, as appropriate.⁸⁹

The decision by the JISC on the scope of the review and the composition of the review team must be made publicly available as part of the report of its meeting.⁹⁰ The project participants and the AIE that performed the determination must be notified of the decision by the JISC.⁹¹ The review team may request clarification and further information from the project participants and the AIE.⁹² The two JISC members supervising the review are responsible for preparing the final recommendation to the JISC.⁹³

84 Procedures for reviews under the verification procedure under the JISC (Annex 1 to JISC 10). Pursuant to para 11 (e) of these JISC Review Procedures, the proposed project is then marked as being 'under review' on the UNFCCC JI website and a notification is sent through the UNFCCC JI news facility.

85 Paragraph 35 of the JI Guidelines. The JISC has developed a determination review form, which parties and/or JISC members can complete and submit (Appendix 1 to the JISC Review Procedures).

86 Paragraph 12 of the JISC Review Procedures.

87 Pursuant to para 13 of the JISC Review Procedures.

88 In which case: 1. the JISC may request the AIE and the project participants to make corrections based on its findings from the consideration of the request(s) for review, and 2. the revised documentation will be checked by the UNFCCC Secretariat, in consultation with the Chair of the JISC, if needed, before the determination is finally accepted.

89 One JISC member/alternate member of the review team must be identified as lead member of the team and will be responsible for, inter alia, drafting the final recommendation of the team to the JISC, and ensuring that any diverging views within the team are reflected. The review team, under the guidance of the JISC members, including alternate members, responsible for supervising the review, must provide input, prepare requests for clarification and/or further information to the AIE and/or project participants, and analyse information received during the review.

90 Paragraph 14 of the JISC Review Procedures.

91 Paragraph 15 of the JISC Review Procedures.

92 Paragraphs 16–18 of the JISC Review Procedures.

93 Paragraph 19 of the JISC Review Procedures.

The review is to be finalised as soon as possible, but in any case within six months or at the second meeting following the request for review.⁹⁴ Taking into consideration recommendations by the two JISC members responsible for the review, the JISC may decide to:

1. accept the determination without conditions;
2. accept the determination subject to certain conditions; or
3. reject the determination.⁹⁵

The JISC decision on the review is final.⁹⁶ It is communicated to the relevant project participants and the AIE that performed the determination and is published.⁹⁷ If the review indicates any issues relating to the performance of the AIE, the JISC may consider a spot check of the AIE.⁹⁸ If the JISC decides to reject the determination and if the AIE is found to be in a situation of malfeasance or incompetence, the AIE is to reimburse the costs of the review.⁹⁹

Project implementation

This phase consists of the preparation and publication of the monitoring report by the project participants, the preparation and publication of the determination by the AIE and a possible review by the JISC.

MONITORING REPORT

Project participants submit a report to the AIE in accordance with the monitoring plan (as included in the PDD) on the emission reductions or removals that have been generated by the project.¹⁰⁰ The report is made publicly available by the AIE through the UNFCCC Secretariat.¹⁰¹

94 Paragraph 35 of the JI Guidelines and para 20 of the JISC Review Procedures.

95 Paragraph 21 of the JISC Review Procedures.

96 Paragraph 35, last sentence, of the JI Guidelines, and para 22 of the JISC Review Procedures.

97 Paragraph 23 of the JISC Review Procedures.

98 Paragraph 24 of the JISC Review Procedures.

99 Paragraph 25 of the JISC Review Procedures (which also states that this provision is 'subject to review as experience accrues').

100 Paragraph 36 of the JI Guidelines.

101 Pursuant to Annex 1 to JISC 14 (clarification regarding scopes and steps of witnessing activities under the JI accreditation procedure), also an applicant independent entity can make a monitoring report publicly available through the UNFCCC Secretariat, but only after the JI Assessment Team has accepted the project as a witnessing activity. The corresponding verification (determination) can be made publicly available through the Secretariat in accordance with para 38 of the JI Guidelines only after the independent entity has been accredited for the relevant sectoral scope(s) and function.

DETERMINATION

On receipt of the monitoring report, the AIE makes a determination of the emission reductions or removals reported by the project participants, provided that they were monitored and calculated in accordance with the baseline and monitoring plan from the PDD.¹⁰² The AIE makes its determination publicly available through the UNFCCC Secretariat, together with an explanation of its reasons.¹⁰³

The determination is deemed final 15 days after the date on which it is made public, unless a country involved in the project (party to the Kyoto Protocol)¹⁰⁴ or three members of the JISC request a review by the JISC.¹⁰⁵

REVIEW

If a review has been requested, the JISC will consider the request at its next meeting and decide on whether the request for review has merit.¹⁰⁶ If the JISC decides that the request for review does not have merit, it may decide to:¹⁰⁷

1. accept the determination without conditions, or
2. accept the determination subject to certain conditions.¹⁰⁸

If the JISC decides that the request for review has merit, it will also decide on details of the review, including:

1. the scope of the review based on the considerations in the request(s) for review, and
2. the composition of a review team.¹⁰⁹

102 Paragraph 37 of the JI Guidelines.

103 Paragraph 38 of the JI Guidelines.

104 Through its DFP (para 27 of the JISC Review Procedures).

105 Paragraph 39 of the JI Guidelines. The JISC has developed a verification review form, which parties and/or JISC members can complete and submit (Appendix 2 to the JISC Review Procedures).

106 Paragraph 33(a) of the JISC Review Procedures. The JISC shall notify the project participants and the AIE that performed the determination that a review has been requested, the project shall be marked 'review requested' on the UNFCCC JI website and a notification shall be sent through the UNFCCC JI news facility (para 32 of the JI Guidelines).

107 Pursuant to para 34 of the JI Review Procedures.

108 In which case: 1. the JISC may request the AIE and the project participants to make corrections based on its findings from the consideration of the request(s) for review; and 2. the revised documentation will be checked by the Secretariat, in consultation with the Chair of the JISC, if needed, before the determination is finally accepted.

109 Paragraph 35 of the JI Review Procedures.

The review team consists of two JISC members, who will be responsible for supervising the review, and outside experts, as appropriate.¹¹⁰

The decision by the JISC that a request for review has merit (including the scope of the review and the composition of the review team) must be made publicly available.¹¹¹ The project participants and the AIE that performed the determination must also be notified of the decision.¹¹² Further clarification and information may be requested from the project participants and the AIE.¹¹³ The two JISC members supervising the review are responsible for preparing the final recommendation to be forwarded to the JISC within two weeks after the decision by the JISC to perform the review.¹¹⁴

The JISC must complete its review within 30 days following its decision to perform the review¹¹⁵ and may decide to (1) accept the determination without conditions, (2) accept the determination subject to certain conditions, or (3) reject the determination.¹¹⁶ The JISC must inform the project participants and the AIE of the outcome of the review, and publish its decision and reasoning.¹¹⁷

If the review indicates any issues relating to the performance of the AIE, the JISC may consider whether to trigger a spot check of the AIE, in accordance with the procedures for accrediting independent entities.¹¹⁸ If the JISC decides to reject the determination and if the AIE is found to be in a situation of malfeasance or incompetence, the AIE will reimburse the costs of the review.¹¹⁹

Unlike the PDD review, it is not explicitly mentioned that the JISC review of the determination is final. However, the JI Guidelines do not provide for further remedies or appeal procedures, nor do other JI decisions or regulations.

Issuance and transfer of ERUs

As in track 1, the issuance and transfer of ERUs is carried out by the host

110 One JISC member of the review team must be identified as lead member of the team and will be responsible for, inter alia, drafting the final recommendation of the team to the JISC, ensuring that any diverging views within the team are reflected. The review team, under the guidance of the JISC members, including alternate members, responsible for supervising the review, will provide input, prepare requests for clarification and/or further information to the AIE and/or project participants, and analyse information received during the review.

111 Paragraph 37 of the JI Review Procedures.

112 Paragraph 38 of the JI Review Procedures.

113 Paragraphs 39–41 of the JI Review Procedures.

114 Paragraph 43 of the JI Review Procedures.

115 Paragraph 39 of the JI Guidelines and para 44 of the JISC Review Procedures.

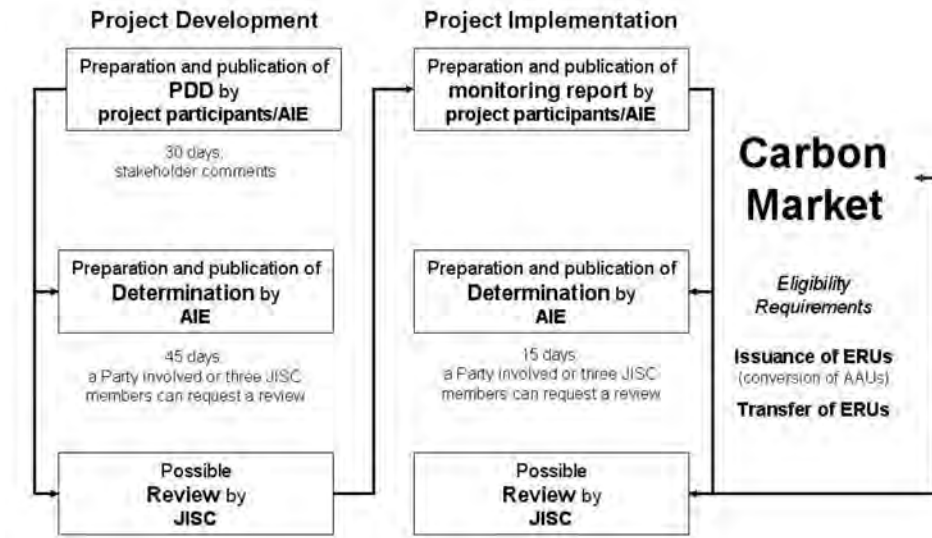
116 Paragraph 47 of the JI Review Procedures.

117 Paragraph 48 of the JI Review Procedures.

118 Paragraph 49 of the JI Review Procedures.

119 Paragraph 50 of the JI Review Procedures (which also states that this provision is 'subject to review as experience accrues').

country. When the AIE's determination of the greenhouse gas emission reductions or removals generated by the JI project has become final in accordance with the JI Guidelines, the host country will issue the ERUs accordingly,¹²⁰ in accordance with the relevant host country's national JI rules.



Disputes and remedies

A variety of disputes can arise under JI, at any stage of the JI track 1 and track 2 procedures and project cycles. Such disputes may include private parties playing their role in JI as project participants or verifiers (AIEs). The remainder of this article explores what remedies are available to such private parties.

Access to justice

When it comes to the determination of their rights and obligations, private parties are entitled to proper access to justice. The right to a fair and public hearing by a competent, independent and impartial tribunal is a basic human right recognised in several human rights treaties, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the

¹²⁰ By converting a number of its AAUs into ERUs.

Charter of Fundamental Rights of the European Union.¹²¹ Therefore, when disputes arise and private parties feel that their rights are impaired, either by another private party or by an act or unfavourable decision of a public entity or authority, they should be able to have their case judged by a court or tribunal.¹²² This could entail, inter alia, requesting injunctive relief against the impairing party or lodging an appeal against the impairing decision of the relevant authority and requesting review and redress thereof.¹²³ If a public (non-governmental) institution has the authority to take decisions that directly affect the rights and obligations of private parties, its decisions should be challengeable, either before the courts or an independent tribunal recognised by the institution to hear the claims of such private entities, or via a judicial review mechanism established by the institution itself.¹²⁴ The court or tribunal that is to assess the case must not only be independent and impartial, but also exercise due process and ensure that its proceedings are fair, equitable, timely and not prohibitively expensive. In addition, the court or tribunal should have the ability to create a binding obligation on the defendant to protect the claimant's rights, that is its judgment should be enforceable against the defendant.

So when a private party engaging in JI becomes involved in a dispute, it should have access to adequate and effective judicial remedies. The relevant legal framework should ideally not only provide a means to resolve the dispute of the individual private party concerned, but also

121 See Art 10 of the Universal Declaration of Human Rights (adopted on 10 December 1948; available at www.un.org/en/documents/udhr/); Art 14 of the International Covenant on Civil and Political Rights adopted on 16 December 1966; available at www2.ohchr.org/english/law/ccpr.htm); Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950; available at www.hrcr.org/docs/Eur_Convention/euroconv.html); Art 47 of the Charter of Fundamental Rights of the European Union (adopted on 7 December 2000; available at www.europarl.europa.eu/charter/pdf/text_en.pdf).

122 See, inter alia, L Lehtimaja and M Pellonpää, 'Article 10 of The Universal Declaration of Human Rights', in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights* (The Hague, 1999), p 227; and Jacobs and White, *The European Convention on Human Rights* (New York, 2006), p 170 et seq.

123 For environmental matters, the right to access to justice has been confirmed in the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed on 25 June 1998, available at www.unece.org/env/pp/documents/cep43e.pdf). This Convention requires its member states to ensure that the public has a right to access to environmental information and a right to participate in environmental decision-making and be granted proper access to justice in case in case these rights are violated. This could, inter alia, be relevant for members of the public in the host country of a JI project that are concerned about the environmental impact of the project. See F Rizzo and A Buchman et al (eds), *Aarhus meets Kyoto* (Szenrendre, 2003).

124 Meijer, note 15 above, at p 917.

contribute to increase the integrity of the entire JI process. If judgments serve as precedents, the dispute settlement mechanism can advance uniformity in the application of the JI rules and a degree of consistency necessary to ensure equity among the private parties involved in JI.¹²⁵ In the case of proceedings against an institution that has taken a decision that impairs the rights of a private party, these should include a review of the reasoning of the relevant institution and an independent check on the validity of its decision. The resulting judgment should then not only annul, amend or rectify the impairing decision, but also be an incentive to the relevant institution and similar decision-making bodies to stay within the boundaries of the applicable rules and conform their future decisions to the judgment. This will improve the functioning of the relevant institution and contribute to its legitimacy. Judgments should therefore be issued in writing and made publicly accessible. To avoid fragmentation and conflicting interpretations of applicable rules, there is a clear advantage in having a single competent body to review cases (or several lower bodies of first instance and one supreme body to hear final appeals).¹²⁶ This body can then acquire expertise and build a uniform and consistent set of review standards to ensure unity of review and interpretation of the applicable rules.

If these conditions are met, access to justice will lead to better decision-making by the relevant Kyoto institutions, increase trust in the system and thereby stimulate private party participation. Private parties expect fair, predictable and non-arbitrary treatment from the competent authorities.¹²⁷ They are more likely to make long-term investment decisions in a stable and predictable regulatory climate, with a solid system of rules and effective remedies in case their interests are harmed. The next section explores the remedies available to private parties in various types of JI-related disputes.

Types of dispute

JI-related disputes may arise between private parties and states, other private parties or UN bodies, particularly the JISC in track 2. Below, each of these types of dispute is assessed from an access to justice perspective.

125 cf Kalas and Herwig, note 15 above, at pp 119–120.

126 Ibid p 130.

127 J D Werksman, 'Defending the "Legitimate Expectations" of Private Investors under the Climate Change Regime: In Search of a Legal Theory for Redress' (2008) 39 *Georgetown Journal of International Law* 691.

DISPUTES WITH STATES

Several possible disputes between private parties and states can arise, both with respect to letters of approval (LoAs) and the issuance and transfer of ERUs.

The first type of dispute concerns the authorisation of the private party by an Annex I country to participate, under its responsibility, in JI projects (this can be the host country of the JI project or another Annex I country involved). Private parties wishing to engage in JI have to apply for an LoA under applicable national JI rules of the relevant Annex I country. Disputes may concern any decision of the relevant national authorities that is deemed unfavourable by the respective private party, for example a decision to refuse authorisation, to grant authorisation only under certain conditions or to revoke a previously issued LoA.¹²⁸ In practice, private entities sometimes try to have the relevant Annex I country include an arbitration clause in its LoA, in order to secure a forum in case LoA-related disputes arise. In the author's experience, however, Annex I countries refuse to agree to arbitration, arguing that rendering the LoA is an act under national administrative law, which cannot be made subject to arbitration.

The second type of dispute consists of disagreement between private project participants and the host country of the JI project about the issuance and transfer of ERUs. In both track 1 and track 2, it is the host country that will eventually issue the ERUs and transfer these to the relevant project participant(s) under its national JI rules. The question arises as to what project participants can do if they disagree with the host country's decisions in this respect, for example if the host country refuses to issue ERUs, or issues fewer ERUs than expected. If the project participant is a country itself (that is a party to the Kyoto Protocol) there is a dispute settlement procedure under the UNFCCC and the Kyoto Protocol.¹²⁹ Parties to the Kyoto Protocol are committed to seeking settlement of a dispute through negotiations or any other peaceful means of their own choice. If, after 12 months following notification by one party to another that a dispute exists between them, the parties concerned have not been able to settle their dispute, the dispute will be submitted, at the request of any of the parties to the dispute, to conciliation.¹³⁰ Parties also have two options for binding settlement of their disputes, namely

128 Revocation of authorisation may also take place on instigation of UN bodies or parties to the Kyoto Protocol. A private entity can only participate in JI project activities if it has the authorisation of a state and its participation will be under the responsibility of that state. This means that if the JISC believes that a private entity has acted in violation of its obligations under the JI Guidelines or other regulations, the JISC can hold the authorising state responsible for this violation and, in turn, this state could withdraw its authorisation with the result that the entity involved can no longer participate in the JI project.

129 Article 14 of the UNFCCC, which is referred to in Art 19 of the Kyoto Protocol.

130 Article 14(5) of the UNFCCC.

submission of the dispute to the International Court of Justice (ICJ) and/or arbitration.¹³¹ The UNFCCC refers to annexes on arbitration and conciliation to be adopted by the COP 'as soon as practicable'.¹³² However, to date these annexes have never been agreed.

In any event, as the dispute settlement provisions from the UNFCCC and Kyoto Protocol concern state-state disputes only, this does not help the private project participant that disagrees with the host country of the JI project or with the other Annex I country involved. However, such participant should be able to challenge the decisions of the relevant Annex I country under that country's domestic administrative law.¹³³ Therefore, JI-related disputes between private parties and states would in principle not give rise to concerns about access to justice.¹³⁴ As these disputes will not relate to the Kyoto rules as such (JI Guidelines, CMP Decisions, etc), but rather the applicable national JI rules of the relevant Annex I country (on the issuance of LoAs or ERUs), the available procedures under domestic administrative law should also be sufficient to ensure a uniform interpretation of these rules.

DISPUTES WITH OTHER PRIVATE PARTIES

Disputes may also arise between private parties themselves. These could be between JI project participants, if several private project participants are involved in the JI project. Such disputes would probably not raise concerns about access to justice either, as there will be contracts in place between these private parties, such as project agreements, joint venture agreements or emission reductions purchase agreements (ERPAs),¹³⁵ which usually

131 Kalas and Herwig, note 15 above, at p 64.

132 Article 14(2b) and 14(7) of the UNFCCC.

133 D Stott and A Felix, *Principles of Administrative Law* (London, 1997), p 4 et seq.

134 In addition, there may be certain remedies under bilateral or multilateral investment treaties (BITs or MITs respectively). If a BIT or an MIT is in force between the host state of the JI project and the home state of the participating private party, this may protect the private party's rights. Such treaties often contain arbitration clauses that grant private parties a right to arbitrate claims against the host country if they have made an 'investment' in the host country and the host country has breached the relevant investment standard. However, it depends on the wording of the relevant BIT or MIT whether private party participation in a Kyoto JI project qualifies as an 'investment' under such treaty. See Ratliff, note 16 above, at p 388; cf also A Boute, 'The Potential Contribution of International Investment Protection Law to Combat Climate Change' (2009) 27 JERL 365 et seq.

135 ERPAs are concluded in both JI and CDM projects between the carbon purchaser and the private or public entities transferring the carbon credits resulting from the relevant emissions reduction project (ERUs or CERs, respectively) at an agreed price, thereby forward selling the carbon credits. In practice, both the transferring party and the purchaser under the ERPA are often appointed as project participants in the relevant JI or CDM project.

contain arbitration clauses, providing parties with a forum in case disputes arise.¹³⁶ The arbitration clause of the Permanent Court of Arbitration (PCA) in The Hague is often used in carbon contracts. The PCA has developed Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment, the use of which is recommended by the International Emissions Trading Association (IETA) in its model agreements.¹³⁷

In JI projects under track 2, another type of dispute between private JI parties can arise when a private project participant disagrees with the work of the AIE that was appointed to make the necessary determinations. If the determination is already published, the only way to change it is by way of a JISC review. Under the JI Guidelines, however, private parties cannot request a review of the AIE's determination, as this is reserved for countries (parties to the Kyoto Protocol) and members of the JISC. Therefore, if a private party wishes to have the determination reviewed, it can only try to lobby parties to the Kyoto Protocol and/or JISC members to persuade them to request a review (see 'Disputes with the JISC' below). If the determination is not yet published, disputes may arise between private project participants and AIEs regarding, for example, the method of working of the AIE, its timing, fees or other contractual issues. For such disputes, the contract between the project participant and the AIE will typically contain a jurisdiction or arbitration clause (or refer to applicable general terms and conditions of the AIE that contain such jurisdiction or arbitration clause). The dispute can then be submitted to the relevant court or arbitral tribunal. It should be noted that the AIE contract or general terms and conditions may also contain certain exclusions or limitations of liability for the AIE which restrict the project participant's possibilities for recourse.

As disputes between private parties will not usually concern the Kyoto rules, but rather contractual matters such as the interpretation and performance of bilateral ERPA or service agreements, dispute resolution through arbitration or national courts will not pose major problems with respect to fragmentation or conflicting interpretations of JI rules.

DISPUTES WITH THE JISC

From an access to justice perspective, the most troublesome (and interesting) disputes are those between private parties and the JISC in JI track 2. Such disputes could arise in respect to JISC decisions on the accreditation of independent entities or project determinations. The relief sought by private

¹³⁶ Ratliff, note 16 above, at p 395.

¹³⁷ The rules can be downloaded from the PCA website (see www.pca-cpa.org/showpage.asp?pag_id=1058).

parties involved would then consist of an independent judicial review of the contested decisions.

However, if the JISC refuses to accredit an applicant independent entity, or suspends or disaccredits an AIE, such entity does not have any remedies against the JISC under the JI Guidelines. Nor are there any remedies for private project participants that disagree with project determinations. Such private project participants have no other means of redress than the diplomatic route of trying to lobby parties to the Kyoto Protocol and/or members of the JISC in order to persuade them to request a review. If the JISC decides not to conduct a review, the project participants cannot challenge that decision under the JI Guidelines.

If a review is carried out, project participants may disagree with the outcome. Following a review, the JISC may decide, for example, that the determination should be revised (leading to no ERUs or fewer ERUs for a project activity than the project participants believe should be issued) or that the determination is rejected altogether. The JISC decision in this respect is final, and the project participant has no remedy against such decision under the JI Guidelines.

There is currently no mechanism available under the JI procedures for private parties engaging in JI track 2 to challenge decisions of the JISC. As this type of dispute concerns the interpretation and application of the Kyoto rules, the UNFCCC legal framework seems to be missing an essential component. Whereas it explicitly creates an opportunity for private parties to engage in international emission reduction projects, it does not provide those private parties with adequate legal protection in case their interests are prejudiced.¹³⁸ It can never be ruled out that at some point private parties may disagree with the JISC on the interpretation of the JI rules, potential conflicts of interest or other matters. The Kyoto system currently leaves such private parties effectively at the mercy of the JISC and offers them no possibilities to appeal against unfavourable JISC decisions. The next section examines whether such private parties may find any remedies outside the Kyoto procedures.

138 In the context of CDM, Werksman (note 127 above, at pp 686–687) doubts whether private parties have any enforceable rights at all under the Kyoto framework, arguing that significant safeguards have already been designed into the system and private parties may not be entitled to additional remedies. He admits that none of these safeguards gives private parties direct recourse to the Kyoto institutions, but suggests that such parties can advance their interests through their representatives on the CMP. However, this seems hardly adequate legal protection in a system that explicitly invites private parties to invest or otherwise play a role in emission reduction projects.

Private party remedies against the JISC

Private parties that wish to challenge decisions of the JISC, or otherwise bring claims against the JISC, may not find a forum willing to adjudicate their matter, as most national courts apply a relatively broad form of jurisdictional immunity for international organisations.¹³⁹ This is similar to sovereign states, which enjoy immunity from suit in the courts of a foreign state, at least for acts that may be qualified as governmental (*acta jure imperii*), rather than commercial (*acta jure gestionis*).¹⁴⁰ The main argument for such immunity for international organisations is that being subject to the judgment of a national court might jeopardise the independence of the international organisation and disrupt its smooth functioning.¹⁴¹ However, the validity of such argument is questionable, especially if the relevant international organisation has not provided for a proper review procedure itself.¹⁴² If private parties are thus denied their basic right to appeal against decisions that affect their rights, it could be contended that the relevant international organisation should not be entitled to immunity, even if this would affect their smooth functioning.¹⁴³

Various arguments have therefore been made against jurisdictional immunity for international organisations, inter alia, on the basis of the substitution theory. It is argued that an international organisation that infringes a private party's rights should not enjoy immunity from suit in respect of such infringements, because the organisation was founded by member states that are bound by human rights principles and conventions, and states cannot transfer more rights than they have themselves.¹⁴⁴ Therefore, if sovereign states are required to allow private parties the possibility to appeal decisions that affect their rights, the decisions of international organisations founded by such states should not be immune to appeal. And if these international organisations have not established or recognised an appeal procedure for private parties themselves, national courts should hear such appeals. There is also the theory of human rights as 'higher ranking law'. As human rights, including the right of access to justice, are universal and fundamental rights, who would argue that international organisations are not bound to such elementary norms? In the case of a UN body this may

139 Meijer, note 15 above, at p 876; A Reinisch, *International Organisations before National Courts* (2000), pp 36, 169.

140 J Klabbbers, *An Introduction to International Institutional Law* (Cambridge, 2002), p 147.

141 See *Cases and materials on the international legal system* (ed C T Oliver, New York, 1995), p 613; Meijer, note 15 above, at p 900.

142 Meijer, see note 15 above, at p 917.

143 cf M Singer, 'Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns' (1995) 36 *Virginia Journal of International Law* 92.

144 C Flinterman and W van Genugten, *Niet-staatelijke actoren en de rechten van de mens; gevestigde waarden, nieuwe wegen* (The Hague, 2003), pp 140–141.

be even more compelling, as it was the UN that promulgated the Universal Declaration of Human Rights.¹⁴⁵ However, these theories do not alter the fact that in practice international organisations are generally granted very broad jurisdictional immunity.

FUNCTIONAL NECESSITY

Most courts apply the approach of functional necessity: an international organisation is entitled to such immunities as are necessary for the exercise of its functions in the fulfilment of its purposes.¹⁴⁶ As a consequence, the decisions of an international organisation that are pursuant to its goals and directly linked to its core business fall within the realm of such organisation's jurisdictional immunities.¹⁴⁷ In respect of CDM, Meijer points out that decisions by CDM institutions (in particular the CDM Executive Board) which directly affect the rights of private entities are part of the CDM institution's 'core business' and, pursuant to the functional necessity doctrine, disputes concerning such decisions could therefore not be brought before national courts.¹⁴⁸ The same would apply to decisions of the JISC affecting the rights of private parties engaging in JI. Deciding on the accreditation of independent entities, project determinations and reviews are the very reasons for the JISC's existence and it would therefore enjoy immunity from suit in respect of such decisions under the functional necessity doctrine.

JURISDICTION OF NATIONAL COURTS?

Meijer, however, proposes a more nuanced approach to the jurisdictional immunity of international organisations in the context of CDM and argues that immunity should only apply to CDM institutions where the general law-making and policy-making powers of these institutions are concerned, and not to decisions of these institutions aimed directly at private entities (referred to by Meijer as administrative decisions).¹⁴⁹ This would require a closer look at the core business decisions of the CDM institutions. If such a closer look reveals that the decision in question is a general rule or law of

145 Arsanjani therefore argues that 'It is hardly radical to contend that the UN, through which the Declaration came about, must, in its own activities and procedures, comply with these principles to the greatest possible extents'; see M H Arsanjani, 'Claims Against International Organisations: Quis custodiet ipsos custodes?' (1980) 7 *The Yale Journal of World Public Order* 175.

146 Klabbers, note 140 above, at p 148.

147 P H F Bekker, *The Legal Position of Intergovernmental Organisations – A Functional Necessity Analysis of Their Legal Status and Immunities* (The Hague, 1994), pp 109–110.

148 Meijer, note 15 above, at p 905.

149 Ibid p 908.

the international organisation, immunity should apply and private entities should not be able to challenge this general rule before a national court. If, however, the decision is an administrative decision aimed at a particular private entity and the CDM institution does not provide for a satisfactory internal review procedure, immunity should not apply and review by a national court should be allowed.¹⁵⁰

Meijer's arguments for access to national courts in respect of administrative decisions of CDM institutions could also apply to administrative decisions of the JISC. However, not all of these arguments are convincing. As an important reason for allowing private parties to appeal against the decisions of an international institution before a national court, Meijer mentions that human rights considerations call for such review.¹⁵¹ However, this observation seems to call for *a form of* independent review, rather than for such review to necessarily be carried out by national courts. It is beyond questioning that access to justice is a basic human right. But the best way to provide such access for private parties active in CDM or JI is probably not through the national courts, since there will be serious disadvantages in bringing Kyoto institutions before national courts.

An important downside would be fragmentation, that is different courts rendering different decisions in similar cases and different interpretations of applicable Kyoto rules. According to Meijer,¹⁵² such differences will not be the result of different courts ruling on the same issue, but of different 'fact patterns' in the cases on which the courts are asked to rule. It seems obvious, however, that different national courts from different jurisdictions may interpret the CDM and JI rules differently and that their judgments on similar legal questions may be inconsistent with one another. Indeed, it is not uncommon even for different national courts within one jurisdiction to hold different views on similar legal questions (therefore, many jurisdictions

150 Meijer (*ibid*, pp 914–915) points to an analogy with the EU, where private entities cannot challenge general EU rules (provisions of the constituent treaties, directives, or regulations) before the Court of Justice of the European Union (ECJ) or the Court of First Instance of the European Communities (CFI). However, para 4 of Art 230 of the European Community (EC) Treaty provides that a natural or legal person that is the addressee of a decision of an EU institution (as opposed to the target of a general rule) can challenge this decision before the ECJ or the CFI. It also provides for such a challenge by a natural or legal person in two other situations: (i) when this natural or legal person is not the addressee but is directly and individually concerned with the decision, or (ii) when the decision is labelled as a 'regulation' but is *de facto* a decision of direct and individual concern to the natural or legal person. In other words, decisions of EU institutions that are of direct and individual concern to a private or legal person, whether addressed to this person or not, and whether officially labelled 'decision' or not, can be challenged.

151 *Ibid* p 910.

152 *Ibid* p 913.

have a supreme court to ensure a uniform interpretation). Fragmentation will also create an opportunity for forum shopping: parties will pick and choose the court most likely to rule in their favour. Meijer¹⁵³ does not believe that private parties active in Kyoto projects will engage in extensive forum shopping. However, in practice we already see 'LoA shopping' in Kyoto projects, as private parties carefully consider in which country they wish to apply for an LoA, looking for the most favourable jurisdiction with respect to issuing LoAs and receiving ERUs. Another disadvantage of allowing national courts to review JISC decisions would be the accessibility of the judgments and their ability to serve as precedents for future decisions. According to Meijer, national judges frequently look at how foreign judges have interpreted certain provisions, but it is clear that case law on related JI-issues from different national courts will be much less easily retrievable and accessible than judgments of a single body. Most importantly, however, Meijer's solution would not be an effective remedy for private parties, because, as she admits, there is little to no possibility of enforcing the judgment of a national court against an international institution.¹⁵⁴

Moreover, Meijer's plea for access to national courts will most probably not be heard by national courts, which continue to grant a broad immunity to international organisations, possibly even more so in the case of UNFCCC bodies such as the CDM Executive Board and the JISC, as UN organs enjoy an immunity that is even stronger than most other international organisations.¹⁵⁵

ABSOLUTE IMMUNITY FOR UN ORGANS

As a result of its particular history and special role, the UN organisation is granted absolute jurisdictional immunity in national courts.¹⁵⁶ Although the UN Charter creates immunities 'as are necessary for the fulfilment of its purposes',¹⁵⁷ the Convention on the Privileges and Immunities of the

¹⁵³ Ibid p 914.

¹⁵⁴ Ibid p 923. Meijer also argues (p 898) that a practical advantage of bringing Kyoto disputes before national courts is that potentially numerous conflicts can be handled by not just one but several courts, which may make resolution of these conflicts faster. However, this does not seem practical at all, as the Kyoto institutions would then have to defend themselves all over the world, and hire and instruct law firms in numerous jurisdictions, which will cost them considerable time and resources and would therefore probably negatively affect their functioning.

¹⁵⁵ Although it may be questioned whether Kyoto institutions such as the JISC and the CDM Executive Board qualify as official UN organs in this respect, cf the memorandum referred to in note 163 below.

¹⁵⁶ Singer, note 143 above, at pp 84–88.

¹⁵⁷ Charter of the United Nations (signed on 26 June 1945; available at www.un.org/en/documents/charter/index.shtml), Art 105.

United Nations states that the UN 'shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity'.¹⁵⁸ The Convention on the Privileges and Immunities of the Specialized Agencies provides the same absolute immunity.¹⁵⁹ Therefore, unless UN organs have explicitly or implicitly, wholly or partially, waived their immunities in their constituent documents, they enjoy absolute immunity. The Kyoto institutions of the UNFCCC, including the JISC and the CDM Executive Board, have not waived their immunity.

Alternative remedies

If it turns out that private parties cannot challenge JISC decisions and enforce their rights *vis-à-vis* the JISC, they may wish to explore other remedies and try to instigate proceedings against (a) individual members of the JISC, or (b) the relevant member states (parties to the Kyoto Protocol).

LIABILITY OF INDIVIDUAL JISC MEMBERS

Private parties that disagree with decisions of the JISC may wish to sue individual members of the JISC on the basis of legal concepts such as wrongful acts or tort (for example with respect to their conduct on a review team or accreditation panel).¹⁶⁰ Under the UNFCCC Headquarters Agreement,¹⁶¹ all persons invited to participate in the official business of the UNFCCC and serving on constituted bodies under the Kyoto Protocol enjoy immunity from legal process in respect of all acts performed by them in their official capacity.¹⁶² However, as this is only an agreement between the UN, the German Government and the UNFCCC Secretariat, members may still be held liable for their acts outside Germany, unless there is another basis for immunity.

158 Signed on 13 February 1946 (available at <http://untreaty.un.org/cod/avl/ha/cpiun-cpisa/cpiun-cpisa.html>), Art 2.

159 Convention of 21 November 1947 (available at www.uia.org/legal/app51.php), Art III, paras 4 and 33.

160 This section will focus on jurisdictional issues and not discuss the question of the law applicable to such claims.

161 Agreement among the United Nations, the Government of the Federal Republic of Germany and the Secretariat of the United Nations Framework Convention on Climate Change concerning the Headquarters of the Convention Secretariat dated 20 June 1996 (available at http://untreaty.un.org/unts/120001_144071/24/3/00019759.pdf), and its amending Protocol.

162 See also Art 14 of the Agreement between the Federal Republic of Germany and the United Nations concerning the Headquarters of the United Nations Volunteers Programme of 10 November 1995 (available at http://untreaty.un.org/unts/120001_144071/7/1/00005112.pdf), which, pursuant to Art 2 of the UNFCCC Headquarters Agreement applies, *mutatis mutandis*, to the UNFCCC Secretariat.

Such basis may be found in the 1946 Convention on the privileges and immunities of the United Nations. However, in a memorandum to the UNFCCC,¹⁶³ the Office of Legal Affairs of the UN advised that it would not be appropriate for individuals serving on constituted bodies and expert review teams under the Kyoto Protocol to be considered ‘experts on missions for the United Nations’ pursuant to the 1946 Convention,¹⁶⁴ as such individuals are not appointed by the Secretary-General, nor do they perform missions for the United Nations. The CMP therefore requested and authorised the UNFCCC Secretariat to take a number of actions aimed at minimising the risk of legal action against individuals serving on constituted bodies established under the Kyoto Protocol.¹⁶⁵ As a result, the Secretariat has taken, *inter alia*, the following actions¹⁶⁶ to minimise the risks of disputes, complaints and claims against individuals serving on constituted bodies under the Kyoto Protocol:

1. convene meetings of constituted bodies at the seat of the UNFCCC Secretariat in Germany, where individuals serving on these bodies have privileges and immunities for acts performed by them in their official capacity in accordance with the provisions of the Headquarters Agreement, and
2. where meetings of constituted bodies are convened at venues other than the seat of the UNFCCC Secretariat, ensure that the host country agreements or memorandums of understanding for the meeting contained provisions for privileges and immunities for individuals serving on these bodies.

In view of the above, there may indeed be certain possibilities for private parties to hold individual members of the JISC personally liable before national courts (outside Germany).¹⁶⁷ If such claim is granted, this may lead to an obligation for the relevant JISC member to pay damages, but will not in principle alter the relevant decisions of the JISC. It is therefore not a very satisfactory way to fill the fundamental legal ‘gap’ in the Kyoto framework, as private parties would not necessarily wish to challenge the personal conduct of the individuals serving on the JISC, but rather the decisions and actions of the JISC itself (as a Kyoto institution) and its interpretation and application of the Kyoto rules. This remedy would not thus be much of a contribution

163 Memorandum dated 30 June 2006 from the Office of Legal Affairs of the United Nations, transmitting the response on privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol to the UNFCCC (see FCCC/SBI/2006/20).

164 Article VI.

165 Decision 9/CMP.2.

166 See FCCC/KP/CMP/2008/10.

167 Werksman, note 127 above, at pp 681–682.

to the legitimacy of the JI process and probably not lead to better decision-making. Moreover, it could prove to be ineffective, as the individual JISC members may not provide sufficient recourse for the monetary claims of private parties.¹⁶⁸

MEMBER STATE LIABILITY

Private parties may also try to instigate legal proceedings against the member states of the UNFCCC, either before their own national courts or another competent forum.¹⁶⁹ The reasoning is as follows: the state is obliged to give (absolute) immunity to the UN bodies of the Kyoto Protocol on the ground of the state being a party to the Kyoto Protocol. The state, however, is also a party to treaties such as the European Convention on Civil Rights or the UN Declaration on Human Rights, which impose an obligation on the state to provide for access to justice and hearing by a tribunal in the determination of the rights and obligations of individuals. In providing (absolute) immunity to the Kyoto bodies, the member state may therefore impair the rights of such individuals. In other words: individuals may hold states liable if the international organisation created by these states impairs the rights of private parties and the states have not ensured access to justice within the procedures of the relevant international organisation.¹⁷⁰

This reasoning is to some extent the reverse of the aforementioned substitution theory. States that are a party to human rights treaties should ensure that these are not violated by international organisations that they have voluntarily created and to which they have voluntarily transferred certain

168 However, the possibility that they may be held personally liable may be an incentive to the members of the JISC to cooperate to establishing or recognising an independent appeal body.

169 The question of jurisdiction will not be further discussed here, but there may of course be immunity concerns when trying to hold states liable; cf C W Jenks, *International Immunities* (London, 1961), p 38.

170 Flinterman and Van Genugten, note 144 above, at p 143. In the European context, if a member state grants absolute immunity to an international organisation and no access to justice for private parties that will be subject to that organisation's decisions, it may be argued that the state is liable for breach of Article 6 of the European Convention on Human Rights (the fair trial provision, which also encompasses access to justice). This could lead to payment of damages by the member state. In the *Osman v UK* case (ECHR 28 October 1998, NJ 2000, 134), the European Court of Human Rights ruled that a 'blanket immunity' may create an unacceptable limitation of one's right to a fair trial. In *Waite and Kennedy v Germany* (ECHR 18 February 1999, NJB 1999, p 510) this standpoint was refined in cases dealing with international organisations. The Court accepted such immunity, provided that the organisation itself has created an internal procedure that provides an adequate possibility of protecting the involved party's rights under the European Convention of Human Rights.

powers. Such argument may be even more compelling in respect of Annex I countries involved in JI and CDM that have issued an LoA, as such states have not only agreed to the creation of the Kyoto institutions and mechanisms, but also explicitly authorised the relevant private parties to participate in these mechanisms.

However, practical problems may arise when trying to hold states liable in this respect, as member states would then be held to account for actions of an international organisation on which they do not have much influence (and with which they may not agree themselves). In addition, the international organisation in question will not be a party to the legal proceedings. This remedy would therefore not contribute to a uniform interpretation and application of the Kyoto rules and not constitute a proper alternative to direct private party appeals against JISC decisions.

Conclusion

The current Kyoto framework does not safeguard the legal position of private parties that participate in international emission reduction projects. Private parties engaging in JI track 2 projects are dependent on the JISC, but the system offers them no remedies against unfavourable JISC decisions. The same applies to private parties that participate in CDM projects and are faced with decisions of the CDM Executive Board.¹⁷¹ This is inconsistent with the fundamental right of access to justice.

It would therefore be desirable that a robust dispute resolution mechanism be included in the relevant UNFCCC procedures. The best solution seems to be the establishment of a new independent appeal body for all flexible mechanisms to hear private party complaints, carry out judicial review of the decision of the relevant Kyoto institution¹⁷² and, if necessary, annul such decisions or issue binding instructions. Its judgments should be duly reasoned and made publicly accessible. Such independent review mechanism would contribute to a uniform interpretation of the applicable Kyoto rules and increase trust in the system. It should ideally be an integral part of the post-Kyoto legal framework for carbon trading that the member states of the UN are currently negotiating, further to the somewhat disappointing outcome

171 See also the memo of the UNFCCC Secretariat to the CMP of 29 September 2008 (FCCC/KP/CMP/2008/10, para 9).

172 This can be the JISC, the CDM Executive Board or the UNFCCC Secretariat (which plays a role in JI, CDM and International Emissions Trading).

of the Copenhagen Climate Change Conference (COP 15).¹⁷³ However, experience has taught that this may be troublesome, as the same member states have not even been able to agree on the (arguably less controversial) annexes on arbitration and conciliation to the UNFCCC.¹⁷⁴ In anticipation (or in the absence) of such overarching appeal mechanism at the UN level, the JISC and the CDM Executive Board should adopt a dispute resolution mechanism themselves, allowing private parties to challenge their decisions before a competent, independent and impartial tribunal.¹⁷⁵ A first step may have been taken at the Copenhagen Climate Change Conference, when the Parties to the Kyoto Protocol requested the CDM Executive Board to design procedures for considering appeals that are brought by stakeholders directly involved.¹⁷⁶ It remains to be seen, however, what appeal procedures the CDM Executive Board will implement and whether these will constitute proper access for private sector stakeholders to an independent tribunal, rather than just another review by the CDM Executive Board itself. In any case, such appeal procedures will be limited to CDM and probably have a confined scope.¹⁷⁷

173 Para. 7 of the Copenhagen Accord (the document drawn up by a limited group of countries, which the delegates agreed to 'take note of' at the final plenary session of the conference on 18 December 2009) provides that opportunities to use markets will be pursued (to enhance the cost-effectiveness of and to promote mitigation actions) and that developing countries should be provided incentives to continue to develop on a low emission pathway. See http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf. As for JI, this off-setting mechanism would probably only have a future if a second commitment period under the Kyoto Protocol were agreed, or a new international agreement were concluded that provides for AAU-like transferable carbon units.

174 F Yamin, 'Operational and Institutional Challenges', in J Goldemberg (ed), *Issues and Options – The Clean Development Mechanism* (New York, 1998) (United Nations Development Programme), p 79.

175 The JISC and the CDM Executive Board may, eg, do this by expressing their willingness to refer disputes to an arbitral tribunal and conclude ad hoc arbitration agreements with private parties whenever disputes arise.

176 Para 42 and 43 of the CMP.5 Decision 'Further guidance relating to the clean development mechanism' (available at http://unfccc.int/files/meetings/cop_15/application/pdf/cmp5_cdm_auv.pdf). No such request was made to the JISC. However, the Parties to the Kyoto Protocol did reiterate the importance of ensuring the efficient, cost-effective and transparent functioning of JI and the executive and supervisory role of the JISC (see CMP.5 Decision 'Guidance on the implementation of article 6 of the Kyoto Protocol').

177 Para. 42 of the relevant CMP.5 Decision provides for procedures 'considering appeals that are brought by stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of clean development mechanism project activities or proposed clean development mechanism project activities, in relation to: (a) situations where a designated operational entity may not have performed its duties in accordance with the rules or requirements of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and/or the Executive Board; (b) rulings taken by or under the authority of the Executive Board regarding the rejection or alteration of requests for registration or issuance.' Other types of disputes, such as disputes about the (dis) accreditation or suspension of DOEs would fall outside this scope.

Therefore, an integral appeal body for all flexible mechanisms would still be preferable.

The possibility to challenge decisions of the Kyoto institutions would increase the legal protection of private parties playing their important role in the flexible mechanisms and advance the stable investment environment necessary for long-term private sector involvement in combating climate change.