



Legal Brief

To: **Joint Implementation Supervisory Committee (JISC)**
From: Climate Focus (Moritz von Unger, Charlotte Streck) on behalf of the **Joint Implementation Action Group (JIAG)**

Subject: **Participation of Belarus and Kazakhstan in Joint Implementation**
Date: 7 June 2010

OBJECTIVE

This Brief seeks to inform the Joint Implementation Supervisory Committee (JISC) as to whether Belarus and Kazakhstan, both Annex I parties to the Kyoto Protocol (KP), may be authorized to enter the determination and verification procedure under Track 2 of Joint Implementation (JI).

In a first step this Brief clarifies the current situation of Belarus and Kazakhstan under the KP concerning the eligibility criteria for Joint Implementation according to Decision 9 of the first session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (“COP/MOP or “CMP”), Decision 9/CMP.1, and subsequent decisions of CMP and the JISC (Section I of the “Analysis”).

It also analyzes the concept, status and function of *JI eligibility* in consideration of the Kyoto legal framework, Kyoto (especially JI and CDM related) precedents and the legal note prepared by the legal service of the UNFCCC (attached as Annex IV) (Section II.).

The Brief further lays out the options for the JISC to authorize participation of Belarus and Kazakhstan in JI Track 2 prior to the fulfilment of all eligibility criteria in consideration of the Kyoto legal framework (Section III.).

Finally, to address the possibility that the JISC sees the matter as an “elaboration of [a rule] of procedures additional to those contained in [the Annex of Decision 9/CMP.1], for consideration by the COP/MOP” (Annex 9/CMP.1, paragraph 3 (g)), the Brief proposes language for a draft rule that the JISC may submit to CMP (Section IV.).

The Brief has been prepared with the support of UNDP under the BRC Project (“*Supporting RBEC countries transition to low-emission development*”) on behalf of Belarus and Kazakhstan.

BACKGROUND

In late 2009 the Joint Implementation Action Group (JIAG), a business association to support policy development of Joint Implementation (JI), suggested that the Joint Implementation Supervisory Committee (JISC) at its 19th meeting authorizes Belarus and Kazakhstan to enter the JI Track 2 project cycle (see JIAG submission of 1 December 2009, attached as **Annex I**). The authorization of Kazakhstan and Belarus would include, JIAG proposed, the publication of projects hosted by these countries on the UNFCCC website for determination, the start of determination proceedings up to final determination.



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In early 2010 JIAG reiterated its suggestion in preparation of the 20th meeting of the JISC (see JIAG submission of 3 February 2010, attached as **Annex II**). Prompted by JIAG's intervention the JISC requested from the secretariat of the United Nations Framework Convention on Climate Change (UNFCCC), and the secretariat prepared, an information note on "legal matters involving the participation of Belarus and Kazakhstan in JI for the JISC's consideration at its twentieth meeting" (attached as **Annex III**).

In consideration of JIAG's submissions and of the secretariat's information note, the JISC noted in its report of the 21st meeting of April 2010:

"The JISC considered an information note prepared by the secretariat in response to a previous query from the JIAG on legal issues regarding participation in JI of Belarus and Kazakhstan. The JISC raised related issues with a representative from the secretariat's office of Legal Affairs and requested the secretariat to compile additional background information and provide it to the JISC for its twenty-second meeting with a view to the JISC considering the matter further and reporting to the CMP. The JISC requested the secretariat to prepare this information in consultation with the following five JISC members and alternates: Ms. Galan, Mr. Oderson, Mr. Pluzhnikov, Mr. Seidel and Mr. Sokolov. The JISC also agreed to request the JIAG to provide further information on this matter."

In a letter dated 8 April 2010, the Secretary to the Joint Implementation Supervisory Committee asked the JIAG to provide further comments to the earlier input in order to prepare the JISC for its 22nd meeting (attached as **Annex IV**). On 26 May, the secretariat agreed to an extension of the deadline to 7 June 2010.

ANALYSIS

I. The Current Situation: Belarus and Kazakhstan and JI eligibility

Through its Annex B, the Kyoto Protocol (KP) submits the majority of Annex I Parties of the UNFCCC¹—all except Turkey, Kazakhstan and Belarus, which do not appear in Annex B—to specific emission reductions commitments for the period 2008 to 2012 (inclusive) and introduces as a means of greenhouse gas (GHG) emissions targets the so called "assigned amounts" (Article 3(1) KP, henceforth "Assigned Amount" accounted for in assigned amount units "AAUs"). The reduction targets are expressed as a percentage of a country's Assigned Amount of total GHG emissions. To achieve their reduction commitments Annex I Parties may resort to the so-called flexible mechanisms of Article 6 ("Joint Implementation" or "JI"), Article 12 ("Clean Development Mechanism" or "CDM") and Article 17 ("International Emissions

¹ It is important to note that the meaning of "Annex I Party" under the Kyoto Protocol is slightly different from the meaning under the Convention. Article 1(7) KP clarifies:

"Party included in Annex I" means a Party included in Annex I to the Convention, as may be amended, or a Party which has made a notification under Article 4, paragraph 2(g) of the Convention."



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Trading” or “IET”). The CDM involves the creation of creditable, Certified Emission Reductions (CERs), generated through projects in developing countries; the JI turns AAUs into specific project-based Emission Reduction Units (ERUs) that are tradable independently. IET refers directly to the trade with AAUs.

However, Annex I status alone does not enable a Party to the Kyoto Protocol to engage in JI, Article 6 KP. It is the Annex B Assigned Amount that sets the purpose (the commitment) and is, precondition for the generation of ERUs (which are transformed AAUs) in the first place.

Article 6(1) KP reads:

“For the purpose of meeting its commitment under Article 3 [which in turn refers to Annex B], any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from [JI] projects...”

This is why the Marrakesh Accords (Decision 9/CMP.1, paragraphs 21-24) list as JI eligibility criteria (among others) (a) that a country is a Party to the Kyoto Protocol, and (b) that its Assigned Amount pursuant to Article 3, paragraph 7 and 8, has been calculated and recorded in accordance with Decision 13/CMP.1 (*see box*).

Calculation, Recording and Issuance of AAUs

The exact quantity of each Party’s initial Assigned Amount in t CO₂ eq must be established prior to the commitment period or within one year of the entry into force of the Kyoto Protocol for the Party, whichever comes later.

The process for establishing a Party’s Assigned Amount is initiated by the Party’s submission of its initial report, which should provide information on the Party’s calculation of its assigned amount and other information necessary for the Party’s accounting of assigned amount during the commitment period.

After the initial report has been reviewed, and any questions of implementation have been resolved by the Compliance Committee (this period may last up to 16 months), the Party’s initial Assigned Amount—and its eligibility to participate in the Kyoto Protocol’s flexible mechanisms—will be recorded in the Secretariat’s Compilation and Accounting Database (CAD). Once the initial Assigned Amount is recorded, it is permanent for the commitment period and cannot be changed. The information will be forwarded to the International Transaction Log (ITL).

It is only now that the Party concerned can begin to issue AAUs in its national registry and that it can engage in the transfer and acquisition of Kyoto Protocol carbon units.

Neither Belarus nor Kazakhstan has an Assigned Amount allocated. For both countries the reason is that their Annex B status—and hence the countries’ commitment threshold—has not yet grown into law.



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However, both countries have since initiated the procedures of joining Annex B. Belarus has already gained a decision at CMP level² but lacks yet the necessary number of ratification acts (75% of all of State Parties) from State Parties to have the amendment in favour of Belarus enter into force.³

Kazakhstan has Annex I status under the Kyoto Protocol via a declaration made under Article 4 (2) UNFCCC regarding the voluntary assumption of Annex I obligations. Following its ratification of the Protocol on 17 September 2009, the Government of Kazakhstan submitted a proposal to CMP 5 (December 2009) to amend Annex B and include Kazakhstan therein. In the session report the CMP noted that an amendment decision could not yet been made due to a six-month-process rule (the delay referring to the time that needs to elapse between the circulation of the amendment proposal and the decision of the matter at CMP level). CMP requested instead that the Subsidiary Body for Implementation (SBI) should consider the amendment proposal at its 32nd meeting in May/June 2010 in order to prepare a CMP decision for CMP 6 (November/December 2010).

In sum, while both countries, Belarus and Kazakhstan, are preparing for gaining Annex B status and fully participating in JI⁴, they are not yet able to, as laid down in Article 6 KP, “*transfer to, or acquire from, emission reduction units resulting from projects*”.

II. JI Eligibility and Project Initiation

a. JI Participation and Eligibility

Joint Implementation, Article 6 KP, is defined by the *transfer* and *acquisition* of carbon units that result from projects. It is *not defined* by the JI project as such. This is an important detail. The Kyoto Protocol does not *per se* regulate the start and implementation of JI projects. It is only at the crediting stage (issuance, acquisition, transfer) that the Kyoto Protocol captures these projects as State Parties engaging in Joint Implementation.

Article 6(2) of the Protocol gives CMP the mandate to clarify the mechanism’s details:

“The Conference of the Parties serving as the meeting of these Parties to this Protocol may, at its first session or as soon as practical thereafter, further elaborate guidelines for the implementation of this Article...”

The CMP issued their JI Guidelines with the above quoted Decision 9 CMP.1 (henceforth “JI Guidelines”). However, when searching this document the definitions of JI participation, JI

² In its Decision 10/CMP.2 (“Proposal from Belarus to amend Annex B to the Kyoto Protocol”, 10th Plenary Meeting, 17 November 2006) the CMP adopted an amendment to Annex B to the Kyoto Protocol to include Belarus to the list of Annex B Parties.

³ By 21 January 2010 20 the Depository of the KP had received 20 instruments of acceptance/ratification from State Parties.

⁴ For Belarus see the letter of the Belarusian Government to the UNFCCC of 22 August 2007; for Kazakhstan see the Statement of Vice-Minister *Sadvakasova* given to the Plenary at CMP 5 on 11 December 2010 (with the authors).



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eligibility and JI implementation are not wholly clear. The terminologies used appear in fact somewhat elusive.

“JI Participation” is the sub-header to part D of the Decision covering paragraphs 20 to 29. Yet participation and eligibility requirements are strictly speaking different things. Paragraph 20 obliges Parties to provide the UNFCCC secretariat with certain information. As this paragraph is placed under the sub-header “Participation” this may be seen as a point of action of Parties participating in JI. However, this obligation is outside the list of requirements regarding JI eligibility (paragraph 21); and compliance with these (eligibility) obligations *alone* affects the ability of a Party to fully engage in the mechanism or not (see paragraphs 23 and 24). Participation, thus, may be used as a broader term to describe the engagement of a Party or (or other, see below) in JI; eligibility, on the other hand, decides on the capability of a Party to conclude the JI process by issuing and transferring ERUs.

‘Participation’ is further used in a different meaning. Under paragraph 29, Parties are authorized to “participate in Article 6 projects”; and again, this is not dependent on the eligibility of the Party concerned to fully engage in JI. It is only the second sentence of this paragraph that establishes the link:

“Legal entities may only transfer or acquire ERUs if the authorizing Party is eligible to do so at that time.”

This leads to two conclusions. First, JI participation requirements and JI eligibility requirements are not congruent. Second, JI eligibility refers to, and conditions, the capacity to *transfer or acquire ERUs* of Parties. The transfer of ERUs is however only the last stage of the engagement in JI. Engagement, or participation, on the other hand, capture the preceding step: They entail the verification (determination) process through which a project proves that it generates emission reductions in accordance with the JI regulatory rules.

b. JI Eligibility and JI Track 2

Paragraph 24 of the JI Guidelines links JI eligibility and JI Track 2. It states that for State Parties that do not meet the eligibility requirements (among them the reduction commitment and AAU quota) verification procedures under JI Track 2 is available:

“Where a host Party does not meet the eligibility requirements set out in Paragraph 21 above, the verification of reductions [...] from an Article 6 project [...] shall occur through the verification procedure under the Article 6 Supervisory Committee...”

Where the JI eligibility criteria are not met, a country can still participate in JI, but is banned from issuing and transferring ERUs until the eligibility criteria are met:

“The host Party may, however, only issue and transfer ERUs upon meeting the requirements in paragraphs 21 (a), (b) [reduction commitment and AAU quota] and (d).”



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c. Verification under the JISC

Verification under Track 2 is regulated in part E of the JI Guidelines. Verification is in the hands of accredited independent entities (AIEs), with the JISC acting as the supervisory body with a right of intervention. It covers the document phase (“determination regarding a project design document”, paragraph 35) and the emission reporting phase (“determination regarding reported reductions”, paragraph 39). The document phase is initiated by the submission of a project design document (PDD) to an AIE (paragraph 31). The AIE then makes the PDD “publicly available through the secretariat” (paragraph 32). In practical terms, this is the inclusion of the project concerned in the online database of the UNFCCC/JISC and the upload of the PDD to the publicly available JISC website.

The PDD upload triggers the stakeholder participation phase (30 days, paragraph 32) in which Parties, stakeholders and observers can submit comments. Only after the commenting phase, the AIE undertakes its assessment of the project. The assessment criteria are

- Whether the project has bilateral project approval;
- Whether the project would result in emission reductions respecting additionality requirements;
- Whether the baseline and the monitoring plan are adequately set; and
- Whether the project meets the requirements of environmental integrity.

When the assessment is positive, the AIE finalizes the determination by making its determination report publicly available through the secretariat (website upload of the report). The determination report will be deemed final after 45 days provided a review by one of the Parties involved or by the JISC is not requested.

Determination in the emission reporting phase is similar (but without stakeholder involvement). Here it is after 15 days of the publication of the determination report that the report becomes final if a review is not requested. With the report becoming final, the verification process is completed.

There are no legal reasons why a KP Party should not be allowed to engage in any of these project development phases until it has achieved full eligibility to participate in JI.

d. JI Eligibility, Issuance and transfer of ERUs, and Project Cycle Initiation

It is after the completion of the verification process that the host Party may convert AAUs in the amount of emission reductions verified into ERUs.⁵ It is not before this stage that the JI eligibility requirements are relevant.

⁵ Decision 13/CMP.1, paragraph 29: “Prior to their transfer, each Party shall issue ERUs into its national registry by converting AAUs... previously issued by that Party and held in its national registry. An AAU... shall be converted into an ERU by a project identifier... The project identifier shall identify the specific



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In that sense project cycle initiation, up to the completion of the verification process, on the other hand, is not dependant on JI eligibility. This is overlooked in the note from the Secretariat (Annex IV) where it is stated that “*Belarus would not be eligible to participate in JI... because one of the eligibility criteria for participation in the mechanism is that the Party must have an assigned amount calculated*”. However, the Secretariat corrected this statement in a recent background note (attached as **Annex V**) where it rightly pointed out that missing the eligibility requirement only bars a Party from issuing and transferring ERUs; but not, it is added here, from having its projects verified under JI Track 2.

e. The Precedents

It is a long experienced practice of the JISC to see the eligibility requirements limited to the stage of credit issuance and credit transfer, while allowing projects to engage in verification under JI Track 2 from countries for which the Assigned Amounts had not yet been calculated. Ukraine, Lithuania and Bulgaria had all initiated JI Track 2 projects and engaged in verification, before JI eligibility was reached (see the following *tables*). In the case of Ukraine and Bulgaria, projects had received final determination status before that date.

Country	Submission date Initial Report	Earliest possible JI Eligibility date (18 months later)
<i>Ukraine</i>	29 December 2006	29 June 2008
<i>Bulgaria</i>	25 July 2007	28 January 2009
<i>Lithuania</i>	22 December 2006	22 June 2008

Country	Project name	PDD publication	Final determination (or rejection where indicated)
Ukraine	Switch from wet-to-dry process at Podilsky Cement,	August 2006	March 2007
Ukraine	Utilization of Coal Mine Methane at the Coal Mine named after A.F. Zasyadko	February 2007	August 2008
Bulgaria	Rehabilitation of Dolna Arda Hydropower Cascade	January 2007	October 2007 (rejected)
Bulgaria	Sreden Iskar Cascade HPP Portfolio Project	November 2006	June 2008
Lithuania	Rudaiciai Wind Power Park Project	December 2006	July 2008
Lithuania	Benaiciai Wind Power Project	January 2007	July 2008

Article 6 project for which the ERU is issued... including whether the relevant reductions... in emissions... were verified under the Article 6 Supervisory Committee.”



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III. Options for the JISC

To bring its policy regarding Kazakhstan and Belarus in line with its previous practice towards other countries, the JISC may wish to consider two options. The **first option** is to apply the existing regulatory framework and its own precedent and to allow determination procedures for projects hosted in Kazakhstan and Belarus to start *instantaneously*. This would include that PDDs can be uploaded, that stakeholder participation can take place, that AIEs can determine the respective projects, make the results public and complete the determination process ('final determination'), with the JISC assuming its full role as supervisor. It is understood that determination would not trigger credit issuance and credit transfer and that following the examples from other JI countries, issuance and transfer could only be made once JI eligibility has been met.

The **second option** for the JISC would be to refer the issue to CMP, while seeing it as a "[rule] of procedure additional to those contained in the JI Guidelines and ask for a CMP decision. Such referral of the issue to the CMP, however, is not required, if covered at all, by the KP or the JI Guidelines, and it would put Kazakhstan and Belarus at undue disadvantage compared to other KP Parties which engaged in Track 2 JI project development in anticipation of future eligibility.

IV. Rule Proposed to CMP

In case the JISC wishes to involve CMP with the matter, it could refer to the following language that should ultimately be adopted by CMP.

"The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol,

Recalling Article 6 of the Kyoto Protocol which provides that for the purpose of meeting its commitments under Article 3 of the Kyoto Protocol, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy,,

Recalling its Decision 9/CMP.1 containing the guidelines for the implementation of Article 6 of the Kyoto Protocol,

...

Recalling that a Party may only issue emission reduction units (ERUs) when the Joint Implementation eligibility requirements as set in paragraph 21 of Decision 9/CMP.1 are met,

....

Decides to facilitate project activities that generate emission reductions in Annex I Parties that do not yet meet the eligibility requirements as set in paragraph 21 of Decision 9/CMP.1,



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Decides that the verification procedure under the Article 6 Supervisory Committee shall be opened to Parties that do not meet the eligibility requirements set out in paragraph 21 of Decision 9/CMP.1.

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