Chapter 17

‘Case’ Studies: CDM and Emissions Trading

At this final stage, we shall attempt to identify some criteria that need to be in place for a climate measure to promote sustainable development according to the test established in the previous chapter. We in turn look at the CDM and emissions trading scheme.

17.1 Clean Development Mechanism

In the case of conflicts with multilateral trade norms, the ability of the CDM to serve as an instrument of sustainable development will be decisive. In other words, the extent to which the trade impact, i.e. differentiation in eligibility to participate between non-Member States to the Kyoto Protocol and complying Members, can be justified will need to be determined by the contribution of the CDM to sustainable development. In this context, the exclusion of non-Member States and their legal entities to participate in the CDM will have to relate to the ‘sustainable integrity’ of the CDM.

17.1.1 Identification of Affected Interests

Which interests would be affected directly or indirectly by a dispute arising over a CDM issue will depend on the particular circumstances of the case. They could be the interests of authorized private companies carrying out a CDM project or of an investor State to which the resulting CERs are to be accredited; a private entity or State which is not a Party to the Kyoto Protocol but is interested in investing in the CDM; the host State; local or indigenous communities; NGOs; private non-commercial entities and many more. However, issues concerning the CDM, as with all climate measures, affect a wider set of
interests, global and intertemporal, which demand the integrity and efficacy of a climate measure as a means to protect the stability of the global climate.

17.1.2 Strength of the Protected Interest

Next, the relationship between the climate measure and the protection of an essential ecological or natural function or condition needs to be assessed. The protection of such a function is the ‘outer frame’ (primary sustainability) for an assessment of the measure’s sustainability and will determine the relationship to other affected interests (secondary or broader sustainability). Here, the question arises whether the CDM aims at protecting such function or condition. Recognizing that the stability of the global climate is essential to human life and welfare, in order to pass a ‘sustainable development test’, it needs to be shown that the measure promotes the stabilization of greenhouse gas concentrations in the atmosphere at a safe level.¹

The important criterion in this context is whether the project at stake can result or has resulted in reductions in emissions that are additional to any that would occur in the absence of the certified project activity.² As said above, the additionality requirement is a crucial aspect of the climate impact of the CDM. Not only is additionality a requirement set out in the Kyoto Protocol/Marrakesh Accords; its contribution to the overall reduction of greenhouse gases is condition sine qua non of a CDM project’s sustainability. CDM projects must show that the emissions reductions achieved are ‘additional’ to a counter-factual baseline scenario. This is measured by comparing the CDM project’s emissions reductions with an emission scenario that likely would have occurred in the absence of the project.³ If emissions reductions are not additional, the overall cap of Annex I countries will become unduly inflated as emissions will rise without corresponding reductions elsewhere. Such a scenario would stand in strong contrast to the demand of environmental integrity of the CDM⁴ and the entire Kyoto system as it would not help achieve the ultimate objective of the Convention.

² Art 12.5(c) Kyoto Protocol, Marrakesh Add.2, Art 43.
⁴ Meijer and Werksman define environmental integrity almost solely in terms of additionality: ‘Environmental integrity is the demonstrated ability of the CDM to approve projects and to certify emissions reductions that are widely perceived as additional to what would otherwise have occurred, and support projects that contribute to long-term reductions in concentrations of GHGs in the atmosphere.’ Meijer and Werksman, 2005, 192.