

THE INTERNATIONAL INSTITUTIONS OF THE
CLEAN DEVELOPMENT MECHANISM BROUGHT
BEFORE NATIONAL COURTS: LIMITING
JURISDICTIONAL IMMUNITY TO
ACHIEVE ACCESS TO JUSTICE

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I. INTRODUCTION

This Article discusses the Clean Development Mechanism (CDM), one of the flexibility mechanisms under the Kyoto Protocol.¹ The CDM explicitly creates an international role

1. See Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 12, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter Ky-

for private entities (private persons, companies, etc.), a step that represents an important new development in international law. Unlike traditional international legal instruments, under which States have sovereignty over their inhabitants and other States and international institutions are not allowed to have any direct relationships with these private entities, the CDM allows international institutions to make decisions that directly affect the rights and obligations of private entities without a State playing an intermediary role. In this Article, these decisions are characterized as administrative decisions.

However, when it comes to the rights of private entities, the CDM is missing an essential component. When a CDM institution makes an administrative decision that violates the rights of a private entity 'playing its role' in the CDM, this private entity has no remedy whatsoever under the CDM rules. It is generally agreed that access to justice is a fundamental right of private entities,² so if private entities are explicitly invited to play an important role in an international legal system, this system should provide these entities with a properly functioning set of legal tools, including the possibility of taking action if their rights are violated.

This Article looks into potential ways of filling this gap through expanding the reach of the already existing Compliance Mechanism under the Kyoto Protocol, through arbitra-

oto Protocol]. *See generally* Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Nov. 28-Dec. 10, 2005, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its First Session, Part Two, Addendum 1: Action Taken By the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its First Session*, U.N. Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006), available at http://maindb.unfccc.int/library/view_pdf.pl?url=http://unfccc.int/resource/docs/2005/cmp1/eng/08a01.pdf [hereinafter COP/MOP First Session Addendum 1]. The CDM provides industrialized Member States with the possibility of fulfilling part of their greenhouse gas (GHG) reduction commitments under the Protocol by using emissions reductions obtained through projects in developing Member States.

2. *See, e.g.*, Universal Declaration of Human Rights art 10, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 312 E.T.S. 5, 213 U.N.T.S. 221 (1950) [hereinafter European Convention on Human Rights]; Charter of Fundamental Rights of the European Union art. 47, Dec. 7, 2000, 2000 O.J. (C 364) 1.

tion, and through bringing cases before national courts. The Article briefly describes the first two options and focuses on the third and most controversial one: private entities bringing CDM institutions before national courts for review of the CDM institutions' administrative decisions.

The majority of suits against international institutions brought before national courts are discarded by those courts through the application of several "avoidance techniques," the most important of which is the application of a relatively broad form of jurisdictional immunity.³ This approach, one of "functional necessity," has as its ground rule the idea that an international organization is entitled to those immunities that will enable it to exercise its functions or fulfill its purposes. The flip side of this approach is that jurisdictional immunities do not apply when there is no danger of jeopardizing or obstructing the "core business" or "core activities" of an international organization.⁴

For the CDM, this Article proposes a new, more restricted approach to jurisdictional immunity that fits the non-traditional characteristics of the CDM. Within the "core activities" of the CDM institutions, a distinction is made between decisions that involve the creation of general rules and those that are administrative in nature.

Under this new approach, jurisdictional immunity is maintained insofar as general rulemaking by the CDM institutions is concerned, but administrative decisions made by the CDM institutions (i.e., decisions that directly affect the rights and obligations of private entities) are subject to review by national courts. This new approach will ensure more respect for private entities' fundamental right of access to justice. It will also improve the quality of decisionmaking by CDM institutions and, through this, it will in fact promote and advance the CDM, making CDM projects more attractive to potential investors.

Part II of this Article describes the CDM, highlighting different situations in which decisions of CDM institutions could violate private entities' rights under the CDM rules and how,

3. See AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 36, 169 (2000).

4. For a more detailed explanation of the term "core business," see *infra* Part V.A.

for each of these situations, the CDM lacks remedies for private entities. In Part III, I discuss the innovative characteristics of the CDM regime. Part IV investigates the possible remedies available to private entities outside the CDM rules, including the advantages and disadvantages of various potential remedies. The remainder of the Article focuses on the idea of national courts reviewing administrative CDM decisions. In Part V, I argue that the traditional doctrine of international institutions' jurisdictional immunity before national courts should not apply to the CDM, and in Part VI I propose a new, more restrictive approach to jurisdictional immunity. Part VI also discusses other issues that would come into play if a private entity could in fact bring a CDM institution before a national court for review of certain of its decisions, looking at the possibility of applying the idea of review by national courts to the administrative decisions of other international institutions.

II. CLEAN DEVELOPMENT MECHANISM

A. *Introduction*

In order to combat climate change, the United Nations (UN) Framework Convention on Climate Change was adopted at the UN Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992.⁵ The Convention came into force on March 21, 1994. As the Convention itself was "only" a framework, stronger and more detailed commitments for industrialized countries were laid down in the Kyoto Protocol on December 11, 1997.⁶ The Kyoto Protocol entered into force on February 16, 2005, after the ratification of the Protocol by the Russian Federation.⁷

5. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, S. TREATY DOC. NO. 102-38, 31 I.L.M. 849. At this time, 188 Countries and the European Communities are parties to the Convention. See, e.g., The World Conservation Union, The United Nations Framework Convention on Climate Change—UNFCCC, <http://www.iucn.org/themes/cec/conventions/unfccc.htm> (last visited July 10, 2007) ("Since the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, 188 states and the European Union signed the Convention.").

6. Kyoto Protocol, *supra* note 1.

7. *Id.* at art. 25(1).

The Protocol contains a set of binding emissions targets for industrialized countries, the so-called Annex I countries.⁸ These countries have agreed, for the first commitment period (2008-2012), to reduce their total greenhouse gas (GHG) emissions by 5% compared to the level of 1990.⁹ The reductions agreed to are laid down in Annex B to the Protocol, and they are different for each country.¹⁰ The “non-Annex I countries” have not agreed to a GHG stabilization or reduction.

In order to make it easier and more affordable for Annex I countries to achieve their commitments, the Kyoto Protocol introduced three different flexibility mechanisms. This Article shall deal exclusively with one of these, the Clean Development Mechanism (CDM).¹¹ The CDM allows Annex I countries to use emission reduction units (“certified emission reductions” or CERs) gained through GHG reduction projects in non-Annex I countries to comply with the Annex I emission reduction targets. These CDM projects are developed and carried out by private entities, public entities, and States, either together or in combination. Article 12 of the Kyoto Protocol sets forth the ground rules for the CDM, which have been further developed in the CDM Modalities and Procedures (CDM M&P).¹²

8. A total of 41 industrialized countries are currently listed in Annex I to the Convention. These include the members of the Organization for Economic Co-operation and Development (OECD) and countries with economies in transition (the EITs), including the Russian Federation, the Baltic States, and several Central and Eastern European States. See United Nations Framework Convention on Climate Change, List of Annex I Parties to the Convention, http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php (last visited July 9, 2007).

9. Kyoto Protocol, *supra* note 1, at art. 3(1).

10. *Id.* at Annex B. The countries of the European Union, for example, agreed to a joint reduction of 8% and the United States to 7%, while the Russian Federation agreed to stabilize at the 1990 level and Iceland was allowed to have its emissions grow by 10%.

11. The other two mechanisms are emissions trading (buying and selling by Annex I countries of their unused parts of assigned amounts in order to comply with their individual national targets) and joint implementation (the transfer of emission reduction units resulting from projects in one Annex I country to another Annex I country). *Id.* at arts. 6, 17.

12. *Id.* at art. 12. See generally Decision 3/CMP.1, Annex I: Modalities and Procedures For a Clean Development Mechanism, in COP/MOP First Session Addendum 1, *supra* note 1, at 7, 7-29 [hereinafter CDM M&P].

B. *Actors in the CDM*

The CDM involves a number of existing and newly created entities. Existing entities include governments, non-profits, businesses, and private citizens—all in close relation to one another. Newly created entities include the Conference of the Parties acting as the meeting of the Parties (COP/MOP), established by the Protocol;¹³ the Executive Board (EB), created by article 12 of the Protocol to supervise the CDM;¹⁴ and Designated Operational Entities (DOEs) to certify emissions reductions.¹⁵

1. *Conference of the Parties acting as the Meeting of the Parties and Executive Board*

The Protocol's COP/MOP consists of all the Parties to the Kyoto Protocol. It provides overall authority and guidance to the CDM. It is the Protocol and the CDM's political organ and the organ that makes the general rules for the CDM.¹⁶ The EB, as mentioned before, is the institutional entity supervising the CDM. It is the CDM's most important administrative organ, running the CDM on a daily basis. It is composed of ten members according to a specific geographical distribution: four from Annex I and six from non-Annex I Parties.¹⁷ Each of the members is chosen for his or her technical and/or policy expertise¹⁸ and, after taking a written oath of service,¹⁹ serves in a personal capacity²⁰ and has no pecuniary or financial interest in any aspect of a CDM project activity or in a Designated Operational Entity.²¹ If possible, the EB makes de-

13. Kyoto Protocol, *supra* note 1, at art. 12(4).

14. *Id.*

15. *Id.* at art. 12(5).

16. As we shall see *infra* Part III.B, the COP/MOP sometimes also plays the role of administrative organ.

17. The EB "shall comprise. . .one member from each of the five United Nations regional groups, two other members from the Parties included in Annex I, two other members from the Parties not included in Annex I, and one representative of the small island developing States, taking into account the current practice in the Bureau of the Conference of the Parties." CDM M&P, *supra* note 12, ¶ 7.

18. *Id.* ¶ 8(c).

19. *Id.* ¶ 8(e).

20. *Id.* ¶ 8(c).

21. *Id.* ¶ 8(f).

cisions by consensus, but if no consensus can be reached, decisions are made by a three-fourths majority.²²

2. *Project Participants*

Project participants are the entities involved in a specific CDM project. A project participant can be “(a) a Party involved, which has indicated to be a project participant, or (b) a private and/or public entity authorized by a Party involved to participate in a CDM project activity.”²³ Most CDM projects involve several project participants, some of which only finance the project and have no actual involvement in carrying out the project activity, while others are mainly involved in running the project.

Because certain terms used in the CDM M&P, including the definition of “project participants,” are rather unspecific, the Executive Board has provided a Glossary. With regard to the authorization of a private and/or public entity to participate in a CDM project activity, the Glossary provides:

A written approval constitutes the authorization by a designated national authority (DNA) of specific entity(ies)’ participation as project proponents in the specific CDM project activity. The approval covers the requirements of paragraphs 33 and 40 (a) and (f) of the CDM modalities and procedures.

The DNA of a Party involved in a proposed CDM project activity shall issue a statement including the following:

- The Party has ratified the Kyoto Protocol.
- The approval of voluntary participation in the proposed CDM project activity.
- In the case of Host Party(ies): statement that the proposed CDM project activity contributes to sustainable development of the host Party(ies).

22. *Id.* ¶ 15.

23. See United Nations Framework Convention on Climate Change, Clean Development Mechanism, Glossary of CDM Terms, at 22, U.N. Doc. CDM-Glos-01, available at http://cdm.unfccc.int/Reference/Guidclarif/glossary_of_CDM_terms.pdf.

The written approval shall be unconditional with respect to the above.

Multilateral funds do not necessarily require written approval from each participant's DNA. However those not providing a written approval may be giving up some of their rights and privileges in terms of being a Party involved in the project.

A written approval from a Party may cover more than one project provided that all projects are clearly listed in the letter.

The Board agreed that the registration of a CDM project activity can take place without an Annex I Party being involved at the stage of registration. Before an Annex I Party acquires certified emission reductions from such a project activity from an account within the CDM Registry, it shall submit a letter of approval to the Board in order for the CDM Registry administrator to be able to forward CERs from the CDM Registry to the national registry of the Annex I Party.

The DOE shall receive documentation of the approval.²⁴

The CDM M&P require that the authorizing State ensure that the private or public entities involved follow the CDM rules. If a private or public entity does not comply with CDM rules, the State can simply withdraw authorization, making it impossible for the entity to continue its involvement in CDM projects.²⁵

In this Article, I focus exclusively on project participants that are private entities (private individuals, private companies, private equity funds, etc.). The reason for limiting the focus in such a way is that it allows me to concentrate on one theme: disputes between private entities and CDM institutions over specific types of decisions by these CDM institutions and the review of these decisions by national courts.

24. *Id.* at 6.

25. *Cf.* CDM M&P, *supra* note 12, ¶ 33 (stating that a Party can authorize private and/or public entities to participate in CDM projects).

3. *Designated Operational Entities*

Designated Operational Entities are either domestic legal entities or international organizations²⁶ that carry out monitoring functions at several stages of the Project Cycle.²⁷ They validate a proposed CDM project and verify and certify throughout the lifetime of the project that emissions reductions have in fact occurred and can thus generate CERs. The EB accredits DOEs on the basis of a set of requirements agreed to by the COP/MOP (including requirements of legal personality, financial stability, insurance coverage, and resources),²⁸ while the COP/MOP is responsible for an entity's final designation as a DOE.²⁹ The CDM M&P do not provide for procedures should an applicant entity disagree with an EB decision not to accredit.

DOEs are contracted by the project participants to perform certain tasks in the Project Cycle. At the same time, they are accountable to the COP/MOP through the EB and must comply with the CDM M&P, with relevant decisions of the COP/MOP and of the EB, and with the applicable laws of the States Party hosting CDM project activities.³⁰

In fact, a DOE functions as a filter between the project participants on the one hand (which are inclined to claim the highest possible amount of emissions reductions in order to earn as many CERs as possible) and the EB (which is charged with ensuring that estimations of emissions reductions are realistic and not overstated). The CDM M&P provide for a system that ensures the integrity of the DOEs. If a DOE no longer meets accreditation standards, its accreditation may be withdrawn or suspended.³¹ If significant deficiencies that have led to excess issuance of CERs are identified either in a validation report or in verification or certification reports prepared by the DOE, the DOE must *itself* buy an amount of CERs equal to the excess amount and transfer it to an EB account.³² The

26. *Id.* at App. A, ¶ 1(a).

27. The Project Cycle is the process a project has to go through in order to be accepted as an official CDM project activity. For more information, see *infra* Part II.C.

28. *See id.* ¶¶ 26-27; *see also id.* at App. A.

29. *Id.* ¶ 3(c).

30. *Id.* ¶¶ 26, 27(c).

31. *Id.* ¶ 21.

32. *Id.* ¶ 22.

CDM M&P do not provide for procedures should the DOE disagree with a COP/MOP decision to suspend or withdraw accreditation or to impose a financial penalty.

In this Article I do not look into the possibility of international organizations being DOEs. My focus is exclusively on DOEs that are private companies. The reason for limiting the focus in such a way is the same as given above for focusing on private entity project participants: It allows me to concentrate on disputes between private entities and CDM institutions over specific types of decisions by these CDM institutions and the possibility of bringing these disputes before national courts.

C. *Project Cycle*

In order to get a CDM project running (a step eventually leading to the issuance of CERs), all of the entities described above have to go through the so-called Project Cycle.³³

The Project Cycle starts off with the Project Design Document (PDD), which contains all details about the proposed CDM project (including details on how the proposed project activity can achieve an actual GHG emissions reduction over the baseline, the situation in the absence of the project).³⁴ The PDD also has to include a plan for monitoring the emissions reductions during the life of the project and an environmental impact analysis/assessment.³⁵

The CDM M&P require that, for both baselines and monitoring plans, the project participants use only methodologies that have the explicit approval of the EB. If a methodology has been approved in one project, it can be used immediately in another, whereas a completely new methodology needs to be approved by the EB before it can be used.³⁶ Neither the CDM M&P nor the EB Rules of Procedure³⁷ provide procedures for situations in which the EB does *not* approve a proposed methodology. So far, the practice of the EB, as available

33. For a graph of the Project Cycle, see <http://cdm.unfccc.int/CommonImages/ProjectCycleSlide> (last visited July 29, 2007).

34. CDM M&P, *supra* note 12, ¶¶ 37(d), 43, 44.

35. *See generally id.* at App. B.

36. *See id.* ¶¶ 5(d), 37(e), 38, 44, 45(a), 48, 54; *see also id.* at App. B, ¶ 2(b), (h).

37. *See generally* Decision 4/CMP.1, Annex I: Rules of procedure of the Executive Board of the clean development mechanism, in COP/MOP First Session Addendum 1, *supra* note 1, at 31, 31-43.

on the website of the United National Framework Convention on Climate Change (UNFCCC), shows that the EB allows project participants to submit a revised proposal for the methodology.³⁸ Many methodologies initially rejected by the EB have been approved after revision and resubmission.³⁹ Also, the CDM M&P do not provide for procedures if the EB, even after revised resubmission, continues to decide negatively on a proposed methodology. There is no material available on the UNFCCC website showing what happens in such a situation.

A complete PDD is submitted to a DOE for validation.⁴⁰ If the validation decision is positive, the DOE sends the PDD to the EB and requests that the EB register the project as a CDM project. The DOE also requests written approval of voluntary participation from each State Party involved, including confirmation by the host State that the project activity assists it in achieving sustainable development.⁴¹

Registration is the formal acceptance by the EB of a validated project as a CDM project activity. Registration is considered tacitly granted unless three or more members of the EB or a State Party involved in the project activity request review of the proposed CDM project.⁴² If a review is requested, project participants and the DOE are involved in the review. They can, *inter alia*, provide comments and attend meetings where the review is discussed. There are three possible outcomes to such a review: (1) the activity is registered as a CDM project, (2) the project participants are asked to make corrections, or

38. When the EB decides to reject a proposed methodology, it states in its report that the methodology "can be resubmitted but will require new expert and public input." *See, e.g.*, United Nations Framework Convention on Climate Change, Executive Board of the Clean Development Mechanism Twenty-Ninth Meeting, Feb. 14-16, 2007, *Report*, at 5, U.N. Doc. CDM-EB-29 (Feb. 16, 2007), *available at* <http://cdm.unfccc.int/EB/029/eb29rep.pdf> (reporting the decision to withhold approval for methodologies NM0155-rev, NM00157-rev, NM0159-rev, NM0193, NM0196, and NM0198).

39. *See* United Nations Framework Convention on Climate Change, Clean Development Mechanism, Methodologies for CDM Project Activities, Approved Baseline and Monitoring Methodologies, <http://cdm.unfccc.int/methodologies/PAmethodologies/approved.html> (last visited Aug. 19, 2007) (listing approved methodologies, of which all those with numbers ending in -rev were approved after revision and resubmission).

40. CDM M&P, *supra* note 12, ¶¶ 27(a), 35.

41. *Id.* ¶ 40(a), (f).

42. *Id.* ¶¶ 36, 41.

(3) the proposed project activity is rejected.⁴³ The CDM M&P do not provide for recourse if the project participants disagree with an EB decision to not register a project.

Once a project is registered as a CDM project, it can start earning CERs. During its lifetime the project is carried out and monitored according to the accepted monitoring plan.⁴⁴ Project participants provide a monitoring report to the DOE to which they contracted for the verification (generally not the same entity as the one that was responsible for the validation of the project).⁴⁵ The DOE verifies the information in the report (through on-site visits if necessary or through data from other sources).⁴⁶ If the monitoring report is correct, the DOE certifies⁴⁷ in writing that the monitored emissions reductions have taken place in the verified period,⁴⁸ and it asks the EB to issue CERs. Once the EB issues CERs, this issuance is considered final unless three or more members of the EB or a State Party involved in the project activity requests a review.⁴⁹

In order to issue CERs, the EB instructs its CDM registry administrator to issue the required quantity of CERs. Part of these are transferred to a special account and used to cover administrative expenses and to meet costs of adaptation projects in those States that are particularly vulnerable to the adverse effects of climate change.⁵⁰ The remaining CERs are

43. Conference of the Parties to the United Nations Framework Convention on Climate Change, Dec. 1-12, 2003, *Report of the Conference of the Parties on its Ninth Session, Part Two: Action Taken by the Conference of the Parties at Its Ninth Session*, at 11, ¶ 18(a)-(c) (Decision 18/CP.9, Annex II: Procedures for Review as Referred to in Paragraph 41 of the Modalities and Procedures for a Clean Development Mechanism), U.N. Doc. FCCC/CP/2003/6/Add.2 (2003) (Mar. 30, 2004), available at <http://unfccc.int/resource/docs/cop9/06a02.pdf>.

44. CDM M&P, *supra* note 12, ¶ 59.

45. *Id.* ¶¶ 27(b), 61.

46. *Id.* ¶ 62.

47. *Id.* ¶¶ 27(b), 61.

48. *Id.* ¶ 63.

49. *Id.* ¶ 65. See also Decision 4/CMP.1, Annex IV: Procedures for Review Referred to in Paragraph 65 of the Modalities and Procedures for a Clean Development Mechanism, in COP/MOP First Session Addendum 1, *supra* note 1, at 58, ¶ 2.

50. CDM M&P, *supra* note 12, ¶ 66(a). The share reserved for adaptation projects is set at 2% of the CERs issued for a CDM project activity. See Conference of the Parties to the United Nations Framework Convention on Climate Change, Oct. 29-Nov. 10, 2001, *Report of the Conference of the Parties on*

forwarded to the accounts of States and other parties that participated in the project.⁵¹ The CDM M&P do not provide procedures should project participants disagree with an EB decision to not issue CERs.

III. CHARACTERISTICS OF THE CDM REGIME

A. *Introduction*

The above description of the Project Cycle shows that the CDM regime has some similarities with traditional international environmental law but also a number of characteristics that are distinctly different. By traditional international environmental law I mean State-centric law: law made by a group of States, of which States are the subjects, with certain obligations for States.⁵²

Several aspects of the CDM differentiate it from this traditional model. First, States are not the exclusive subjects of the CDM, but instead share this role with both public and private non-State entities.⁵³ Secondly, the CDM institutions (the EB, the COP/MOP, etc.) have a more prominent relationship with private entities than do most international institutions, given that they make decisions that directly affect the rights of private entities. CDM institutions do this by making decisions that apply the “general” CDM rules to ‘specific’ situations of private entities in a way that is comparable to national governmental entities making administrative decisions.

On the other hand, the CDM is still somewhat traditional insofar as it holds States Party responsible for ensuring that private entities under their authorization comply with the CDM rules.⁵⁴

its Seventh Session, Part Two: Action Taken by the Conference of the Parties, at 23, ¶ 15(a) (Decision 17/CP.7: Modalities and Procedures for a Clean Development Mechanism, As Defined in Article 12 of the Kyoto Protocol), U.N. Doc. FCCC/CP/2001/13/Add.2 (Jan. 21, 2002), available at <http://unfccc.int/resource/docs/cop7/13a02.pdf>.

51. CDM M&P, *supra* note 12, ¶ 66(b).

52. HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW, § 1428 (4th ed. 2003) (1972).

53. While both public and private entities are subjects of the CDM, this Article is about CDM-related disputes between private entities and CDM institutions and as such focuses only on the private entities.

54. See *supra* Part II.B.2.

B. *The 'Non-Traditional' International Law Approach*

Many international environmental treaties, as well as subsidiary international regulations based on those treaties, contain obligations that the Member States have agreed to fulfill within their jurisdictions. To fulfill this international environmental obligation, a State can create national legislation so that private entities within its jurisdiction are obliged (or entitled) to do or not do certain things. Depending on the doctrine of international law applied within a State, the private entities within the jurisdiction of the State may be concerned *only* with national law (dualist doctrine) or with both international and national law (monist doctrine and doctrine allowing for direct effect of provisions of international law).⁵⁵

In all three doctrines, the sole rulemaking entity these private entities deal with is the State within whose jurisdiction they fall. "Other states and international organizations would not be allowed to pierce this sovereign veil [of the home State] and have direct relations with the population."⁵⁶ The following example may illustrate this: If an international treaty requires, for example, a certain maximum percentage of nitrates in a State's groundwater, a Member State with a dualist doctrine would generally take national legislative action curbing the nitrate emissions of its citizens. These legislative activities would generally be followed by more detailed administrative actions, such as the issuance or denial of permits. A Member State with a monist doctrine or a doctrine allowing for direct effect of certain provisions of international law⁵⁷ would not have to take legislative action. It would, however, likely need to provide for administrative decisions such as the issuance or denial of permits in order to apply the treaty obligations to individual citizens. In either case, the private entities affected by this maximum percentage of nitrates generally deal with the lawmaking and administrative organs of their State, not with those of other States that have signed the treaty and not with international institutions linked to the treaty structure.⁵⁸

55. See SCHERMERS & BLOKKER, *supra* note 52, §§ 1522-37, at 959-70.

56. *Id.* § 1428, at 900.

57. This is on the assumption that the treaty provision fulfills the requirements for such direct effect.

58. See Stefano Battini, *International Organizations and Private Subjects: A Move Toward a Global Administrative Law?* 4-6 (Inst. of Int'l Law & Justice,

Under the CDM this alignment seems to have shifted somewhat; the separation of national jurisdictions is not as strict as under the traditional international law approach. Annex I States have each agreed to fulfill certain obligations (emissions reductions), but the whole idea of the CDM is that these obligations are fulfilled through projects that take place on *another* (non-Annex I) State's territory and thus within this *other* State's jurisdiction.

Let us take a simple CDM example: A private entity from an Annex I State initiates a CDM project in a non-Annex I State. The private entity has to have the authorization of the Annex I State, and the Annex I State must ensure that the private entity participation is consistent with the CDM M&P. In this respect, the private entity seems to fall within the jurisdiction of the Annex I State. The private entity will, however, undertake its activities in the territory of the non-Annex I State, and some or all of these activities may also be under the jurisdiction of the non-Annex I State. Even this simple example brings up a host of questions: Do the rights and obligations of the private entity derive directly from the CDM M&P, or do they apply through the national law of the Annex I State even though the actual activities take place in another State's jurisdiction? Or, alternatively, do they apply through the laws of the non-Annex I State where the project takes place? And since many of the CDM M&P rights and obligations are fairly general, who is responsible for more detailed follow-up decisions (decisions that apply the CDM M&P to the specific project and the specific private entity)?

Legal traditionalists might say that such follow-up decisions specific to a project or a private entity can only be made by a State because of the way that international and national law are organized.⁵⁹ If, however, we look at the current practice under the CDM, we see that this traditional approach is not being used. It is not the States but the CDM institutions that make these follow-up decisions. For example, a private entity involved as a project participant can, if its project fulfills

Global Admin. Law Series, Working Paper 2005/3), available at <http://www.iilj.org/publications/documents/2005.3Battini.pdf>; Edith Brown-Weiss, *The Rise or Fall of International Law?*, 69 *FORDHAM L. REV.* 345, 346-47 (2000).

59. See *supra* Part III.A (describing traditional state-centric international law).

the necessary requirements, earn CERs with this project. The requirements for the project as well as for the issuance of CERs arise directly from the CDM M&P, not from national implementing legislation, and it is the EB and not a national administrative organ that makes the follow-up decisions on the registration of the entity's project and on the issuance of the CERs. Another example is a situation in which a private entity wishes to be designated as a DOE. The necessary conditions for such designation are set out in the CDM M&P, and the "job" of DOE is also created under the CDM M&P and the Protocol rather than under national legislation. Moreover, it is the EB and the COP/MOP, not a national administrative organ, that make the follow-up decisions to accredit and designate the private entity as a DOE. So far, none of the Protocol's Member States, however traditional their views on international law, have objected to this practice. From this silence, and from the fact that Member States actually devised these rules, we cannot but conclude that the Member States have agreed to allow CDM institutions to make decisions that apply directly to private entities.

It is somewhat novel, but at the same time perfectly understandable, that the CDM institutions make these follow-up decisions instead of the States. As the simple example given in the above paragraph shows, the CDM obligations do not apply to strictly separated national jurisdictions. Therefore, the follow-up decisions to these obligations do not fall within the competence of strictly-separated national administrative organs either. Most likely for that reason, a large part of the more administrative aspects of the CDM (including these follow-up decisions) directed toward private entities has remained in the hands of the CDM institutions. The CDM M&P create both rights and obligations for private entities, and these rights and obligations are distributed to private entities directly by decisions of the CDM institutions.

To make a long story short: When making decisions pursuant to and based on the CDM obligations that are directly aimed at private entities, the CDM institutions play the role of administrative organs—*international* administrative organs—toward these private entities.

C. *Administrative Decisions*

A proper characterization of the nature of CDM decisions that directly affect private entities is essential to determining how such decisions should be treated by national courts. As discussed briefly in Part III.A, the most appropriate analogy in my opinion is to a division that is more commonly used on the national level between general rules or laws enacted by a legislative entity on the one hand and, on the other hand, administrative decisions made by administrative organs that apply these general rules or laws to a specific situation or entity. To take an example from the Netherlands (the national jurisdiction with which I am most familiar): The Environmental Management Act (a law) was enacted by the Congress (legislature), and, based on that Act, an environmental permit for a factory (a specific administrative decision) can be issued by the city council (administrative organ) of the municipality in which the factory is located.

We can see a similar division in the CDM structure. The Kyoto Protocol, the CDM M&P, and decisions made by the COP/MOP in its role as supreme rulemaking body to the Protocol are general rules. When enacting them, the COP/MOP is acting as a legislative body. A decision by the COP/MOP to refuse to designate a private entity as a DOE or a decision by the EB to persist in its refusal to approve a methodology suggested by project participants are specific administrative decisions and, in these cases, the COP/MOP and the EB are acting as administrative organs. It is important to note that, under this model, the COP/MOP acts at different times as a legislative body *and* as an administrative institution.⁶⁰

60. In international institutional law, the word 'administrative' has so far been used primarily when discussing the relationship between international organizations and individual members of their staff. A number of international organizations have established their own "administrative tribunals" to adjudicate these employment conflicts, or they make use of other organizations' administrative tribunals (the World Health Organization, the Food and Agriculture Organization and the World Meteorological Organization, for example, have declared the administrative tribunal of the International Labor Organization competent to hear complaints brought by their staff members). See International Labor Organization, Administrative Tribunal, <http://www.ilo.org/public/english/tribunal/orgs.htm> (last visited July 26, 2007). Insofar as this use of the word administrative describes the relationship of the international organization with a private entity (i.e., the em-

D. *Concluding Remarks*

In summary, the CDM system blurs the traditional distinction between national and international legal instruments. The CDM practice so far makes clear that it is the CDM institutions, and not States, that make administrative decisions pursuant to the CDM M&P, and that these decisions directly affect the rights and obligations of private entities. The States' traditional role as intermediary between the national and international legal systems has diminished, creating closer contact between private entities and international institutions. In their relationships with private entities described above, the CDM institutions have in fact taken on the role of international administrative agencies, and the decisions they make can be characterized as international administrative decisions.

IV. DISPUTES BETWEEN PRIVATE ENTITIES AND CDM INSTITUTIONS AND THE MEANS TO ADDRESS THEM

A. *Possible Disputes Between Private Entities and CDM Institutions*

Closer contact between private entities and CDM institutions makes it more likely that disputes will arise between them. Either a CDM institution may allege that a private entity acted in violation of its obligations under the CDM M&P, or a private entity may claim that a decision of a CDM institution is contrary to the CDM M&P.⁶¹

ployee), there is a similarity with the CDM. However, the fundamental difference between this traditional use in international law of the qualification "administrative" and the way it will be used for the CDM in this Article is that the traditional use is limited to relationships that are *internal* to the international organization and that have their basis in a contract, while the use in this Article has to do with a non-contractual relationship between the international organization and private entities *external* to the organization. See REINISCH, *supra* note 3, at 268. See also SCHERMERS & BLOKKER, *supra* note 52, § 690, at 480.

61. These two categories of disputes between private entities and CDM institutions are, of course, not the only types of disputes possible in a CDM context. Any entity with an interest in a CDM project could potentially get involved in a conflict with another such entity over the way a project is undertaken with regard to, *inter alia*, environmental impact of the project, money invested in the project, validation, registration, verification and certification of the project, or the accreditation and designation of a DOE.

The likely resolution to the first category of disputes, in which a CDM institution believes that a private entity has acted in violation of its obligations under the CDM M&P, shows the power imbalance between the two parties: The CDM institution can simply make it impossible for the private entity to continue being a part of the CDM. The CDM institution could accomplish this by, for example, refusing or withdrawing accreditation or designation of the private entity, refusing to register a project, or refusing to grant CERs.⁶² If the private entity

In disputes between private entities before national courts that involve some interpretation of general agency rules or specific administrative decisions, the question comes up whether it should be for the national court to make this interpretation or if the national court should refer the matter to the relevant agency authority. In the United States, this issue is known as the doctrine of primary jurisdiction. Case law shows that U.S. courts may decide to refer a case or part of a case to administrative agencies based on a variety of factors: statutory requirements, desire for the uniform application of a statute, the perception that the agency's technical expertise is required for the application of the particular statute, or the presence of concurrent proceedings in the court and the agency that will likely impose conflicting obligations on the defendant. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 1165 (5th ed. 2002).

Rodgers Kalas and Herwig, for example, have identified the following possible disputes:

- disputes arising out of the investment relationship, including disputes over the failure of a project due to the fault of the non-Annex I host State (for example because this State expropriates the investment) or due to the failure of the project participant running the project;
- disputes over the registration of projects and issuance or revocation of CERs;
- disputes on auditing and bookkeeping decisions, such as the wrongful transfer of CERs or fraudulent misrepresentation of CERs in the corporate books;
- disputes with regard to decisions of whether to accredit or to withdraw or suspend accreditation of DOEs; and
- disputes about CERs that are retroactively held to be invalid.

See Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution Under the Kyoto Protocol*, 27 *ECOLOGY L.Q.* 53, 111 (2000).

This Article does not discuss in detail all of these possible types of disputes. Instead, I limit my discussion to certain disputes which may arise between private entities and CDM institutions.

62. There is also another, more theoretical, possibility. As explained *supra* Part II.B.2, a private entity can only participate in CDM project activities if it has the authorization of a State and the State is under an obligation to ensure that the entity's participation is consistent with the CDM M&P. This means that if a CDM institution believes that a private entity has acted

affected by such actions would, in turn, consider these decisions to be in violation of the CDM M&P, a dispute of the second category is born.

As we have seen in the description of the Project Cycle in Part II.C, there are a number of occasions when disputes of this second type are likely to arise. Examples of such situations include:

- when the EB refuses to accredit a private entity as a DOE and the entity thinks it fulfills all criteria for accreditation;
- when the COP/MOP refuses to designate a private entity as a DOE and the entity thinks it fulfills all criteria for designation;
- when the COP/MOP, at the recommendation of the EB, suspends or withdraws the accreditation of a DOE (possibly combined with fining the DOE) for misrepresenting the number of CERs earned with a project and the DOE thinks it has followed all the rules and that there is no such misrepresentation;
- when the EB persists in its refusal to approve a new baseline methodology suggested by project participants and the participants think the methodology fulfills all CDM M&P criteria for methodologies;
- when the EB issues no CERs for a project activity and the project participants think that CERs should be issued.

The CDM M&P do not provide a means for the private entity to challenge the decision of the EB or COP/MOP in any of these situations. The remainder of this Article focuses on different methods of dealing with this lacuna in order to provide private entities with a remedy against rights-violative administrative decisions of the CDM institutions.

in violation of its obligations under the CDM M&P, the CDM institution can hold the authorizing State responsible for this violation (and, in turn, this State could withdraw its authorization so the entity involved can no longer participate in CDM projects).

B. *Resolution of Disputes Between Private Entities
and CDM Institutions*

As indicated above, there is currently no mechanism available under the CDM M&P for private entities that wish to challenge decisions by CDM institutions that directly affect their rights under the CDM. Thus, the remainder of Part IV discusses the possibility of resolving such disputes by resort to three existing mechanisms that are not part of the CDM framework: (a) the more general compliance mechanism available under the Kyoto Protocol, (b) arbitration, and (c) dispute resolution by national courts. I examine each of these dispute settlement instruments along with potential procedures for implementation and their relative advantages and disadvantages for the types of disputes central to this Article. The first two mechanisms are discussed in less detail than the third.

1. *Kyoto Compliance Mechanism*

The only available “in house” instrument that ensures conformity with the Kyoto rules, including some related to the CDM, is the Kyoto Protocol’s Compliance Mechanism. The compliance regime consists of a Compliance Committee made up of a Facilitative Branch and an Enforcement Branch. The Facilitative Branch is designed to provide advice and assistance to States Party in order to promote their compliance, while the Enforcement Branch has the power to determine consequences for States Party not meeting their commitments. However, private entities are not allowed to bring cases under this Mechanism. Moreover, the Mechanism does not allow for cases brought against CDM institutions, only against States Party.⁶³ The kinds of disputes I focus on in this Article therefore fall entirely outside the scope of this Mechanism.

63. See generally Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, Nov. 28-Dec. 10, 2005, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session, Part Two, Addendum 3: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at its First Session*, at 96, ¶ 4 (Decision 27/CMP.1, Annex: Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol), U.N. Doc. FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006), available at <http://unfccc.int/resource/docs/2005/cmpl/eng/08a03.pdf>.

This void could, however, be filled by creating an entity specifically for the review of claims by private entities against decisions by CDM institutions or by adding review of such claims to the authority of the Compliance Committee, for example through a specialized branch.⁶⁴ Such a solution could be inspired by existing mechanisms that deal with disputes between private entities and international organizations, such as the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (which has jurisdiction in certain disputes between private entities and institutions under the UN Convention on the Law of the Sea)⁶⁵ or the World Bank Inspection Panel (which hears claims of individuals who believe they have been, or are likely to be, adversely affected as a result of actions or decisions of the World Bank that violate the Bank's own social and environmental policies).⁶⁶

A clear advantage of making such an addition to the existing mechanism is that all disputed decisions by CDM institutions would be reviewed by a single entity. This entity could acquire specialized expertise and build a consistent set of decisions on CDM-related issues, ensuring unity of review. This would also ensure unity in administrative decisionmaking,

64. I have proposed and discussed this option in another article. See Ernestine E. Meijer, *Het Clean development mechanism: verlies binnen een 'win-win' instrument* [The Clean Development Mechanism: Loss Within a "Win-Win" Instrument], 7 *TJDSCHRIFT VOOR MILIEU EN RECHT* 406 (2004).

65. The Seabed Disputes Chamber was established in accordance with part XI, section 5, of the Convention on the Law of the Sea and article 14 of the Statute of the International Tribunal for the Law of the Sea. See United Nations Convention on the Law of the Sea arts. 186-91, Annex VI art. 14, Dec. 10, 1982, 1833 U.N.T.S. 3, 397; 21 I.L.M. 1261 (1982), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. The Chamber has jurisdiction in disputes regarding activities in the International Seabed Area. See *id.*

66. The World Bank Inspection Panel is a three-member body established to improve the Bank's compliance with its social and environmental policies. The Panel is available as a forum for locally affected people who believe that they have been or are likely to be adversely affected as a result of the Bank's policy violations. Some Bank violations consist of the Bank allowing national implementing organizations using Bank loans to operate in a way that is inconsistent with Bank policies. For a list of Inspection Panel cases, see World Bank, Summary of Inspection Panel Cases, available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Requests%20for%20Inspection/20568554/SummaryofInspectionPanelCases06152005.pdf>.

since the CDM institutions could take up the recurring issues in these reviews and conform their future decisions to those of the entity. The Compliance Mechanism could even make suggestions to the COP/MOP for necessary changes to, for example, the CDM M&P rules and procedures.

A disadvantage of this approach is that it creates yet another international institution or branch, adding to the already very large number of international institutions. Another disadvantage is that the growing number of CDM projects may also lead to an increasing number of conflicts. If only one specially-created entity had to deal with all these cases, it might lead to long delays, which would be disadvantageous for the projects involved and for the CDM as a whole.

2. *Arbitration*

An option outside the Kyoto instruments that could be considered is arbitration.⁶⁷ However, arbitration does not automatically come into play whenever there is a conflict between a private entity and a CDM institution. In order for arbitration to be possible, it needs to be pre-arranged. In a contractual relationship, parties can add a clause calling for arbitration if conflicts arise, but most of the situations in which private entities want to challenge decisions of CDM institutions involve relationships, rights, and obligations “born” out of the CDM M&P and not created by a contract.⁶⁸

The problem of the absence of a contract including an arbitration clause could be solved by making both private entities who want to participate in CDM projects and the CDM

67. The most well-developed arbitration system is that of the International Centre for the Settlement of Investment Disputes (ICSID). See World Bank, International Centre for the Settlement of Investment Disputes, <http://www.worldbank.org/icsid/> (last visited July 27, 2007). However, arbitration under ICSID does not allow for cases against international institutions such as the CDM institutions, and ICSID is therefore not useful for the kinds of disputes we are looking at in this article. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. For a similar conclusion not limited to the CDM, see Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 YALE L.J. 1167, 1182-1183 (1982) [hereinafter *Jurisdictional Immunities*], and Michael Singer, *Jurisdictional Immunities of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 64 (1995).

68. See *supra* Part IV.A.

institutions themselves sign a general arbitration clause before participation begins. This general clause would cover *all* the situations (contractual and non-contractual) in which the two parties interact and where conflicts might arise.

Arbitration has the advantage of granting the parties involved a deciding vote in the appointment of arbitrators and the scope of the arbitrators' power. The flexibility of arbitration often makes this form of dispute settlement attractive and easy to agree to beforehand. However, this flexibility can also be disadvantageous. The freedom to choose arbitrators makes it more difficult for a consistent group of persons to build expertise in the issues specific to the CDM, while limits on the power of the arbitrators as delineated in an arbitral agreement may prove too constraining when an actual conflict arises.

Another disadvantage is the fact that arbitral proceedings are often opaque: It is difficult if not impossible to know the course of prior arbitral proceedings, and often the arbitral award is only made public if parties have agreed to its publication. This makes it difficult for an arbitral tribunal to consult previous case law to make its decision and therefore frustrates the goal of building the consistent set of arbitral decisions necessary to assure some degree of predictability in the resolution of future CDM disputes.⁶⁹

3. *Dispute Resolution by National Courts*

The third and, in my opinion, most interesting option for the resolution of disputes between private entities and CDM institutions is to bring such disputes before national courts.⁷⁰

69. See generally Stuart H. Bompey et al., *The Attack On Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW 21 (1997) (noting a "runaway" arbitrator problem); Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L.J. 121 (1995) (discussing privacy rights); S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915 (1998).

70. Before getting to the subject of bringing CDM institutions before national courts, it should be acknowledged that it may make a difference whether the national court in question is a court of a State Party to the Kyoto Protocol or a court of a non-Member State. Some authors state that case law shows that courts make little distinction between international organizations of which their forum State is a member and the ones of which it is not a member. See REINISCH, *supra* note 3, at 42. Some argue that whether a State is a member or not is irrelevant: after the conclusion of the constituent

One advantage of this approach is that, unlike the two options already presented, its implementation does not require the creation of new (permanent or ad hoc) judicial entities. The recent proliferation of varied international and mixed international-national tribunals and their equally varied successes militates for a solution that does not require adding yet another strand to the already over-complicated web of dispute settlement bodies. Another advantage is that potentially numerous CDM conflicts can be handled by not just one but several national courts. This may make resolution of these conflicts faster—although these national courts would have to decide CDM cases in addition to their existing caseloads, so speedy resolution is not guaranteed.

A disadvantage of this approach is the fact that it may make the “marble cake” structure of the CDM (with an already unclear mix of responsibilities and rights for States, CDM institutions, and private entities) even more opaque.⁷¹ It also raises concerns about the potential impact on the global legal order of national judges deciding international issues. A related disadvantage is that this approach could pose a problem for the unity of review under the CDM, since different national courts could potentially judge similar issues in different ways. As will be explained below, this is unlikely to cause significant problems, but the chances of such conflict are greater when national courts review CDM administrative decisions

treaty, an organization simply exists and non-member States cannot ignore this. See Robert Y. Jennings, *What Is International Law and How Do We Tell It When We See It?*, in *SOURCES OF INTERNATIONAL LAW* 27, 30-31 (2000). Others claim that there is “ample precedent in international law” for non-member States refusing to recognize the existence of an international organization. See Singer, *supra* note 67, at 69. In this Article, I only look at the possibility of dispute settlement by courts of Kyoto Protocol Member States.

A similar issue is whether private entities that are nationals of or headquartered in non-Member States can participate in the CDM. For a discussion of this issue, see Martijn Wilder, *Can Companies or Entities from a Non-Party to the Kyoto Protocol Participate in the Flexible Mechanisms?*, in *LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK* 249 (David Freestone & Charlotte Streck eds., 2005).

71. Grodzins used this metaphor of the “marble cake” to describe the way federal and state authority in the United States are mixed together. This is as opposed to the “layer cake” metaphor, with each level of government seen as distinctively separate, one on top of the other, in a strict hierarchical order. Morton Grodzins, *The Federal System*, in *AMERICAN FEDERALISM IN PERSPECTIVE* 256, 257 (Aaron Wildavsky ed., 1967).

than when one CDM institution conducts the review (the first option presented above).

Considering the option of having national courts review administrative decisions of CDM institutions leads us to the more general question of when and how international organizations can be brought before national courts. National courts have shown a general reluctance to get involved in cases involving international organizations. While national courts cite a variety of reasons for staying away from judging such cases,⁷² respect for the jurisdictional immunity of international organizations is the most fundamental objection raised by courts against claiming jurisdiction over suits against such organizations.⁷³ I can find no evidence of any attempt to bring a case involving administrative decisions of CDM institutions before a national court. However, if such a case were to be brought, it would most likely be discarded through the application of this immunity doctrine.

In the following section, I discuss the doctrine of immunity of international organizations, propose a new approach to jurisdictional immunity that should apply to the CDM, and explain why this approach is necessary. Finally, I will briefly look

72. Reinisch researched large numbers of cases in which international organizations played some kind of role and came up with a list of grounds used by national courts to refuse to judge these cases:

- courts refuse to recognize international organizations as legal persons under domestic law, which means they cannot be a party to a dispute;
- courts see the scope of an international organization's domestic legal personality as functionally restricted, and any act of the organization that does not fit the organization's functional personality is considered an act *ultra vires* for which the organization cannot be sued;
- courts abstain from judging a case using the "act of state doctrine," the "political question doctrine," the doctrine of *acte de gouvernement*, or the doctrine of non-justiciability;
- courts claim to have limited adjudicative powers and refrain from judging a case by stating that the case lies beyond their adjudicative power;
- courts claim that a case is in fact not a real case (the case is moot, or not ripe for adjudication);
- courts use their discretionary powers to declare a case frivolous, insincere, harassment, without merit, fanciful etc.; or
- courts refuse a case because of the jurisdictional immunity of international organizations.

See REINISCH, *supra* note 3, at 42.

73. *Id.* at 36.

into some issues that would arise if national courts were to adjudicate CDM cases according to this new approach.

V. DISPUTES BETWEEN PRIVATE ENTITIES AND CDM
INSTITUTIONS AND JURISDICTIONAL IMMUNITY

A. *Doctrine of Jurisdictional Immunity of
International Organizations*

For a long time, international organizations brought before national courts were treated in a way similar to foreign States brought before other States' national courts: No case could be brought against them, because they were granted absolute immunity from prosecution before national courts.⁷⁴ As applied to States, the doctrine of absolute immunity was based on the legal maxim *par in parem non habet imperium*. All States are equals and therefore no one State's judiciary can sit in judgment of another State. Any conflict that arose between a private entity and a foreign State had to be solved by diplomatic interaction between the foreign State and the home State of the private entity. Absolute immunity for international organizations rested on a different conception: They were considered "young and vulnerable fledglings that, not being mature organizations, could not survive, much less function, without special protection."⁷⁵ Needless to say, this conception no longer holds true for most international organizations. Many of them have grown to become powerful entities and, as we have seen in the example of CDM institutions, some even have the power to directly affect the rights of private entities.

But even if international organizations are no longer weak and powerless, some commentators present other reasons why absolute immunity should still be granted to these organizations. Their main argument is that being subject to judgments of national courts could jeopardize the independence of international organizations and present an obstacle to their smooth functioning.⁷⁶ Another reason given by some is that national courts may be prejudiced against international organizations

74. See Singer, *supra* note 67, at 56.

75. See *Jurisdictional Immunities*, *supra* note 67, at 1181.

76. See COVEY T. OLIVER ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 613 (4th ed. 1995).

in favor of domestic claimants, even if such prejudice would not necessarily be in bad faith.⁷⁷ National judges' experience and participation in a particular legal order will have impressed upon them legal notions which differ from the basis of judgments rendered in other jurisdictions. A final argument often given by those opposed to national courts deciding cases involving international organizations is that the legal effects of acts performed by international organizations should not be determined, quite possibly in conflicting ways, by national courts.⁷⁸

In any case, the doctrine of jurisdictional immunity has begun to soften. As applied to States, immunity has shifted from absolute to restrictive: A State can generally be brought before a national court in respect of its commercial activities (*acta jure gestionis*, the kind of commercial activities a private entity could also undertake), but not for its sovereign, typically governmental, activities (*acta jure imperii*).⁷⁹

Jurisdictional immunity of international organizations has also become less absolute, though the doctrine has not shifted as far as it has for States. Most national courts now use the so-called functional necessity approach to immunity for international organizations. The ground rule of this approach is that an international organization is entitled to those immunities that will enable it to exercise its functions or fulfill its purposes.⁸⁰ In other words, jurisdictional immunities do not apply when there is no danger of jeopardizing or obstructing the "core business" or "core activities" of an international organization. I introduce the term "core business" in this Article to define the main substantive activities of an international organization. To use a very simple example, the core business of

77. Singer, *supra* note 67, at 128.

78. See, e.g., Hugh McKinnon Wood, *Legal Relations Between Individuals and a World Organization of States*, 30 TRANSACTIONS GROTIUS SOC'Y 141, 144 (1962) (making similar objections with respect to the League of Nations).

79. SOMPONG SUCHARITKUL, *STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW* 254-55 (1959).

80. See, e.g., U.N. Charter art. 105, para. 1 and 2; Constitution of the World Health Organization arts. 66 and 67, para. a, July 22, 1946, 14 U.N.T.S. 185, 62 Stat. 2679; Constitution of the International Labour Organization art. 40, para. 1, Oct. 9, 1946, 15 U.N.T.S. 35; Agreement Establishing the World Trade Organization art. VIII, para. 1, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144. This type of immunity has also been characterized as immunity for "official activities."

the World Health Organization (WHO) is activities related to “the attainment by all peoples of the highest possible level of health.”⁸¹ This means, for example, that the organization takes coordinating action on international health issues or assists national governments in strengthening their health services.⁸² While the WHO may also rent a building for the organization or buy office furniture, these activities are peripheral and not part of the organization’s core business.

However, the functional necessity approach to immunity leaves room for different interpretations. Some argue that interference by a national court will *always* obstruct the organization’s core activities, which makes functional necessity a de facto absolute immunity.⁸³ This is, however, a minority argument. More accepted is the view that the functional necessity approach is a restriction of absolute immunity.⁸⁴

The proponents of the functional necessity approach can roughly be divided into two categories. First are those who explicitly or implicitly interpret the functional immunity of international organizations in the same way as restrictive State immunity:⁸⁵

The advantage of a concept of immunity for official activities could lie in the fact that it makes clear that not all activities contributing to the functioning of an international organization, but rather only such acts

81. Constitution of the World Health Organization, *supra* note 80, at art. 1.

82. *Id.* at art. 2, para. a, c.

83. REINISCH, *supra* note 3, at 211-12, 333 (summarizing Oberster Gerichtshof [Supreme Court], June 11, 1992, 7 Ob 627/91, 47 Österreichische Juristenzeitung 661, No. 161 (Austria), and United Nations Charter Drafting Committee Report, 13 UNCIO Doc. 933, IV/2/42(2) (1945), at 704 (clarifying the standard of the UN’s immunity)). Under such a broad interpretation of functional necessity, buying office furniture would also be considered essential for the substantive functioning of the organization and therefore subject to immunity.

84. See REINISCH, *supra* note 3, at 335.

85. This interpretation also employs a distinction between *acta jure imperii* and *acta jure gestionis*. The United States International Organizations Immunities Act, Pub. L. No. 79-291, 22 U.S.C. § 288 et seq. (1945) explicitly grants international organizations “the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.” Italian courts have consistently used the *acta jure imperii-acta jure gestionis* distinction when using the functional necessity doctrine. See, e.g., REINISCH, *supra* note 3, at 189.

that are intrinsically related to its official functions, merit exemption from the adjudicative power of a domestic court. Such a restrictive approach would probably exclude those “instrumental” activities such as renting office space, contracting for secretarial services, etc. which undoubtedly contribute to the functioning of an international organization, but are far from the core of its functional tasks.⁸⁶

Secondly, there are those who apply a test similar to the one used to define the limits of the implied powers doctrine. According to this test, immunity applies to those activities essential to the organization’s performance of its duties:⁸⁷

The functional necessity concept can be said to dictate that the scope of the privileges and immunities of international organizations shall be limited to only those necessary for the exercise of the organization’s functioning in the fulfillment of its purposes.⁸⁸

Although they come from different theoretical perspectives, in practice these two interpretations of functional necessity often lead to very similar results. Those decisions that an international organization makes that are pursuant to the goals of the organization and directly linked to its core business fall within the realm of the organization’s jurisdictional immunities. Other decisions that the organization makes which are not, or are only indirectly, relevant to the core functions of the organization are outside the scope of immunity and are therefore subject to national judicial scrutiny. This approach provides private entities access to justice for the category of decisions directly relevant to them while at the same time barring this access with respect to core business decisions, thus ensuring that national courts do not make judgments about policy issues that are for the organization’s Member States to decide.

86. REINISCH, *supra* note 3, at 338.

87. *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11) (“Under international law, the [UN] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication *as being essential to the performance of its duties*.” (emphasis added)).

88. Peter H.F. Bekker, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS* 152 (1994), *quoted in* Reinisch, *supra* note 3, at 339.

The shift away from absolute immunity for international organizations has not yet reached an endpoint. A more recent development suggesting an even narrower application of immunity can be found in the field of employment disputes between private entities and international organizations. In the past, most national courts recognized the immunity of international organizations in such conflicts and would not judge the case, but this seems to have changed.⁸⁹ In situations in which the international organization does not provide a mechanism for resolution of employment conflicts (such as an administrative tribunal linked to the organization), cases brought by private entities against such organizations have been accepted and judged by national courts.⁹⁰

This further shift does not indicate that employment disputes are no longer considered part of an organization's core business, but rather that the private entity's right of access to justice is thought more important than the reasons for the immunity of international organizations in this context. An important example is the case of *Waite and Kennedy v. Germany* before the European Court of Human Rights.⁹¹ The Court ruled:

63. . . . the rule of immunity from jurisdiction, which the German courts applied . . . in the present case, has a legitimate objective.

. . .

67. The Court is of the opinion that where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immuni-

89. *Id.* at 36, 285-87.

90. *See, e.g.*, SCHERMERS & BLOKKER, *supra* note 52, § 544A, at 385 n.502 (discussing the Hague District Court judgments of February 13, 2002 and June 27, 2002).

91. In this case, Waite and Kennedy initiated legal proceedings against their ex-employer, the European Space Agency (ESA), and a German court ruled that the ESA could not be brought before it because of its immunities. The plaintiffs then initiated proceedings before the European Court of Human Rights (ECHR) claiming that Germany had violated their right to a court. The ECHR ruled that Waite and Kennedy had other means beside the German court to protect their rights and that the jurisdictional immunities of ESA should therefore prevail over their right of access to a German court. *Waite and Kennedy v. Germany*, 30 Eur. Ct. H.R. 261 (1999).

ties, there may be implications as to the protection of fundamental rights. . . .

68. For the Court, a material factor in determining whether granting [the international organization] immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.⁹²

Administrative decisions by CDM institutions which directly affect the rights of private entities are part of the CDM institutions' core business. Under the functional necessity doctrine, disputes over such decisions cannot be brought before national courts. Yet granting CDM institutions immunity from jurisdiction seems to contradict the doctrine's *raison d'être*. After examining the policy behind this model of jurisdictional immunity and the circumstances in which it is supposed to apply, it is questionable whether the doctrine should apply at all to the disputes regarding the administrative decisions of CDM institutions that are central to this Article.

B. *Non-Applicability of Jurisdictional Immunity*

The functional necessity doctrine of jurisdictional immunity of international organizations indiscriminately grants immunity to international organizations for one large category of activities and decisions: If a decision is part of an organization's core business, this decision cannot be challenged by a private entity before a national court.⁹³

Within the context of the CDM, the core business decisions of the CDM institutions can be divided up into at least two categories:

- decisions made by the COP/MOP that involve the creation of general rules; and
- administrative decisions made by the COP/MOP or the EB in their roles as international administrative organs that are specific to one CDM project and aimed directly

92. *Id.* ¶¶ 63, 67, 68. See also *Beer and Regan v. Germany*, App. No. 28934/95, Eur. Ct. H.R., 118 I.L.R. 121 (1999).

93. See *supra* notes 80-81 and accompanying text.

at specific private or public entities and/or specific States.⁹⁴

This division highlights the indiscriminate nature of the functional necessity doctrine, since the doctrine actually allows for immunity with regard to both types of decisions. General rules created by the COP/MOP in the context of its core business as well as administrative decisions of the COP/MOP and the EB are all considered subject to immunity, even though these two types of decisions are fundamentally different in legal nature.

It is not, however, surprising that the doctrine does not distinguish between these different categories of decisions. Until recently, there were few instances in which international organizations acting within the realm of their core business would make decisions that had a direct effect on the rights and situations of private individuals. And there were even fewer instances in which these decisions were *meant* to have such an effect, as is the case with the administrative decisions of the CDM institutions.⁹⁵

The fact that the functional necessity doctrine simply does not provide for the current situation becomes even more clear when we look at international financial institutions, which are among those international institutions that make decisions that are not directly *aimed* at private entities but that nonetheless do have direct effects on rights of private entities. Four of the five organizations within the World Bank Group have provisions in their constitutive documents specifically allowing private entities to sue them in national courts, showing both that these organizations assume that an express provision is needed because the doctrine of jurisdictional immunity would block private individuals from bringing cases against them before national courts and that they acknowledge the necessity of adjudicating such cases.⁹⁶ However, this blanket submission to ju-

94. As explained previously, this article focuses on those decisions that are aimed at private entities.

95. See *supra* Part III.A (description of traditional state-centric international law).

96. Constitution of the International Bank for Reconstruction and Development art. 7, § 3, Dec. 17, 1965, 2 U.N.T.S. 134, T.I.A.S. No. 1507; Articles of Agreement of the International Development Association art. 8, § 3, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249; Articles of Agreement of the International Finance Corporation art. 6, § 3, May 25, 1955, 7 U.S.T. 2197,

jurisdiction is as indiscriminate as its mirror image of absolute jurisdictional immunity. Under this general waiver of immunity, both the World Bank in a more general “lawmaking” capacity and the World Bank making specific administrative decisions that implement such general rules are potentially subject to suits before national courts.

A similar approach could be applied to the CDM: A blanket provision could be added to the CDM M&P allowing private entities to bring cases against CDM institutions before national courts. This would provide a remedy to private entities without necessitating a reform of the doctrine of jurisdictional immunity. Such an approach would, however, inadequately address the fact that States have in the CDM consciously created a mechanism that breaks from the model of an international organization under traditional international law by reducing the traditional role of States as middle men between international organizations and private entities. This new model allows private entities to be part of the international institution’s core business. Such a fundamental change *requires* fundamental rethinking of the doctrine of jurisdictional immunity of international organizations, and Part IV will explore a new approach to this doctrine which responds to the challenges posed by the CDM.

VI. A NEW APPROACH TO JURISDICTIONAL IMMUNITY

A. *Bringing CDM Institutions Before National Courts Over Their Administrative Decisions*

The functional necessity approach to jurisdictional immunity is based on a traditional idea of the international order in which the core business decisions of an international organization are aimed at its Member States, such decisions do not di-

264 U.N.T.S. 117; Convention Establishing the Multilateral Investment Guarantee Agency art. 44, Oct. 11, 1985, 1508 U.N.T.S. 99, 24 I.L.M. 1605. Similar provisions can be found in the Agreement Establishing the Inter-American Development Bank art. 9, § 3, Apr. 8, 1959, 10 U.S.T. 3029, 389 U.N.T.S. 69; Agreement Establishing the Asian Development Bank art. 50 para. 1, Dec. 4, 1965, 17 U.S.T. 1418, 571 U.N.T.S. 123; and Agreement Establishing the African Development Bank art. 52, Aug. 4, 1963, 510 U.N.T.S. 3. The IMF is the exception to the rule: It has full immunity which can only be withdrawn by express waiver. *See* Articles of Agreement of the International Monetary Fund art. 9, § 3, July 22, 1944, 2 U.N.T.S. 39, 60 Stat. 1401.

rectly affect the rights of private entities, the rights of private entities are only affected by this core business *through* their home State, and the only direct contact between private entities and the international institution is on subjects peripheral to the core business of that institution. If the CDM fit this traditional mold, private entities interacting with the CDM institutions would have all the access to justice they need. The CDM, however, explicitly provides for core business decisions specifically aimed at private entities. Therefore, the core business doctrine should not apply to the CDM.

Instead, I propose a more nuanced approach to the jurisdictional immunity of international organizations. I propose to maintain the existing distinction between peripheral decisions and core business decisions and to allow access to national courts for review of the first category, but to do away with the categorical denial of access to national courts for *all* core business decisions and instead take a closer look at these core business decisions. If such a closer look reveals that the core business decision in question is a general rule or law of the international organization, immunity should apply and private entities should not be able to challenge this general rule before a national court. If, however, this closer look reveals that the core business decision is aimed at a particular private entity, as are the administrative decisions of the CDM institutions, and the international organization does not provide for a satisfactory internal review procedure, immunity should not apply and review by a national court should be allowed.

Two hypothetical examples may illustrate the proposed distinction. The CDM M&P are general rules adopted by the COP/MOP. Article 1(c) and (d) of appendix A to the CDM M&P provide that a DOE should:

- (c) have the financial stability, insurance coverage and resources required for its activities; [and]
- (d) have sufficient financial arrangements to cover legal and financial liabilities arising from its activities.⁹⁷

What if immunity did not apply with respect to these general rules? In this case, could a private entity interested in be-

97. CDM M&P, *supra* note 12, at App. A, ¶ 1(c), (d).

coming a DOE bring the COP/MOP before a national court, obtaining the annulment of these provisions because they discriminate in favor of affluent entities and might thus de facto exclude entities from poor countries from becoming DOEs? One suit by a private entity before one national court could invalidate general provisions of the CDM M&P applicable to all entities that wish to become DOEs. In other words, the private entity, with the “help” of this court, could single-handedly influence the general rules of the CDM.

If, however, a private entity interested in becoming a DOE challenged an EB decision to refuse it accreditation because it did not have the financial stability, insurance coverage, or resources required for its activities or because it did not have sufficient financial arrangements to cover legal and financial liabilities arising from its activities, the situation would be different. If the entity could prove that it fulfilled these requirements, it could ask a national court to rule that the EB decision was not in conformity with the CDM M&P or was otherwise unreasonable or illegal. Such a judgment would only affect the single EB decision and would not have any effect on the underlying CDM rules.

More generally, jurisdictional immunity should apply to CDM institutions where the general lawmaking and policymaking powers of these institutions are concerned, but should not apply to specific administrative decisions aimed directly at private entities.⁹⁸ In other words, the entities directly affected by these discreet decisions should be able to bring cases against the EB or the COP/MOP before a national court when the EB:

- refuses to accredit a private entity as a DOE and the entity thinks it fulfills all criteria for accreditation;
- persists in its refusal to approve a new methodology suggested by project participants and the participants think the methodology fulfills all criteria for methodologies;

98. See, e.g., Ombudsperson Institution in Kosovo, Special Report No. 1 (Apr. 26, 2001), available at <http://www.ombudspersonkosovo.org/repository/docs/E4010426a.pdf>. The United Nations Mission in Kosovo (UNMIK), which acted as an interim administrative authority, claimed immunity in cases of Kosovars complaining about damage done by the Kosovo Force as part of UNMIK. The Ombudsperson concluded: “The rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration (United Nations Mission in Kosovo – UNMIK) in fact acts as a surrogate state.” See *id.* ¶ 23.

- issues no, or too few, CERs for a project activity and the project participants think more CERs should be issued; or when the COP/MOP:
- refuses to designate a private entity as a DOE and the entity thinks it fulfills all criteria for designation; or
- suspends or withdraws the accreditation of a DOE and the DOE thinks it has followed all the rules.

B. *Reasons for Allowing a Nuanced Approach to Jurisdictional Immunity*

There are at least four general reasons, and one reason specific to the CDM, why the proposed distinction between general rules and administrative decisions can and should be made when applying jurisdictional immunity to international organizations:

- many of the dangers perceived by proponents of a broad application of jurisdictional immunity will most likely not materialize;
- the proposed distinction follows a line of reasoning present in other legal systems;
- human rights considerations call for such a distinction;
- review is likely to improve decisionmaking in a CDM context; and
- allowing for review by national courts is in fact in furtherance of the objectives of the CDM.

1. *Perceived Dangers May Not Materialize*

The most fundamental reason why the dangers perceived by opponents of limited jurisdictional immunity will not materialize is that my proposal does not affect those situations in which immunity traditionally applies. If an international institution operates in a traditional way,⁹⁹ immunity applies and its core business decisions cannot be challenged by private entities before a national court. Only when institutions do not op-

99. The traditional operation of international institutions is defined as: The core business decisions are aimed at the Member States and do not directly affect the rights of private entities, rights of private entities are only affected by this core business *through* their home State, and the only “direct contact” between private entities and the international institution is on subjects that are peripheral and not core business. See *infra* Part. IV.A.

erate in a traditional way would certain of their core business decisions become reviewable by a national court.

Proponents of the widest possible application of jurisdictional immunity would probably claim that even this much-restricted scope of national court review presents dangers to the ultimate effectiveness of international institutions. However, a closer examination of such dangers makes clear that many of them are rather hypothetical and may not materialize.

a. *Independence and Smooth Functioning of Organizations Jeopardized*

The main anticipated danger of allowing national court review of decisions made by international organizations is that it may jeopardize the independence of such organizations and thus provide an obstacle to their smooth functioning.¹⁰⁰ This perception is incorrect for a variety of reasons.

First of all, this fear is not specific to national courts: Any review, whether by a national court, an international court, or an arbitral tribunal, would have some effect on an international organization. Secondly, it is not necessarily undesirable that an adjudicative body should have an effect on such an organization: In a worst case alternative scenario, freedom from judicial review could allow an international organization to consistently violate the rights of private individuals without ever being held accountable. Though it seems unlikely that such a situation would arise under the CDM, it is equally unlikely that a CDM institution's independence will be jeopardized or that it will be unable to carry out its mission because it could be brought before a court for violations of private entity rights. Thirdly, the proposal made in this Article does not involve review of *all* possible decisions made by CDM institutions but only allows for review of administrative decisions of CDM institutions. In other words, national courts will not judge the CDM general rules.

100. See Ignaz Seidl-Hohenveldern, *Failure of Controls in the Sixth International Tin Agreement*, in *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS* 270-71 (Niels Blokker & Sam Muller eds., 1994), *quoted in* Singer, *supra* note 67, at 123.

b. *Prejudice*

Another frequently cited danger is that national courts may be prejudiced against international institutions in favor of domestic litigants, even if such prejudice would not necessarily be in bad faith, because the training and participation of national judges in their particular domestic legal order will have impressed upon them legal notions which may differ from the reasoning used in judicial opinions elsewhere.¹⁰¹ This argument can be countered relatively easily: If indeed national courts were so prejudiced, they would have already had many years and many opportunities to make this prejudice against international organizations felt. They could have completely disregarded all forms of jurisdictional immunity and unjustly decided against international organizations, ordering them to pay large sums to private claimants or allowing for seizure of their property. There is, however, no evidence that this has happened to international organizations in the past or that such a thing would happen to CDM institutions if their administrative decisions were reviewable by national courts.¹⁰²

c. *Fragmentation*

A danger also often mentioned is fragmentation: If national courts from different legal systems and with different experiences and possibly different legal notions rule on the legal effects of acts performed by international organizations, their decisions may be inconsistent with one another.¹⁰³

It cannot be denied that whenever more than one court interprets the same rule there is a danger that these court decisions will diverge. Again, this is not a danger exclusive to review by national courts of the decisions of international institutions, but can happen when different courts in the same country apply national law or when different national or inter-

101. See, e.g., McKinnon Wood, *supra* note 78, at 144.

102. Singer offers even more assurance. In his model, if the national judiciary proves to be prejudiced, the international organization could require that the national executive give it assurances of fair treatment. If the executive also proves to be prejudiced, the relationship between the State in question and the international organization is "clearly in crisis" and jurisdictional immunity would not be "the crux of the problem." Singer, *supra* note 67, at 128-29.

103. See, e.g., McKinnon Wood, *supra* note 78, at 144.

national courts apply international law. Full application of this argument with regard to international organizations would mean that all issues of international law would at all times fall outside the competence of national courts.¹⁰⁴ “Furthermore, there is no intrinsic reason why different (national) courts should not be able to apply identical legal rules. As a matter of fact, this idea clearly forms the working premise of private international law and conflict of laws.”¹⁰⁵ It is of course possible that, by weighing case-specific circumstances, courts can come to different interpretations of the same rule. These differences are not a 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.

In addition, the chance that interpretations by different national courts will differ for the wrong reasons is becoming increasingly smaller. As Slaughter has rightly observed:

The language and conception [of a global community of courts] is ambitious, but the reality is there. The judges themselves who are meeting, reading, and citing their foreign and international counterparts are the first to acknowledge a change in their own consciousness. They remain very much national or international judges, charged with a specific jurisdiction and grounded in a particular body of law, but they are also increasingly part of a larger transnational system.¹⁰⁶

Unlike arbitral awards, which are often not made public, most judgments of national courts are publicly available. Moreover, it has become increasingly easy over the past decade to obtain these judgments through the internet and other publicly available databases. Judges frequently look at how foreign judges have interpreted certain international provisions or dealt with certain legal issues in order to arrive at their own decisions, making radically divergent interpretations of one international legal instrument less likely.¹⁰⁷ If national courts

104. See REINISCH, *supra* note 3, at 243.

105. *Id.* at 245.

106. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003) [hereinafter Slaughter, *Global Community*]. See also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65-103 (2004).

107. See Slaughter, *Global Community*, *supra* note 106, at 194.

were allowed to review certain decisions of CDM institutions, other national courts would probably study earlier foreign judgments before ruling on their own cases. This would allow for the building of a consistent set of CDM-related case law. CDM institutions could in turn review this case law to make sure their future decisions are in conformity with it, or they could make suggestions to the COP/MOP for necessary changes to, for example, the CDM M&P to attempt to avoid future disputes.

d. *Forum Shopping*

Some commentators argue that another danger of bringing international institutions before national courts is the opportunity for forum shopping: With limited jurisdictional immunity, private entities would be able to pick and choose the national court most likely to rule in their favor, or even to switch legal systems after unsuccessfully litigating before a first national court in the hopes of receiving a more favorable ruling elsewhere.

Again, this danger is not exclusive to cases between private entities and international institutions. Any case that has international aspects—whether because the parties to the case or the central factual situation have their origins in more than one country—will provoke questions of which national court has jurisdiction and the related specter of forum shopping. There is, however, no evidence of extensive forum shopping in more “ordinary” international cases,¹⁰⁸ perhaps because of the existence of conflicts-of-law rules that have evolved to combat these and related problems. There is no reason to fear that the situation would be different if national courts were allowed to review CDM administrative decisions.

2. *Similarity with Other Legal Systems*

The distinction suggested above between CDM general rules and administrative CDM decisions (with immunity before national courts for the first and the possibility of review of the latter) is similar to one used in EU law for deciding whether a private entity can bring an action for annulment

108. See LUC STRIKWERDA, INLEIDING TOT HET NEDERLANDSE INTERNATIONAAL PRIVAATRECHT, §§ 211-12 (8th ed. 2006).

against one of the EU institutions before the Court of Justice of the European Communities (ECJ) or the Court of First Instance of the European Communities (CFI).

Under EU law, private entities cannot challenge general EU rules (provisions of the constituent treaties, directives, or regulations) before the ECJ or the CFI.¹⁰⁹ However, paragraph 4 of article 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.¹¹⁰ It also provides for such a challenge by a natural or legal person in two other situations: (1) when this natural or legal person is not the addressee but is directly and individually concerned with the decision, or (2) when the decision is labeled as a “regulation” but is de facto a decision of direct and individual concern to the natural or legal person.¹¹¹ 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 labeled “decision” or not, can be challenged.¹¹²

One finds a similar divide in many national legal systems. U.S. law makes a distinction between rulemaking (general decisions) and adjudication (specific decisions) when determining the appropriate scope and content of judicial review of the actions of administrative agencies.¹¹³ Under Dutch adminis-

109. See PAUL J.G. KAPTEYN AND PIETER VERLOREN VAN THEMAAT, *HET RECHT VAN DE EUROPESE UNIE EN VAN DE EUROPESE GEMEENSCHAPPEN* 379-82 (6th ed. 2003).

110. Consolidated Version of the Treaty Establishing the European Community art. 230, ¶ 4, 2002 O.J. (C 325) 1.

111. *Id.* For case law on this subject, see the very early Case 25/62, *Plaumann v. Commission*, 1963 E.C.R. 95. For recent confirmations of this case law, see Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-6677, and Case C-263/02 P, *Commission v. Jégo-Quéré*, 2004 E.C.R. I-3425.

112. See PAUL CRAIG & GRAÏNNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 487 (3d ed. 2003).

113. The U.S. approach to review of rulemaking and adjudication is both broader than what is possible under EU law and broader than the approach to review of administrative decisions of CDM institutions suggested in this Article. Historically, U.S. courts review only specific decisions and not general rules, except when enforcing these general rules or otherwise applying them against a specific party in an adjudication. However, since 1967, this practice has changed to a presumption in favor of a broader approach that

trative law, there is generally no judicial review of Acts of Parliament or of rules enacted by Dutch administrative agencies, but review usually does exist with regard to those decisions of administrative agencies that directly affect, or are of direct concern to, private entities.¹¹⁴ German, Italian, and French law apply essentially the same distinction.¹¹⁵

3. *Human Rights Reasons for Allowing National Courts to Review Certain CDM Decisions*

The fact that the CDM provides a context fundamentally different from the traditional international order is not the only reason why the doctrine of jurisdictional immunity should be applied more restrictively; there is an equally important human rights reason to do so. The right to a fair and public hearing by a competent, independent, and impartial tribunal is a basic human right recognized in several human rights instruments including, inter alia, the Universal Declaration of Human Rights,¹¹⁶ the International Covenant on Civil and Political Rights,¹¹⁷ the European Convention on Human Rights,¹¹⁸ and the Charter of Fundamental Rights of the European Union.¹¹⁹ Therefore, if an international organization like a CDM institution violates the rights of private entities, international human rights law mandates that these entities be given the possibility to have their case judged by a court or tribunal.

includes direct review of rulemaking. *See* *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). I would not want to apply this broader approach to the general rules enacted by CDM institutions.

114. Under Dutch law, there is also administrative review (regardless of the nature of the administrative decision or rule) if the review is explicitly provided for in an Act of Parliament, but this is outside the scope of this article. *See* PETRUS JACOBUS JOHANNES VAN BUUREN & T.C. BORMAN, *ALGEMENE WET BESTUURSRECHT: TEKST EN COMMENTAAR* 81 (5th ed. 2007) (cmts. 1, 2 to art. 3:10).

115. Personal communication by Justice Sabino Cassese (on file with author).

116. Universal Declaration of Human Rights, *supra* note 2, at art. 10.

117. International Covenant on Civil and Political Rights, *supra* note 2, at art. 14.

118. European Convention on Human Rights, *supra* note 2, at art. 6.

119. Charter of Fundamental Rights of the European Union, *supra* note 2, at art. 47.

An international tribunal established or recognized by the international organization in question to hear the claims of private entities would fulfill this human rights requirement. However, in many situations, including the CDM, there is no such international tribunal available. In these situations, affected private entities must be given access to justice before national courts.¹²⁰ Ensuring the protection of a right as fundamental as access to justice should prevail over the less fundamental and more practically-oriented doctrine of jurisdictional immunity of international organizations (which, as noted in Part V.1, *supra*, is based on mostly hypothetical or even outdated objections).

As discussed in Part V.1, a shift has taken place in the field of employment conflicts between private entities and international organizations, restricting immunity for the latter and opening up the possibility for national courts to judge these conflicts. This shift is based on considerations of access to justice. There is no good reason why a similar calculus should not be performed with regard to the administrative decisions of CDM institutions. Private entities wishing to challenge a CDM administrative decision have no other means available to them to protect their rights, and limiting national judicial review to the administrative decisions of CDM institutions while retaining immunity for CDM general rules ensures that neither the independence nor the smooth functioning of the CDM institutions is jeopardized.

4. *Review Is Likely to Improve Decisionmaking*

Under the traditional international law approach, conflicts about international rules or decisions only involved the traditional international players—States and international institutions—and would be solved through negotiation and discussion. If, more rarely, a conflict involved not only these traditional international players but also a private entity, the

120. See e.g., KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS 213 (2002) and Singer, *supra* note 67, at 157. Both authors take the position that if a national court refuses to hear a case against an international organization for the wrong reasons (for example because the court invokes the immunity of the organization), this is a violation of human rights by the state to which the court belongs and not by the international organization.

home State of that entity would, if it considered the case worthy, engage in negotiation and discussion with the other traditional international players on behalf of the private entity. There was little room for judicial review. Applying this traditional approach to CDM administrative decisions would probably mean that disputed decisions would be put on the agenda of the COP/MOP by Member States on behalf of their national private entities. This is not a satisfactory approach. The States Party of the COP/MOP meet once a year.¹²¹ Reviewing CDM administrative decisions made in the previous year would be only one item on a very full COP/MOP agenda, and there could be a large number of decisions to review. It is therefore unlikely that these CDM administrative decisions would get the attention needed for proper review.

Review by national courts would supplement the political controls that could be exercised by the COP/MOP in its role as supreme rulemaking body by checking whether administrative decisions by the EB and by the COP/MOP itself were in accordance with the general CDM rules. Review by national courts could serve as a second look at the reasoning used by the CDM institutions acting in their administrative capacity. As an independent check on the validity of the administrative decisions of CDM institutions, the review would contribute to the political legitimacy of the CDM rules.

An important result of review by national courts would be the meaningful incentives it would create for the EB and the COP/MOP to stay within the authorized boundaries of the general CDM rules and to properly explain why a particular decision was made. In other words, this review could yield more careful and rational decisionmaking.

In addition, it is likely that CDM institutions would pick up on the outcomes of such review and incorporate this knowledge in their future administrative decisions so as to ensure that these decisions successfully withstand review, thereby enhancing the quality of decisions and their consistency with one another.

121. Kyoto Protocol, *supra* note 1, at art. 13, ¶ 6.

5. *Review by National Courts Is in Furtherance of the CDM*

Many of the arguments given above for allowing national courts to review administrative decisions of CDM institutions may well apply to international legal systems other than the CDM, but the particular nature of the CDM makes such review even more urgent.

The CDM's main function is to mobilize investment, including private investment, in GHG reduction projects in developing countries. It is a well known fact that private as well as State investors will invest more readily in projects that take place in a stable, predictable, and well-regulated environment.¹²² Essential to such an environment is a solid system of administrative rules and regulations, including effective means of review and redress of administrative actions. At this moment, the CDM lacks any means for such review and redress. Consequently, it is possible that a private entity could invest time and money in a CDM project or in getting accredited as a DOE, have the EB refuse for an improper reason to issue CERs or accredit the entity, and have no mechanism to have the decision reversed or to recoup lost investments. The possibility of having national courts review such decisions and correct potential errors enhances the quality and predictability of the CDM and could therefore stimulate investment.

C. *National Court Review of Administrative Decisions of CDM Institutions*

I have already explained why private entities should be able to bring certain cases against CDM institutions before national courts. In this Part, I briefly discuss four issues that come into play when a CDM institution is in fact brought before a national court: (1) the law to be applied by national courts in these cases; (2) the standard of review that should be used by the national courts; (3) the judgments that national courts could deliver against CDM institutions; and (4) the enforceability of such judgments against CDM institutions.

122. U.N. CONF. ON TRADE & DEVELOPMENT, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D, at 161, U.N. Doc. UNCTAD/WIR/2005, U.N. Sales No. E.05.II.D.10 (2005).

1. *Law to Be Applied by National Courts*

Under the proposed system, CDM institutions could only be brought before a national court as a result of violations of rules which they are bound to obey. Therefore, claims by private entities against CDM institutions would likely be limited to violations of the CDM M&P, of rules based on the CDM M&P, and maybe of the Kyoto Protocol.¹²³ However, the ability of national courts to apply such international rules is not self-evident in all jurisdictions.

In States that adhere to a monist doctrine with respect to the application of international law, national courts will be able to directly apply the CDM M&P when reviewing a CDM administrative decision. These courts could therefore rule that a CDM institution has acted in violation of a CDM rule. In States adhering to a dualist doctrine the situation is unfortunately not as clear. As noted in Part III.B, no dualist State Party to the Kyoto Protocol has objected to the fact that CDM institutions make decisions directly affecting the rights and obligations of private entities located in those States. Moreover, these States have authorized domestic private entities to participate in the CDM, which means the CDM M&P are applied directly to these entities through the administrative decisions of CDM institutions.

Apparently, States adhering to the dualist doctrine do not see a problem in the *direct* application of these international rules to domestic private entities (which *prima facie* goes against their dualist doctrine). At the same time, I have found no evidence of any dualist Member States incorporating the CDM M&P or corresponding administrative decisions of CDM institutions into their national laws, which under the dualist doctrine would be the only means of making them applicable to domestic private entities. Could this contradiction be seen as an implicit waiver of the dualist approach, a waiver limited to the CDM? If it were an implicit waiver of dualism, one could argue that national courts in these dualist countries could directly apply the CDM M&P when reviewing administrative decisions of CDM institutions. These courts could thus

123. These limitations would apply largely because it is difficult to argue that certain national substantive rules could apply to the international CDM institutions.

rule that a CDM institution has acted in violation of a CDM rule.

However, States adhering to the dualist approach probably have not waived their dualism with regard to CDM administrative decisions. It is more likely that they simply do not recognize that, by allowing CDM institutions to make decisions that directly affect the rights and obligations of domestic private entities, they are in fact allowing a practice contrary to the dualist approach. If a private entity brought a case regarding an administrative CDM decision before a court in a strictly dualist State, the court would most likely reject the claim, ruling that the CDM M&P are not considered applicable law in a domestic context.¹²⁴

In the proposed plan, in cases in which a national court could review CDM administrative decisions, it could only hold the relevant CDM institution accountable for violations of standards that the institution is bound to apply. Thus, na-

124. An example of a country with a relatively strict dualist approach to international law is the United Kingdom. The U.K. approach to treaties that have not been incorporated into domestic law has been summarized as follows:

Two overlapping principles have traditionally determined the role of unincorporated treaties in the domestic context. First, that domestic courts have no jurisdiction to construe or apply such treaties (the principle of non-justiciability). . . . Secondly, that unincorporated treaties are not part of domestic law and cannot create directly enforceable rights in domestic law nor deprive individuals of existing domestic law rights (the principle of no direct effect). . . . It is a principle of legal policy that domestic law should conform to international law. This principle has informed the development of presumptions of compatibility that both statutory and the common law should be interpreted in a way which does not place the United Kingdom in breach of (a) its international, unincorporated treaty obligations . . . nor (b) rules of international law."

SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS 269 (2005). Although this description is limited to unincorporated *treaties*, it is unlikely that the approach would be more lenient with regard to the CDM M&P, which are a less "official" component of international law than treaties. Applying an analogous approach to the CDM M&P would mean that, in the UK, an exception to the rule of dualism could be construed only if there existed domestic law that could be interpreted in a way compatible with the (unincorporated) CDM M&P. In a case of a private entity challenging an administrative decision of a CDM institution for violation of the CDM M&P, it would then be this analogous interpretation of domestic law and not the CDM M&P themselves that would be applied by the court.

tional courts could only review the procedural aspects of a decision to the degree permitted by the CDM M&P. The CDM M&P, for example, provide that when there is review of registration or issuance of CERs, there should be a hearing. When reviewing a registration decision of the EB, a national court could judge whether such a hearing was held. However, neither article 12 of the Kyoto Protocol nor the CDM M&P seem to allow for the application of a wider range of procedural requirements by a national court.

2. *Standard of Review*

The world's national courts use a wide spectrum of standards in reviewing decisions of their respective national administrative bodies. On one end of this spectrum is a highly deferential approach according to which courts only judge whether an administrative agency could reasonably have come to the decision under review. Under this approach, the assessment of what is reasonable focuses on the overall methodology employed by the agency, disregarding the strengths and weaknesses of particular parts of its decision.¹²⁵ On the other end of the spectrum is what in the United States is called "hard look review." This calls for a very rigorous review by the court, in which each and every aspect of the decision, factual and legal, is scrutinized almost as closely as if the court itself were asked to make the decision anew.¹²⁶

In order to promote unity of review of CDM administrative decisions, it would undoubtedly be best if all national courts used a similar standard of review. Neither the CDM M&P nor any other CDM-related document provide guidance as to what type of review would be most appropriate. However, in view of the fact that the applicable law for those national courts in a position to review CDM administrative decisions is limited in scope,¹²⁷ there may be too little basis for a "hard look review." In addition, review by national courts of admin-

125. For a more general overview of these issues, see Richard B. Stewart, *U.S. Administrative Law: A Model For Global Administrative Law?*, LAW & CONTEMP. PROBS. (SPECIAL ISSUE), Summer/Autumn 2005, at 15, 63.

126. See Fred Anderson et al., *Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review*, 11 DUKE ENVTL. L. & POL'Y F. 89, 113-14 (2000).

127. See *supra* Part VI.C.1.

istrative CDM decisions will most likely be considered revolutionary, not only by the CDM institutions but also by the Member States and their courts. It may therefore be more realistic to start with a relatively deferential approach, leaving the CDM institutions a generous margin for their administrative decisions and allowing “interference” by national courts only if the decision is clearly and unmistakably in violation of the CDM M&P.

3. *Judgment*

If national courts were to review CDM administrative decisions using the CDM M&P as the applicable law, they might issue different types of judgments. One type of judgment could be purely declaratory, such as a judgment finding the case inadmissible, deciding that the court lacks jurisdiction, finding that the private entity does not have standing, or simply ruling that the administrative decision in question conforms with the CDM M&P. A judgment could also be constitutive, such as a judgment that fully or partly annuls the CDM decision and all or part of its legal effects or a judgment that orders or requests the CDM institution to make a new decision reflecting certain “guidance” given by the court. Additionally, a court decision could be a combination of these types. Most national administrative systems provide the opportunity for courts to give all three kinds of judgments, and there is no reason why this should be different with regard to cases involving the administrative decisions of CDM institutions.

4. *Enforceability*

Enforceability is not a relevant issue with regard to purely declaratory judgments. If the judgment is fully or partly constitutive, though, enforceability is an issue. Unfortunately, there seems to be little to no possibility of enforcing such a judgment. If, for example, after reviewing a CDM administrative decision and finding it lacking, a national court required the CDM institution in question to make a new decision in conformity with the CDM M&P, there would be no way of forcing the institution to actually make such a decision. Rather, it is up to the CDM institution to decide whether it will follow

the court's instructions.¹²⁸ As explained in Part VI.B.5, there may be compelling reasons for CDM institutions to voluntarily comply with such a judgment because it would be in furtherance of the objectives of the CDM, but enforcement by national authorities (which would be possible if the CDM institution were a national administrative agency) would not be an option.

D. *Review by National Courts as an Option for Other International Institutions*

A final issue to discuss is whether the idea of bringing CDM institutions before national courts for review of their administrative decisions and limiting jurisdictional immunity so as to exclude immunity for these cases is an approach that is transferable to other international institutions and their administrative decisions.¹²⁹ It is difficult to give an unequivocal answer to this question.

The impetus for this Article and for exploring the idea of bringing CDM institutions before national courts is that it is unacceptable to create a mechanism like the CDM, which has an important impact on the rights and obligations of participating private entities, without equipping this mechanism with a proper set of remedies for these private entities. Review by national courts of CDM administrative decisions is one way to ensure that private entities have such remedies.¹³⁰

As we have seen, review by national courts has its advantages and disadvantages and is currently prevented by certain obstacles that are not easy to overcome. Review by national courts of administrative decisions made by international institutions will be subject to similar advantages, disadvantages, and obstacles. At the same time, the compelling reasons given above for why the functional necessity approach to the jurisdictional immunity of international institutions should not ap-

128. If a national court awards damages, there may be some possibility of enforcement. If there are assets of CDM institutions available in the country where the court is located, these could be seized. Alternatively, if no such assets are available in the country, the judgment awarding damages could be taken to a country where there are assets for recognition and enforcement.

129. See *supra* Part III.B (administrative decisions defined as decisions that are directed toward, and directly affect, specific private entities).

130. See *supra* Part IV.B for other possible means of ensuring access to justice for participating private entities.

ply to CDM institutions and their administrative decisions demonstrate that it is time for a new and more restricted approach to immunity. While it would go too far to see this new approach as the only or even the best option for all international institutions, it would nonetheless be valuable to consider allowing national courts to review the administrative decisions of international institutions other than the CDM institutions.

This is especially true for international institutions that make administrative decisions directly affecting the rights of private entities and that, willfully or neglectfully, have no internal or external system in place to allow private entities to request review of these decisions. In an international legal society governed by the rule of law and where access to justice is recognized as a human right, it is unacceptable that private entities are subjected to administrative decisions of international institutions without the possibility of having these decisions reviewed by an independent and impartial court or tribunal. Therefore, if all other means of review are absent, access to national courts is needed to ensure that the rights of these private entities are effectively protected.¹³¹

VII. CONCLUSION

The Clean Development Mechanism of the Kyoto Protocol is a very challenging, innovative, and even controversial international legal phenomenon. Unlike most other international legal instruments, it has created an environment in which States do not seem to play their traditional roles as intermediaries between private entities within their territories and international institutions. CDM institutions make decisions that are directly aimed at private entities and that directly affect the rights and obligations of these entities. In a more traditional international legal context, such decisions could only be made by national administrative organs, not by international institutions. When making such decisions, the CDM institutions in fact operate as international administrative organs, and their decisions could be qualified as international administrative decisions. However, accountability mechanisms

131. This view of national courts as a “last resort” closely follows the line of reasoning used by the European Court of Human Rights in *Waite and Kennedy vs. Germany*. See *supra* note 91 and accompanying text.

on which private entities rely when dealing with national administrative organs and their administrative decisions do not apply to the CDM institutions. If a CDM institution makes an administrative decision directly aimed at a private entity that is in violation of the CDM M&P, the private entity has no opportunity to have the decision reviewed by an independent court or tribunal.

This total lack of access to justice for private entities could be put right by creating a mechanism for judicial review of administrative CDM decisions in the context of the CDM or the Kyoto Protocol. Arbitration is another option. Private entities and CDM institutions could sign general arbitration agreements, ensuring arbitral review of administrative decisions of CDM institutions. A third and more challenging possibility would be to see whether national courts can review these administrative CDM decisions at the request of the affected private entities.

The main substantive obstacle that stands in the way of bringing such cases before national courts is the jurisdictional immunity generally granted to international institutions. Under the current functional necessity approach to jurisdictional immunity, immunity is granted when the case before the national court is in regard to the organization's core business and would likely affect the full functioning of the organization in doing its core business.

The administrative CDM decisions central to this Article are without a doubt part of the CDM's core business. Thus, national courts applying the functional necessity approach would grant jurisdictional immunity to CDM institutions for cases dealing with these decisions. However, it is questionable whether a doctrine based on a traditional view of international law should apply to the non-traditional CDM. Jurisdictional immunity under the functional necessity approach is applied rather indiscriminately: No distinction is made between actions for which international institutions are given immunity and those for which they are not. In other words whether international institutions act as general rulemakers or as international administrative bodies making administrative decisions, such decisions fall within the core business of the CDM and therefore within the scope of jurisdictional immunity.

This Article proposes a different and more nuanced approach to jurisdictional immunity, distinguishing between general rulemaking by an international institution and administrative decisionmaking by an international institution. If a private entity could successfully challenge general rulemaking before a national court, it would be able to affect the organization's discretionary powers and would de facto give an erga omnes effect to judgments of national courts. A successful challenge to an administrative decision of an international organization, however, would not have such an effect. Therefore, the first category should be subject to immunity, while the second category should not. When a CDM institution acts as an international administrative organ and makes administrative decisions, affected private entities should be able to have these decisions reviewed by national courts.

There are a number of reasons why such review could and should be possible. First of all, many of the dangers perceived by proponents of a broad application of jurisdictional immunity are unlikely to materialize. Secondly, the idea of reviewing administrative decisions but not general rules is not new; it is common to other national administrative law frameworks and is used in the EU. A third point is that important human rights considerations call for review of these administrative decisions. CDM administrative decisions can affect the rights and obligations of private entities, and affected entities currently have no remedy whatsoever against improper decisions. This is in violation of their right to a fair and public hearing by a competent, independent, and impartial tribunal. A fourth reason for allowing review is that the chance that a national court could take a second look at a decision may provide an incentive to the CDM institutions to stay within the authorized boundaries of the CDM rules. If they do not stay within those boundaries, the court can indicate this, allowing the CDM institution to make a better decision. The last reason for allowing national court review in the case of the CDM is that such review furthers the objectives of the CDM by creating a more stable and reliable legal framework and thus making CDM projects more attractive for investors.

However, even if national courts were to review administrative decisions of CDM institutions, there are other issues that need to be resolved. For one, it is unlikely that courts in States that adhere to a dualist doctrine of international law will

be able to use the CDM M&P as applicable law, and without this private entities do not have a case for review. Other issues are the standard of review that courts should use and what kinds of judgments they could render. The last difficult issue is the impossibility of enforcing a national court's judgment against a CDM institution.

The more nuanced approach to the jurisdictional immunity of international institutions proposed in this Article is only a first step toward creating a situation in which national courts can, at the request of a private entity, review administrative CDM decisions. Review by national courts is a very valuable option to consider, and an option that, despite its disadvantages and obstacles, could also be considered for other international institutions that make administrative decisions directly affecting specific private entities.