

# MULTILATERALISM IN THE IMPLEMENTATION OF CLIMATE POLICIES-TODAY'S IMPERATIVE



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**Dedication**

To those of us fortunate enough to have

Inherited it-

We must try to be stewards

But not beneficiaries

”...man has too long forgotten that the  
Earth was given to him for usufruct alone,  
not for consumption, still less for profligate.”

-George Perkins March-

This paper is dedicated to my children to be born soon

## **Acronyms**

APEC	Asia-Pacific Economic Compact
AU	African Union
BBC	British Broadcasting Corporation
CBDR	Common But Differentiated Responsibility
CDM	Clean Development Mechanism
COP	Conference of Parties
CSIR	Centre for Scientific and Industrial Research
DNA	Designated National Authority
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
GHGs	Greenhouse gases
IEL	International Environmental Law
IFIs	International Financial Institutions
IPCC	Inter-governmental Panel on Climate Change
ITLOS	International Tribunal on Law of the Sea
JI	Joint Implementation
MDGs	Millennium Development Goals
MNEs	Multinational Enterprises
NGOs	Non Governmental Organizations
REDD	Reducing Deforestation and Forests Degradation in Developing Countries
UNCAR	University Corporation for Atmospheric Research
UNEP	United Nations Environmental Program
UNCCD	United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification Particularly in Africa
UNCED	United Nations Conference on Environmental Development
UNCHE	United Nations Conference on Human and Environment
UNCLOS	United Nations Convention on Law of the Sea

UNFCCC      United Nations Framework Convention on Climate Change  
WSSD        World Summit on Sustainable Development

## 1 Introduction

### 1.1 Presentation of the topic

Atmospheric emissions of greenhouse gases (GHGs) have risen considerably due to fossil fuel burning, deforestation, livestock farming and other human activities. The scientific community has warned of the potentially serious effects of climate variability caused by increased concentration of GHGs. Resultant climate impacts are devastating in nature. Earth's air supply system is changing rapidly. The delicate balance of gases in the air is being interfered with, and for the worse, the water supply system of the earth is in even graver danger. The seas and its resident marine lives have been subjected to extreme abuse. Fisheries resources are down by as much as ninety per cent.<sup>1</sup> Agriculture, forests, and ecosystems of all kinds would also be threatened by increasing temperatures and changes in the water cycle.<sup>2</sup> These impacts will affect the environmental, social and vital economic interests of all states and have profound consequences for virtually every aspect of human society. The poorest countries and communities will suffer the earliest and the most. Though, climate change is an added cost and risk to development, a well-designed and well-implemented global climate policy can open new economic opportunities to developing countries. This must, however, be initiated by the developing countries themselves to establish the platform for any financial and technological assistance from the North. Five years ago, the High Level Panel on Threats, Challenges and Change clearly identified environmental degradation as one of the six major areas that needed the collective attention now and in the decades to come.<sup>3</sup>

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<sup>1</sup> Climate Change 2007: The Fourth ICPCPC Assessment Report

<sup>2</sup> Horsh, Richard A. And Joseph D. Richards, Does Kyoto Protocol Fall Short of the Mark? New York Law Journal, April 1998.

<sup>3</sup> Report of the Secretary General's High-Panel on Threats, Challenges and Change, 2004.



It is obvious that of the many global issues that would be best managed through multilateral cooperation, a significant number are environmental in nature. Climate change presents a collective challenge to the international community. This is because meeting the challenge is necessarily a collective endeavour. Atmosphere has no boundaries. The unilateral approach of dealing with the menace of the environmental degradation, especially climate change, simply can not meet the needs of combating the threat more interconnected and complex than ever before.

The UNFCCC and the Kyoto Protocol were adopted when it was assumed that climate change would evolve gradually. Recently, however, scientists have warned that abrupt climate change is a distinct possibility if fresh water intrusion into the North Atlantic slows or shuts down ocean currents and thus the thermohaline circulation. These scientific warnings cast further doubt at the adequacy or effectiveness of the current international response designed in the UNFCCC and the Kyoto Protocol to address the climate change phenomenon. Will the international community embrace the idea of multilateralism by working together to address the threats posed by global climate change? Or will nations shun collective strategies in reliance upon sovereignty to decide what best suit their individual goals at the expense of benefits accrueable to the international community as an aggregate whole? Will emphasis continue to be on only the developed nations for mitigating climate change by limiting emissions of GHGs from fossil fuel thereby omitting biological sinks from climate regulation? Or the developing nations will be required to take up commitments commensurate with their circumstances and capabilities for the reduction of GHGs? Is there no possibility of binding the non-state actors by legal norms encoded within the UNFCCC and the Kyoto Protocol for the enhancement of efficacy in climate policies? The answers to these questions require a multilateral approach, not only by state actors but also non state actors including individuals, multi-national corporations, and non-governmental organisations.

Multilateralism has been increasingly accepted generally as the modus operandi in the global politics, and in global environmental politics in particular. It is the emerging conviction that co-operation is no longer a matter of choice but a clear imperative, in all fields of human endeavour to find lasting solutions to the challenges of our planet. This is

the very basis of international law and finds reflection in proliferation of international agreements and institutions<sup>4</sup>

Over the past few decades, nations have come to realize that challenges of environmental insecurity are too vast and complex for any nation or group of nations, no matter how powerful, to effectively manage on their own. A compelling example of the scale of the challenges and the urgency of shaping a new approach is the present climatic change regime (global warming).<sup>5</sup> There is the need for a genuine and universal agreement with new norms that will govern the collective behaviour and strengthen or create the institutions that will ensure respect for global climate policies.

At the close of the 20th century, the World Court on the Nuclear Tests case<sup>6</sup> emphasised the urgency of the situation when it stated:

”the court recognises that the environment is under daily threat and that ... the environment is not an abstraction but represent the living space, the quality of life and very life and health of humankind”

The International Tribunal on the Law of the Sea in the Mox case<sup>7</sup> underscored the primacy of cooperation in the field of the environment when it stated that the duty to cooperate may be legally enforceable.

## 1.2 The purpose of the thesis

The aim of the study is to highlight the extent to which multilateralism will facilitate the efforts of the international community in the quest for solution to climate change challenges. While serious considerations of interstate effort has been a practical and ethical prerequisite for stabilizing the current trend of deterioration of the atmosphere, genuine and meaningful solutions lie in the preparedness of the players concerned to co-ordinate efforts

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<sup>4</sup> Alexander.Kiss, *Guide To International Environmental Law* Leiden/Boston: Martinus Nijhoff Publishers 2007, 12

<sup>5</sup> Lisa Gardiner, *Effects of Climate Change Today* May 8 2009 @ <http://www.windows.ucar>

<sup>6</sup> Legality of the Use by State of Nuclear Weapons in Armed Conflict, 35 ILM 809, 1996.

<sup>7</sup> Mox Plant 2002

in the spirit of multilateralism. Against the background of some states uncooperative attitude towards the climate change, the study seeks to defend the logic of multilateralism within the global climate treaty regime by exploring ways of making the developing nations contribute to the reduction of global GHGs emissions and why the developed nations must cooperate with them by way of financial and technical assistance.

The paper will briefly provide an overview of the treaty framework for global climate change mitigation and adaptation: UNFCCC<sup>8</sup> and Kyoto Protocol<sup>9</sup>. Any future climate policy that does not fully integrate forestry will fail to meet the necessary targets.<sup>10</sup>

### 1.3 Sources and methodology

The normative approach method was used. Two basic international environmental treaties- UNFCCC and the Kyoto Protocol were evaluated. Again, the study was conducted by researching relevant secondary literature including books, various articles on the subject as well as customary international environmental law norms. Principally, the bulk of the research was done on law journals and published writings, reports and other electronic sources.. Informal interviews, discussions, preliminary consultations were relied on.

### 1.4 Delimitation of the thesis

The study is strictly confined to the international climate change regime and how multilateralism can bind both nation-actors (whether developed or undeveloped) and non-state actors (including Multinational Enterprises(MNEs, International Financial Institutions (IFIs) by the legal norms encoded within the UNFCCC and the Kyoto Protocol as well as any successor thereto. The benefits, the players of international climate change will derive if

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<sup>8</sup> The United Nations Framework Convention on Climate Change (UNFCCC) signed 9th April 1992 and came into effect on 21st March 1994

<sup>9</sup> The Kyoto Protocol to the UNFCCC enacted on 11th December 1997 and came into force on the 16th February 2005.

<sup>10</sup> Stern, N. (2008). *Key Elements of a Global Deal on Climate Change* London School of Economics and Political Science, London, United Kingdom.

all cooperate to conserve the world's resources, prevent the further contamination of our air, land, and waterways, and to find innovative new methods for promoting sustainable development. In so doing the study will be limited to evaluation of international efforts in combating climate change. The focus on international climate change in the context of multilateralism means national instruments particularly domestic legislations on the subject shall not be covered. A perennial problem in international climate politics is how to engage developing nations in controlling greenhouse-gas emissions. In assessing the two major treaties that deal with the issue, the study will be exploring how a multilateral approach can bring the developing countries on board any measures put in place to find effective solutions to the global warming crisis.

### 1.5 The structure of the thesis

After the introductory chapter, the next chapter will explore the definition of multilateralism with emphasis on the evolution of its use and its discrepant meanings. The comprehensive meaning of the term shall be expounded to deduce the benefits and risks associated with its application to developing countries on one hand, and developed countries on the other. In chapter three, multilateralism will be considered in relation to sovereign equality of states concept. While states zealously seek to protect their independence and right of self-determination (in short to do what they want), there is a growing recognition that cooperation among countries is indispensable if the world is to at all have a chance to avert the clear and present danger staring at humanity today. Chapter four of the study will be focused on global climate change treaty regime. Some customary norms of international environmental law and the interplay between them and multilateralism were looked at. Selected but common basic principles like the preventative principle, sustainable development and CBDR were examined. This is done to spell out how non-state actors may be bound by the legal norms enshrined in the climate framework. Chapter five concentrated on the way forward after Kyoto Protocol which comes to an end in the year 2012. The role of forestry was considered for its possible incorporation into any

future efforts towards fighting global climate challenge of our time.<sup>11</sup> Thus, the current arrangements of excluding the developing countries from taking any commitment towards the reduction of GHGs concentration in the atmosphere, on the basis of their incapacabilities, is an affront to the multilateral corporative efforts required for the combat of the climate phenomenon and its attendant lethal impacts.

However, substantial and meaningful contributions from the developing countries can only be expected when proper mechanisms that suit their dispositions are properly considered and rigorously executed. In this case, paying attention to forest and related issues, therefore, becomes indispensable in the search for successor to the Kyoto Protocol. The final chapter would conclude and make remarks and recommendations. Specific solutions taking into consideration local differences for every country and every special plan, closely adapted to the different legal and administrative situations in the different countries/regions albeit in a cooperative manner are, therefore, unavoidable for purposes of mitigation and adaptation.<sup>12</sup>

## 2 Multilateralism

### 2.1 Multilateralism defined

James Caporaso observes that the first documented use of the term "multilateral" to describe an international arrangement dates back to 1858.<sup>13</sup> However, the noun form of the

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<sup>11</sup> COP 13 of the UNFCCC in December 2007

<sup>12</sup> *Mitigation* is about slowing down global warming by reducing the level of greenhouse gases in the atmosphere while *adaptation* involves dealing with the existing or anticipated effects of climate change

<sup>13</sup> James Caporaso, *International Relations Theory and Multilateralism: The Search for Foundations* *International Organizations* 46 3 (Summer 1992) 600-601

word- "multilateralism" only came into use in 1928, in the aftermath of the First World War. Caporaso argues that the noun form comes in the form of an '-ism' indicating a belief or ideology rather than a straightforward state of affairs. The US post 1945 foreign policy gives credence to this assertion. Multilateralism was then defined as "international governance of the many and its central principle was 'opposition [of] bilateral and discriminatory arrangements that were believed to enhance the leverage of the powerful over the weak."<sup>14</sup>

In 1990, Robert Keohane defined multilateralism as "the practice of coordinating national policies in groups of three or more states".<sup>15</sup> In a 1992 article, John G. Ruggie agreed that this was an accurate definition of multilateralism, but termed it "nominal" and criticised it for being incomplete. According to Ruggie "what is distinctive about multilateralism is not merely that it coordinates national policies in groups of three or more states, which is something that other organizational forms also do, but that it does so on the basis of certain principles of ordering relations among those states." He subsequently formulated a substantive definition of multilateralism which stated as follows "multilateralism refers to coordinating relations among three or more states in accordance with certain principles".<sup>16</sup> Looking at it from the modern purposive approach to international politics, the term was meant to describe the emergence of norm-governed behaviour between states, moderating purely self-interested behaviour in a complex world. Multilateralism, therefore, lends itself to issues where clear common interests in the international community are identifiable. Recently, in what was described as a watershed moment, more than 2500 leading environmental experts agreed a statement that called on governments to act before the planet became unrecognizable.<sup>17</sup>

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<sup>14</sup> Miles.Khaler, Multilateralism with Small and Large Numbers *International Organizations* 46, 3 (Summer 1992)681.

<sup>15</sup> Robert O.Keohane, Multilateralism: An Agenda for Research *International Organizations* 46 3 (Summer 1992) 681.

<sup>16</sup> John G.Ruggie, Multilateralism: The Anatomy of an Institution *International Organizations* 46 3 (Summer 1992) 566-68.

<sup>17</sup> Report by Richard Alleyne available at [www.telegraph.co.uk](http://www.telegraph.co.uk)

To this end Caporaso <sup>18</sup> explains

”As an organizing principle, the institution of multilateralism is distinguished from other forms by three properties: indivisibility, generalised principles of conduct, and diffuse reciprocity...”<sup>19</sup>

With the current global climate crisis, it could be argued that a new form of multilateralism has emerged, one that involves collaboration not only between states, but also private actors- including business and foundations closely linked to large corporations and multilateral organizations. This is an urgent action given the essence of the developing international legal principle of CBDR.<sup>20</sup> The concept of diffuse reciprocity in Caporaso’s definition of multilateralism requires that both developed and developing states, in multilateralist perspective, will have different burdens to shoulder corresponding to their needs and capabilities. Obviously this will lead to realization of immediate benefit to some actors than others but the overall benefit in the long run, mutual in nature will be the prevention of dangerous alteration to our dear planet.

In this sense, multilateralism as an approach to international environmental crisis, must depart from global politics where states seek their parochial objectives through mere consultation and synchronization with other states by combining efforts in the spirit of diffuse reciprocity to fight the global environmental menace.

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<sup>18</sup> James Caporaso *supra note 13*

<sup>19</sup> *Indivisibility* can be thought of as the scope (both geographic and functional) over which costs and benefits are spread. *Generalized principles* of conduct usually come in the form of norms exhorting general if not universal modes of relating to other states, rather than differentiating relations case by case on the basis of individual preferences, situational exigencies, or prior particularistic grounds. *Diffuse reciprocity* adjusts the utilitarian lenses for a long view, emphasizing that actors expect to benefit in the long run and over many issues, rather than every time on every issue.

<sup>20</sup> Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law* 93 AM J Int’l L 596 597-99 (1999).

## 2.2 The risks and benefits of multilateralism

According to the multilateralist point of view, in the area of the environment, if states go around deciding which actions and which will not be embraced, without regard to the overall benefits both present and future, then the international community will woefully fail in its stewardship of handing the planet to the future generations in a more secured way. Multilateralism lies in devising and applying rules where the legitimate interests and points of view of different states are accommodated, and decisions are reached collectively. Several non-binding texts have expressed the desirability of international cooperation.<sup>21</sup> As the world has become intimately integrated, the failure of multilateral major players, especially the US and to some extent the emerging economies like China, Brazil and India, to succinctly articulate and accommodate its basic principles risks turning multilateral cooperative efforts in meeting the glaring environmental challenges in a harmful direction.<sup>22</sup> Equally, without the cooperation of the developing nations, especially the strong emerging economies like China, Brazil and India, GHG reduction made in the north under the Kyoto commitment targets (by the developed nations) would not make a significant difference in the overall climate change trend. The concepts of generalised principles and diffused reciprocity dictate that, for the attainment of the common goal in the international community's efforts to save the environment, and for their mutual benefit, albeit at different times and levels, both developed and developing nations have roles corresponding to their capabilities to play. To this end, aside the general demand for cooperation, several international documents specify the aims of cooperation.<sup>23</sup>

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<sup>21</sup> See Principle 24 of the Stockholm Declaration 1982 World Charter for Nations Rio Declaration on Environment and Development as well as several UN General Assembly Resolutions.

<sup>22</sup> Under the Kyoto Protocol, the developed countries (major players in a multilateral world) agreed to reduce their GHG emissions relative to 1990 by at least five percent by the period 2008 to 2012. The then Clinton administration signed the treaty but did not seek ratification since it was likely to be defeated. The just ended Bush administration rejected the Protocol altogether. Manik Roy, who monitors Congress for the Pew Center on Global Climate Change, a Washington Research Group, said the world "shouldn't just give up on the US until 2008" when Bush's term is over. "There is a huge amount of change going on in Congress at this time" on climate issues, he said.

<sup>23</sup> See 1982 UNCLOS Art 192, 1992 UNFCCC Art 4(5) Art 20(2) and UNCCD. Art 21



The ideals of multilateralism notwithstanding, the critics of its implementation are concerned about its interference with market operations. This is rooted in the notion among certain key international players that economic development would be hamstrung, if mandatory multilateral measures are adhered to in an attempt to address global environmental menace. The anti-multilateralists also hold the view that the bureaucratic enforcement of multilateral measures is a major set back. Again, others criticise the failure of multilateralism to accommodate the different preferences and capabilities of differently developed nations. There is, sometimes also a sense of old conception of sovereignty with the feeling that multilateral action will usurp the sovereign power of states thereby clearly confusing global governance with global government.<sup>24</sup>

### 2.2.1 Developing nations

The most outstanding risk of multilateralism to developing nations is its failure to accommodate their incapacities "in so far as multilateral cooperative agreements call upon them to implement regulatory measures beyond their reasonable capacity to do so."<sup>25</sup> The financial and technological gap between the developed and the developing nations clearly make it quite cumbersome to the developing states to comply with, and less of a priority for them, internationally designed policies aimed at pursuing shared interests like protecting the environment and coordinating efforts to make the planet habitable. To this end, to the developing nations, certain pattern of charting developmental agendas, for example to reduce poverty and enhance access to basic necessities of life are not only more fundamental, but also hard to change. Emerging economies like China, India and Brazil in relation to environmental issues are strongly of the view that the strict requirements of multilateral engagement has the potency to hinder development, in so far as they will be

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<sup>24</sup> John O. McGinnis, *The Political Economy of Global Multilateralism* Chicago Journal of International Law Fall 2000, 6.

<sup>25</sup> Lindsey. Powel, *In Defense of Multilateralism* Yale Center for Environmental Law and Policy New Haven, CT.

required to reduce or abate certain traditional activities that would ordinarily facilitate more convenient economic development.

In meeting more immediate priorities, most developing countries rely on natural resources as linchpin of their economies. These economies fail to implement environmental protection policies mainly because they tend to overlook the importance of cooperation at the interest of meeting the requirement of provision of basic services to their people. Any international restriction on resources use has the potential not only to hinder economic development, but even to threaten the livelihoods and basic rights of many people.<sup>26</sup> It is a priority consideration, and expectation of many environmental experts, that a new Copenhagen treaty will require substantial reduction in greenhouse gas emissions from developing countries in the forms of biological sequestration of carbon in plants, trees and soils. That means reducing deforestation, increasing reforestation, and utilising sustainable agriculture and grazing practices that conserve soil and water. However, the concern of the developing nations is that , land use regulations, by the creation of new protected areas can cut locals off from water, fuel, and other resources essential to their survival. Developing nations are not oblivious of the essence of protecting "global" resources, however, the risk of signing themselves into a regulatory framework which will reduce their potential for future economic development and stifled ability of the citizenry to meet their basic needs is deeply rooted at the back of their leaders' mind whenever negotiating multilateral agreements. Again, in the case of developing states mostly in Africa, even where there is the will to embrace multilateralism in all genuiness, the lack of the necessary institutions and systems pose a serious threat to any scheme for implementation of policies pursuant to multilateral agreements. For example lack of proper land tenure system for the rural poor, inequitable sharing of benefits, and marginalization of the true land owners through legal engineering by governments need global attention as provision of platform for demanding any meaningful contribution from the developing nations as far as the fighting of climate change is concerned.

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<sup>26</sup> Ibid

However, the magnitude of the risks notwithstanding, multilateralism offers equally qualitative mechanisms capable of addressing them which have the potential to maximize long-term benefits for all parties involved. Whatever the reservations of the developing nations, multilateralism offers the most equality of all states in decision making and policy formulation. Multilateral arrangements are among the very few fora in which the developing nations can potentially have an equal voice (at least in theory). Some authorities are of the view that, "multilateralism in general, and multilateral institutions in particular, thus provide a more democratic means of determining which global issues should be addressed and how states should address them".<sup>27</sup> The notoriety of the assertion that, when it comes to bargaining power in multilateral arrangements most especially in addressing global commons, the developing countries are either marginalised or underrepresented is understatement. But this is why there is an urgent need for review of what multilateralism is all about. All parties in multilateral arrangement are secured by the indivisibility of the scope over which costs and benefits are spread, and at the long run there is no winner and loser, whether underrepresented or not. Here the basic requirement is the consideration of respective capabilities of the parties involved and their preparedness to sacrifice for the aggregate whole rather than unilateral approach of issues. This is more particular in the area of protecting global resources wherever located.

### 2.2.2 Developed nations

Environmental regulation enshrined in multilateral agreements is frequently implemented through a system that allows states to choose whether to prioritise the implementation and enforcement. To date, the conventional wisdom has held that prioritising environmental regulation and their subsequent implementation and enforcement by states is driven by its commitment to the environment. Multilateralism in the global environmental politics on the other hand, requires that the developed nations place real, and stricter restrictions on the industries that are primarily responsible for environmental degradation. Guided by the principle of CBDR, the developed nations are equally responsible to help southern nations

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<sup>27</sup> Martin Wight, *Great Powers. Power Politics*. New York: Holmes & Meier Publishers, Inc., 1978, 66.

fulfil their responsibility to mitigate and adapt to climate change. This is to be done through development and dissemination of clean technology, and direct aid that helps to bolster social and ecological defenses against the catastrophic effects of the climate change. Though the developed nations' capabilities, after a century and a half development, unquestionable in fulfilling this task, there exist the perceived risk that a strict adherence to such regulatory mechanisms will hamstring their market operations and for that matter economic development. Indeed, the reality is that compliance with such regulations involves some degree of economic loss, however, balancing the unilateral economic gain with the future benefit and crucial environmental success that will come from a strong and vibrant multilateral cooperation in the search for measures to abate the current trend of degradation of the environment, places the interest of the aggregate whole over individualistic preferences.

According to Kennedy, "because the market does not reflect the costs of pollution, it also does not reflect the gains yielded by its abatement. Multilateral agreements that seek to regulate activity in this way thus threaten to make industrialised states temporarily less competitive, and have therefore carried disfavor among elites in some developed countries."<sup>28</sup>

However, the notion that economic development comes from withholding certain cooperative efforts or that we can safeguard our economic interests by picking and choosing which policies to be adopted and implemented by states is an illusion. Multilateralism in a broader context offers the necessary solution to the fears of the developed nations. There must be a sustained efforts among the competing nations not only to identify common interests, but to expand multilateral cooperation that spells out progress in synchronization of implementation of such regulations. In a multilateral context, since equally competing developed nations will be required to regulate their activities, forging partnership on environmental protection poses no danger to such economies. Yet unfortunately, there is sometimes a sense that the developed nations, comparable to their developing nations, have no benefits to derive in such multilateral partnership. To this

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<sup>28</sup> Kevin C.Kennedy, *Why Multilateralism Matters in Resolving Trade-Environment Disputes*. Widener Law Symposium Journal, Spring 2001

end, multilateral cooperation in the scheme of things for the developed nations is to sign themselves into a regulatory corner where they only impose upon themselves restrictions rather than to derive benefits. This notion tends to suggest that it is the developing nations that becomes the beneficiaries of multilateral cooperation at the expense of their developed counterparts that are generally able to achieve results independently or by cooperating with a limited number of other developed nations. In competitive economics sense, this may be the case but in protecting global shared interests, especially in curbing imminent environmental catastrophe, there are contributions that are not expected to be contained by borders of nations that caused them, as vast as those borders are. The diffused reciprocity concept expounded in Caporaso definition of multilateralism, reminds us that the aggregate benefit supersedes unilateral success. In her article, Lindsey Powel argues that, the temporary economic compromises sometimes demanded by environmental agreements can often be offset by gains in other areas. More short-term benefits can thus be achieved for the developed states by expanding multilateral agreements across environmental issues, she stated.<sup>29</sup> For example, by exchanging compliance with environmental regulation for technology transfer, as was agreed upon at the UN Conference on Environment and Development in 1992<sup>30</sup> incorporated in the UNFCCC.<sup>31</sup>

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<sup>29</sup> Ibid

<sup>30</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992

<sup>31</sup> 1992 UNFCCC Art 3

### 3 Multilateralism and Sovereignty

#### 3.1 Multilateralism and the principle of sovereignty

One of the fundamental principles of which international law and for that matter international cooperation rests and relies on is that of sovereignty.<sup>32</sup> At one level sovereignty can be divided into legal and behavioural sovereignty.<sup>33</sup> The argument according to Steinberg, is that all states are legally sovereign but they are not behaviourally sovereign. The concept of behavioural sovereignty, according to its proponents, contains within itself the "competence to participate in the international system."

Sovereignty has been defined by Oppenheimer in the following way "sovereignty is supreme authority, which on the international plane means not legal authority over all other states but rather legal authority which is not in law dependent on any other earthly authority."<sup>34</sup> The idea behind state sovereignty is that a state ought to be able to govern itself, free from outside interference, while on the other hand underpinning international law is the idea that external rules ought to be able to limit states behaviour.<sup>35</sup>

Sovereignty, therefore, has been a constant source of tension between states when it comes to the implementation of environmental policies. The tension is due to the two extremes within which state sovereignty is exercised. On one hand, states are zealous in protecting their independence and right to do what they want including the right to manage their resources in a manner dictated by the fulfilment of their basic necessities, and on the other hand, there is in ascendancy, the call for international system that advances cooperation in the interest of protection and preservation of the planetary resources.

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<sup>32</sup> Snigdha Nahar, *Sovereign Equality Principle in International Law* @ <http://www.globalpolitician.com/print.asp?id=4351> 2009

<sup>33</sup> Richard H. Steinberg, *Who is Sovereign*, *Stanford Journal of International Law*, 40 *Stan. J Int'l L* 329 2004.

<sup>34</sup> Jennings and Watts (editors) *Oppenheimer's Int'l Law Vol. 1*, Universal Law Publishing, 9<sup>th</sup> Edition 1996, 122.

<sup>35</sup> Janis Mark W, *An Introduction to International Law*, Aspen Publishers, 3<sup>rd</sup> ed. 1999 157.

The conflict has some legal basis in some international texts. In 1972, Principle 21 of the Stockholm Declaration states that "states have, in accordance with United Nations Charter and principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies."<sup>36</sup> Twenty years along the arc of history, and under the aegis of the United Nations, a reformulated sovereign right of states to exploit their own resources was declared modifying the 1972 principle. Under the Rio Declaration, sovereign states were called upon to embrace international agreements "which respect the interests of all and protect the integrity of the global environmental and developmental system."<sup>37</sup> The underpinning of the paradigm shift regarding the sovereign right of states to exploit their own resources could be traced to what Kiss and Shelton assert that "the ecological processes of the biosphere, such as climate change, necessitate protection at the global level, while transboundary and many domestic environmental issues can not be managed effectively by national efforts alone."<sup>38</sup>

Recently in the Russian capital, the president of the United States told a group of Russian 'think tank' that "governments must work to protect their national security and interests but no one nation can meet the challenges of the 21st century on its own, nor dictate its terms to the world."<sup>39</sup> The central idea within the assertion of Kiss and his colleague which was affirmed by the president of the US, is the necessity of acting together in mutual self-interest, both practically and philosophically to avert the problems that are created when the ecological side of development in a cooperative manner is neglected by blindly cherishing and holding on to the tenets of sovereignty. The observance of any international law principle in the 21st century, must put to currency that we share the same planet, that the environment is a wonderfully integrated system, and that any large-scale ecological misdemeanour may result in an ecodisaster for all of us.

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<sup>36</sup> Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972.

<sup>37</sup> Preambular paragraph 3 *supra* note 30

<sup>38</sup> Kiss Alexander *supra* note 4 p 14

<sup>39</sup> See <http://www.msnbc.msn.com/id/31102929>.

For instance, in the third world countries, some of the steps taken to achieve improved living conditions in accordance with the social contract principle between the government and the people, like logging of timber, the indiscriminate extraction of mineral resources,<sup>40</sup> the expansion and intensification of agriculture, the establishment of industries may all occur simultaneously with a progressive deterioration of the environment. This, obviously will negatively off-set any considerable gain made in the North in reducing their emission rate if not checked. There is, therefore, the need in exploiting their resources, for the third world nations not only to embrace the concept of multilateralism, but more importantly to incorporate its ideals/tenets into any steps taken to realize their social and economic objectives, at best in a sustainable development perspective.

### 3.2 The sovereign Equality and the logic of Multilateralism

In their environmental relations, states never really enjoyed absolute territorial integrity nor absolute territorial sovereignty. Rather, co-existence and cooperation have always been elements of environmental sovereignty, reinforcing the idea that the necessities of global ecological interdependence had finally "forced" the North to realize the need for a new partnership with the South, based on equality and third world empowerment as Prof. Handl explained:

"Environmental interdependence as reflected in the need to enlist the cooperation of key developing countries in order to ensure the success of international regimes for the protection of globally sensitive natural resources thus may be a turning point in North South relations."<sup>41</sup>

The new multilateral approach that is seeking to undo the notorious effects of global environmental degradation for which the North was largely responsible must be injected

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<sup>40</sup>See <http://news.myjoyonline.com/tecnology/200905/30454.asp> . Published May 5 2009 where a Ghanaian Research Scientist at Centre for Scientific and Industrial Research (CSIR) in Ghana has warned worsening climate change in the country as a result of uncontrolled human activities.

<sup>41</sup> Handl G., *Environmental Security and Global Change The Challenge to International Law* in W. Lang, H. Neuhold and K. Zemanek(Eds.) *Environmental Protection and International Law* 859(1991)



with preparedness to uphold the logic of multilateralism whereby the developing countries will have not only the right to development, but also the right to cooperate and be assisted as equal stewards of the global planetary environment. By so doing, elements of ineptitude, ineffectual, and sporadic efforts directed at international environmental management based on cooperation among states, would be ironed out.<sup>42</sup> The sovereign equality doctrine recognises that states are equal despite their obvious inequalities in other respects. The need for international cooperation in environmental issues especially, in the implementation of regulations and policies, requires states to limit their right to use their natural resources, or at least to limit certain activities within their respective territories or in collaboration with other countries under legally recognised mechanisms.<sup>43</sup> Strict adherence to the sovereign equality doctrine has the potency to derail the efforts by national governments and the broader international community in developing distinct approaches and specific techniques for ensuring the highest degree of compliance with international climate policies/regulations. For smooth implementation of climate policies, sovereign equality principle ought to be eroded to an appreciable level to create an appropriate platform for the realization of the goals of multilateral efforts to salvage the planetary resources from the deleterious consequences of degradation. To this end, the spatial flexibility provided for cost effectiveness<sup>44</sup> purposes, attached to the flexibility mechanisms under the Kyoto Protocol to the UNFCCC, is a locus classicus.<sup>45</sup> In her article, Eriika Melkas argues that reliance on cost effectiveness may conflict with the international law principle of sovereign equality of states in that some states would have to reduce more emission than others.<sup>46</sup>

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<sup>42</sup> UNEP Environmental Law: An In-Depth Review 5 UNEP Rep. No. 2 1981.

<sup>43</sup> See *below note 45*

<sup>44</sup> 1992 UNFCCC Art 3

<sup>45</sup> Joint Implementation, Clean Development Mechanism(Art. 12, Kyoto Protocol) and Emission Trading(Art. 17).

<sup>46</sup> Eriika.Melkas, Equitable as Equals: The Kyoto Protocol Project Based Flexibility Mechanisms in an Unequal World, *International Community Law Review* 9 (2007) 263-289.

There is no difficulty in agreeing with her on that score, however, as she rightly pointed out in her writing, the strengthening of international cooperation may be a justification as one of the rationale behind the introduction of these mechanisms. In that case the infraction of sovereign equality principle may be seen as a compromise under the multilateral efforts by the international community to confront the climatic change menace. The elaboration of international environmental law, by entering into treaties, of course, constitutes the foundational step in any viable environmental protection strategy. However, in the absence of comprehensive implementation and enforcement tools, these legal instruments are ineffective at achieving their goals. And obviously, designing appropriate tools for such a comprehensive implementation and enforcement regime requires an appreciable infraction of hitherto international law status quo. That is more reason why in the 21st century, the world must show strength and make sacrifices, in order to achieve hard-earned progress in curbing the fast degradation of the planetary resources. Achieving such objectives by implementing and complying with international environmental instruments revealed to be a multi-faceted and complex issue in both developing and developed countries. The recipe for achieving all-encompassing benefits in a such a complex field lies in a multilateral approach.

International law has been traditionally defined as the corpus of law which guides the relationships and actions of sovereign states in the international legal system.<sup>47</sup>

Revitalization of international legal order by moving away from mere cooperation into fusion of tenets of multilateralism as defined by Caporaso through legal engineering is a prerequisite for realization of objectives of legislative frameworks and instruments designed for purposes of fighting global environmental depletion. A careful perusal of recent specific and general environmental law treaties reveals that the status quo of international law and its various institutions are undergoing reformation to meet the challenges of the 21st century. The sovereign equality principle must be respected as the bedrock of international relations, however, the imperativeness of multilateralism that calls for an appreciable infraction of the status quo can not be undermined. To some extent, the

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<sup>47</sup> Antonio. Cassese, *International Law* 2nd Ed. New York (Oxford University Press) 2005 12.

state centred orientation of international law is being purposefully reformed, for example, allowing non state actors to participate in the implementation of treaties like the UNFCCC and the Kyoto Protocol is productive development.<sup>48</sup> Public access to information, participation in decision making, access to judicial and administrative proceedings were traditionally considered to be within the state sovereignty. This is no longer the case as seen in the Rio Declaration where these matters were addressed at international forum.<sup>49</sup> In the past few years, multilateralism has come under fire, as the worlds' greatest sovereign power has chosen to disregard that cooperative norm when it has found it convenient to do so in the name of sovereignty.<sup>50</sup> Since 1990s skepticism has increased in the United States foreign policy community about the value of multilateralism in the country's global engagements not only in the field of politics but in its environmental considerations as well.<sup>51</sup> In order to achieve any meaningful success in the global efforts to address the numerous climate challenges, that blatant disregard of cooperative international norm ought to give way to a multilateral engagements.

### 3.3 Public Participation in the Implemetation of Environmental law

International environmental policies and laws in general, if they are to be effective, require the participation of a diversity of actors.<sup>52</sup> This assertion is reiterated in the Rio Declaration under Principle 10 which states, inter alia, that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."

The call for public participation, both at the national and international levels, in environmental issues is primarily based on the right of those who may be affected to have a

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<sup>48</sup> For example the role of the International Financial Institutions like the World Bank in the current negotiations on deforestation and forests degradation in the developing countries cannot be compromised.

<sup>49</sup> Principle 10 *supra note 30*

<sup>50</sup> United States ratified the UNFCCC in 1992. In 1997 the Kyoto Protocol was designed to be the first step to give specificity to commitment made in the UNFCCC. The US rejected the Kyoto Protocol altogether.

<sup>51</sup> Patrick.Stewart, *Multilateralism and Its Discontents Multilateralism and US Foreign Policy: Ambivalent Engagement*. Patrick and Shepard Foreman eds. Boulder, Co. Lynne Rienner Publishers 2002 13

<sup>52</sup> Jonas.Ebbsson, *Public Participation* in Oxford Handbook of Environmental Law 2006, 681.

say in the determination of their future.<sup>53</sup> To this end, since the Stockholm Conference, several international treaties call upon states to prioritise the need to have the public informed adequately about issues related to the environment in diverse ways.<sup>54</sup>

Ebbsson observes that "the public" in the context of the environment is often ascribed a loose definition to encompass almost all actors outside the public-governmental organization. Thus it includes individuals, groups, NGOs, social movements, indigenous peoples, and local communities, which are not affiliated with the governments or public administration. He adds that the development of international norms concerning public participation in environmental decision-making reflects the general move in international governance, as well as numerous states, towards expanding the involvement of non-state actors in decision-making processes.

While the goals may be common, the rationale for the involvement of the public in environmental governance may differ at the national level from the international arena. In the multilateral perspective, however, it may serve as an excellent platform for garnering broader participation in the efforts to halt the current trend of degradation of the environment. As alluded to earlier, the current global environmental crisis demands shaping of a new form of cooperation, that involves collaboration not only between states, but also private actors.

Governments can promote cooperation, but ultimately individuals ( i.e both natural and juristic personalities) must advance this cooperations. The most comprehensive of all treaties on public participation in environmental issues, regional Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters(Aarhus, June 25 1998), building on prior international texts, especially Principle 1 of Stockholm Declaration states in its preamble that: "every person has the right to live in an environment adequate to his or her health and well being". The convention adds that everyone has "the duty, both individually and in association with others, to protect and improve the

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<sup>53</sup> Alexander Kiss,,*supra note 4 p. 102*

<sup>54</sup> 1992 Convention on Transboundary Effects of Industrial Accidents Art 9, 1991 Convention on Environmental Impact Assessment in Transboundary Context Art 1(viii), Preamble of the regional 1998 Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters

environment for the benefit of present and future generations ” The bulk of literature on the implementation of environmental policies and laws in general, and all related treaties, speak of obligations of states to act or otherwise.<sup>55</sup>

It is observed that, failing to discourage consumption and pollution by capable persons, including the tens of million of people in the developing world whose governments have no obligation to limit nationwide pollution, for instance, is a serious setback in the climate change regime. Getting the public on board any implementation strategies demands their participation in decision-making processes.

In the text of UNFCCC, the contributions of NGOs are recognised which addresses the role of NGOs in arts. 4(1)i, 7(2)1, and 7(6). These provisions establish the rules for admission of NGOs to the proceedings as ”observers” recognise the importance of NGOS for public awareness of climate change, and state that the Conference of Parties(COP) shall utilize their services and cooperation in the supervision of the implementation of UNFCCC. Clearly, REDD activities cannot yield the needed dividends without an appreciable participation of the public especially the International Financial Institutions(IFIs), Non-Governmental Organisations(NGOs)Idigenous Peoples of communities rich in forestry resources.

### 3.3.1 Why Public Participation

There has been a formal recognition of partnership with the public through the instrumentality of NGOs in implementation of international policies on the environment and related issues. Salient among such recognition is the ”multiple stakeholder ’partnership’ concept at 2002 WSSD in Johannesburg, South Africa.<sup>56</sup>

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<sup>55</sup> Paul G.Harris, *Climate Change and The Impotence of International Environmental Law: Seeking a Cosmopolitan Cure*, Penn State Environmental Law Review, 16 Penn St. Env’tl L. Rev. 323, Winter 2008.

<sup>56</sup> See Johannesburg Plan of Implementation, in *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August- 4 September 2002, UN Doc. A/CONF.199/20 (2002) @ paras. 49, 106, 146 and 167.

Aside from legitimizing the policies and laws adopted by states, public participation serves as a medium of soliciting support of the public in the implementation of environmental regulatory activities by the state. Public participation has the potency of increasing general awareness to enable the public express their views on environmental matters. This will lead to influence and engagement of themselves in law and policy making in respect of the environment. In recent years, there has been a positive paradigm shift in the activism of NGOs in conferences devoted to environmental issues.<sup>57</sup> David Takacs, writing on the role of the public in the implementation of environmental policies, observed that the formal recognition of partnership in implementation of international policies presupposes that states are neither exclusive representatives of the public interests in environmental decisions making nor solely responsible for implementation of agreements and commitments.<sup>58</sup> For instance, given the rapid increase in the numbers of affluent people in the developing world, bringing them into the equation in existing international environmental law on climate change is long over due. Such involvement could be legally fixed through the engagement in a multilateral approach to implementation of environmental policies.

#### **4 The Global Climate Change Treaty Regime**

Climate change is a high profile political issue because greenhouse gas (GHG) emissions currently arise from virtually all aspects of the global economy and ecology.

Industrialization has come with many costs, chiefly among which, is the widespread pollution of the global atmospheric commons. As greenhouse gases (GHGs) accumulate in the atmosphere at concentrations significantly above preindustrial levels, scientists have

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<sup>57</sup> See 1972 UN Conference on the Human and Environment (UNCHE), 1992 Rio de Janeiro UN Conference on Environment and Development (UNCED), and 2002 Johannesburg World Summit on Sustainable Development (WSSD).

<sup>58</sup> David Takacs, 15 *Hastings W.-N.W.J. Env't'l Law Pol'y* 39, Winter 2009 19.

sounded the alarm about the consequences these changes in greenhouse gas (GHG) concentrations portend for human and nonhuman communities.<sup>59</sup>

Political and legal control over human activities contributing to climate change is fragmented between states, international organizations and an array of other actors, (individuals, groups, transnational organizations, multinational corporations and media networks). In less than a decade, after the scientific community has warned of the potentially serious effects of climate variability caused by anthropogenic factors, the international community has negotiated two major landmarks international treaties: the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.

The search for solutions, though largely reflective of mitigation measures as detailed in the Convention and the Protocol, adaptation measures are equally important given the fact that, the wheels of climate change have already been set in motion and, concentration of greenhouse gases (GHGs) is irreversible. Adaptation, according to David Takacs means building ecological and social community resiliency to climate change.<sup>60</sup> He explained that ecological resiliency means "protecting and preserving the natural ecosystems that help human communities survive through buffering from floods, filtering drinking water, stabilizing soil, provides sustainable forest products and preserving a host of other ecosystem services necessary for human survival."<sup>61</sup> Again, citing Alfred Ofori Ahenkorah<sup>62</sup> he explained social resiliency to mean "forging the democratic capacity to help marginalised countries accrue the administrative, technical, and political power that

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<sup>59</sup> See Statement by the National Academies of 13 nations, including those of G-8: Joint Science Academies' Statement: Climate Change Adaptation and the Transition to a Low Carbon Society (June 2008) at <http://www.nationalacademies.org/includes/climatechangesstatement.pdf>.

<sup>60</sup> David Takacs, *supra note 58*

<sup>61</sup> Ibid

<sup>62</sup> Ofori A. Alfred. *CDM Participation and Credit Pricing in Africa in Equal Exchange: Determining a Fair Price For Carbon*, 133(Glenn Hodes and Sami Kamel, eds., 2007 at [www.cd4cdm.org/Publications/Perspectives/FairPricingCarbon.pdf](http://www.cd4cdm.org/Publications/Perspectives/FairPricingCarbon.pdf).

will help them make difficult decisions and survive the coming vicissitudes of nature and the coming economic and political upheavals.<sup>63</sup>

The UNFCCC sets goals for the World's nations to reduce their greenhouse gas (GHG) emissions in order to mitigate global climate change.<sup>64</sup> The UNFCCC has been ratified by over 189 parties and thus enjoy near universal adherence. The 1997 Kyoto Protocol, widely regarded as one of the most innovative and ambitious international agreements ever agreed, spelled out the terms that legally bind signatory nations, and entered into force in 2005.

Anchored on the guiding principle of "common but differentiated responsibility" (CBDR), Annex 1 nations- nations of the "North" – have been primarily responsible for greenhouse gas (GHG) build-up, and their economic development has allowed them the financial and technical means to mitigate this pollution.<sup>65</sup> The Convention and the Protocol constitute the core of the international climate treaty regime and are, therefore the central focus of concentration and assessment of any efforts so far made, and equally serve as a yardstick for proposing a new treaty. Under the CBDR principle, Northern nations committed themselves to various degrees of emissions reduction, targetting an overall reduction to 5 percent below 1990 levels, as measured during the commitment period of 2008-2012.<sup>66</sup> As far as commitment is concerned, under the Kyoto Protocol, Southern nations-developing nations have no binding emissions reduction targets, even though the CBDR principle levels some obligations jointly with their developed counterparts to cooperate to fight against the climate change and its attendant catastrophes.

The urgency of clear international consensus that action is needed has, however, been underscored at various fora across the globe. This is evidenced in the repeated affirmation by the international community to rise to the challenge both at the respective national,

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<sup>63</sup> Ibid

<sup>64</sup> 1992 UNFCCC Art 2

<sup>65</sup> Anita M.Holsorsen, *Common But Differentiated Commitments in the Future Climate Change Regime: Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund*, 18 Colo. J. Int'l Envtl. L. & Pol'y 247, 254-55 (2007).

<sup>66</sup> Christopher.Carr,*Flexible Mechanisms for Climate Change Compliance: Emission Offset Purchases Under the Clean Development Mechanism*, 16 N.Y.U Envtl. L.J. 44, 46 (2008).



regional jurisdictions and international level. The G.8 meeting in Hokkaido, Japan in 2008, reaffirmed their commitment to take "strong leadership in combating climate change".

<sup>67</sup>Assembly of the African Union(AU), meeting in Addis Ababa in January 2007, expressed its grave concern on the vulnerability of Africa's socio-economic and productive systems to climate change and variability and to the continent's low mitigation and response capabilities and committed to, inter alia, "integrate climate change and climate change adaptation strategies into national and subregional development policies, programmes and activities".<sup>68</sup>

Developing countries have an important role to play in shaping the post-2012 climate change regime. Therefore the current legal framework, especially the Kyoto Protocol arrangements as far as commitment allocation (obligations) in reduction of GHG emissions is concerned, must be critically looked at in post-2012 global climate change treaty regime come December 2009 in Copenhagen.<sup>69</sup> The shape of any post Kyoto Protocol regime that intend to address this concern must equally be realistically receptive to the strategic interests of the developing countries in order to whip up their commitment drive. To this end, certain basic differences between the North and the South in terms of development should be of paramount concerned to all the players at the international level. Guided by tenets of multilateralism; thus diffused reciprocity, generalised principles and indivisibility, there are several options available to the international community for negotiation as to how best the developing countries can contribute towards the realization of the ultimate objectives of the climate change treaty regime. Any regime that fails to articulate the economic development interests of the developing countries risks the failure to obtaining their genuine commitment and contribution, even though they stand to suffer the grave

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<sup>67</sup> G8 Summit Declaration on Environment and Climate Change. Hokkaido Tokayo Summit. Sapporo. July 8, 2008.

<sup>68</sup> Decision on Climate Change and Development in Africa. (DOC.ASSEMBLY/AU/12(VIII)).

<sup>69</sup> Delegates from more than 190 countries met in Poznan to hammer out some of the final details for a new climate treaty under the UNFCCC. Targeted for completion in Copenhagen in December 2009, the new climate treaty will be the successor to the 1997 Kyoto Protocol, which has been in force since 2005 and expires in 2012.

consequences of the impacts of climate change. So far there has been no concrete international efforts in the global climate change treaty regime, offering the developing nations mechanism through which strategic developmental priorities peculiar to their circumstances, will be championed, and at the same time addressing the climate change. Lack of comprehensive mechanisms with defined incentives capable of pooling the contribution of the developing countries, has negative implications for the multilateral efforts of the international community to fix the climate change challenge. Any aggregate reduction in GHGS concentration made by the efforts of the North-developed nations could be offset by the anthropogenic activities of the South-developing nations through deforestation and multiplicity of unsustainable agricultural practices, and other unhealthy land uses; irrespective of the current magnitude of such activities, especially when taken in the long term.

#### 4.1 Potential Conflict Between Economic Growth and Action on Climate Change

As stated earlier in this paper, to the developing country, any international restriction on resources use has the potential not only to hinder economic growth and development, but affects the livelihood and basic rights of the citizenry. It stands to reason, therefore, that the developing country's interest in climate change action largely depends on and in fact propelled by what economic incentives/benefits accrueable through the implementation of any such action or policy.

Where, therefore, there are no discernable economic incentives and benefits to derive, the needed action on climate change on the part of the developing country conflicts with its developing agenda. For example, in Ghana, the Water Research Institute (WRI) of the Centre for Scientific and Industrial Research (CSIR) has warned that excessive exploitation of timber, and the upsurge of mining activities had caused the removal of the vegetative cover in many areas seriously contributing to climate change by making the environment bare, and increased hot conditions in the mining communities. The centre has sufficiently demonstrated to the government of Ghana in terms of scientific and other empirical evidence that the continue treatment of the environment at the governmental level in such a

manner has a detrimental effect on the livelihood of the people in that communities in particular and Ghana as a whole.

Despite the warning by the institute, the government is in the process of negotiating to give out forest reserves for limestone production and had already put in place a policy of allocating two percent of Ghana's forest reserves for mining operations.<sup>70</sup> This move of the government obviously is to generate revenue to meet the basic necessities of the citizenry. To this end, what is considered prudent measures to conserve the environment is being relegated by the prioritization of economic interests of the nation in an unsustainable manner. This conflict might be the reason behind the 11th Conference of the Parties (COP) of the UNFCCC in Montreal, Canada, 2005 on agreement to initiate "Dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention"<sup>71</sup> The dialogue, among other things, centred primarily on four themes:

- (i) Advancing development goals in a sustainable way
- (ii) Advancing action on adaptation
- (iii) Realizing the full potential of technology
- (iv) Realizing the full potential of market-based mechanism.<sup>72</sup>

Realizing that deep cuts in global emissions will be required to achieve the ultimate objective of the Convention, the COP decided in the Bali Action Plan, subsequent to the Montreal meeting, virtually affirming the four themes, "to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention". They identified certain actions as pillars for the realization of the ultimate objective of the Convention, including, inter alia, adaptation, technology transfer and market-based mechanism (finance and investment).<sup>73</sup> Advancing development goals is embedded as a cross-cutting objective throughout the other elements of the plan.

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<sup>70</sup> See *supra* note 40

<sup>71</sup> 1992 UNFCCC 2006 Decision 1/CP.11. March 30, 2006.

<sup>72</sup> Aaron Cosby, Developing Country's interest in Climate Change Action and the Implication for post-2012 Climate Change Regime. New York and Geneva 2009. *International Institute for Sustainable Development* (IISD).

<sup>73</sup> Para 1 (a)-(d) of the Bali Action Plan.

On the basis of the cross-cutting objective in the Bali Action Plan: advancing developmental goals in a sustainable way, the conflict between the economic growth agenda and action on climate change can be ironed out to establish the appropriate platform for a meaningful contributions in the GHG emissions reduction from the developing countries within the legal framework. Thus through international support, identified strategic interests of the developing countries could be addressed while simultaneously dealing with climate change phenomenon.<sup>74</sup> This will be in line with the call for expansion of the so-called "clean development mechanism" to incorporate elements that are not incompatible with growth and plans to fight poverty especially in the developing countries.

#### 4.2 The Climate Change Treaty Regime and Customary Norms of International Environmental Law

There are some basic legal principles grounded in the UNFCCC and the Kyoto Protocol and based on customary norms that could or do provide the basis for proper implementation of climatic policies in a multilateral fashion. The principles may well ground the notion that Northern nations are legally obligated to provide adaptation aid to Southern nations that helps communities become more socially and economically resilient when faced with the adverse effects of climate change.<sup>75</sup> This notwithstanding, the guiding principle of CBDR coupled with the diffused reciprocity tenet of multilateralism, the southern nations can contribute in certain ways corresponding to their dispositions and capabilities.

Again under the cloak of these principles, private actors investing in climate change especially forests carbon offsets (FCOs) could be made to follow those legal strictures as anyone providing adaptation aid. Under the UNFCCC/Kyoto framework, private actors may participate in generating projects under the CDM by developing, financing, and

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<sup>74</sup> Aaron Cosby, 2009, *supra note 72*

<sup>75</sup> 1993 UNFCCC Art 3 *supra note 8*

supervising projects under the CDM.<sup>76</sup> The ultimate objective of the use of these principles will help to prevent any FCOs that result in a net transfer of wealth from the South to North, or that disinvest poor people of their means of subsistence. International environmental law usually focuses on the obligations of nation-actors with no proper regulation of the non-state actors. I argue here that the same norms that govern state-actors by spelling out obligations through legal engineering should apply to non-state actors including Multinational Enterprises(MNEs), and International Financial Institutions(IFIs). The current climate change treaty regime treatment of non-state actors as far as the reduction of GHG emissions is concerned is inadequate. The climate change treaty regime have no detailed international rules, or procedures, for the environmental regulations of MNEs and other non-state actors and their involvement in the arrangements therein contained.

As opined earlier in this paper, it is a growing recognition that, concerning the issues of the environment, it has been underscored by the international community that the necessity of cooperation and the paramountcy of preservation/prevention of the global commons dictates that traditional doctrine of state sovereignty and responsibility ought to be accommodative enough to allow innovations. Private actors may pollute and with respect to the various mechanisms embedded in the Kyoto Protocol arrangements, forment environmental change across national boundaries. Having been permitted to act as CDM project developers, it stands to reason that private actors be controlled by the legal norms encoded within the UNFCCC/Kyoto Protocol. Commenting on the subject, Prof. Peter Muchlinski characterises as "weak" the assertion that corporate social actors are liable in domestic countries for violations of principles of customary international environmental law.<sup>77</sup> International regulation of these actors is imperative since there are virtually no incentive to do so in the home countries of these companies. It has been observed that the host states, particulaly in the South, may lack the expertise, capacity, and power to regulate

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<sup>76</sup> Boisson De Chazournes, Laurence. *Technical and Financial Assistance*, in *The Oxford Handbook of International Environmental Law* 947 at 969(Bodansky Daniel et al. eds. 2007)

<sup>77</sup> Mulchlinski, Peter T. *Multinational Enterprises and the Law* 566

and may be willing to accept whatever Foreign Direct Investment(FDI) is profered, particularly if powerful elites(mostly in leadership positions) are beneficiaries.

More importantly, the Southern countries may actually have legislations for the regulations of these corporations but its implementations is another issue. There are other developing countries, obviously, where there is simply no legislation. If a factory is set up there, it is really up to the corporation concerned to decide what is satisfactory environmental standards.

It is, therefore critical for the purposes of regulating anthropogenic activities of both natural and juristic personalities, to standardise the operations/activities of these non-state actors at least in the international climate change treaty regime.This hiatus in the international climate legal order creates an unfettered platform for operations by the non-state actors, that has the potential to offset any gains made by the state actors in the efforts to stabilize the concentration of the GHGs. This problem can be fixed by resort to customary norms of international environmental law.

Even where private actors are not legally bound by international environmental legal norms, or do not consider themselves legally regulated, the norms are available for adaptation as ethical principles and "best practices" that private actors may follow which will eventually contribute to the realization of the ultimate objective of the climate change treaty regime. To the extent that international environmental law does not regulate private actors investing in the climate change especially the FCOs and other treaty based mechanisms, international climate change treaty regime "ought to be reformed so that private actors do have clear legal responsibilities to forment guinea adatation activities within the guiding framework of principles of customary international environmental law".<sup>78</sup> I opine here to say that, these principles (though not legal themselves) provide a guiding framework for the formulation of international environmental legal principles, in a multilateral fashion to bind not only state actors, but non-state actors as well to guide in the implementation of climate policies. The logic lies in the fact that once the non-state actors are involved in the efforts to combat the vicissitudes of the climate change, there must be a

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<sup>78</sup> David Takacs, *supra note 58*

way of levelling some obligations on them in whatever way their services are solicited for that common purpose. It is obvious that the status quo of international law primarily focuses on states obligations as the primary actors in the global governance, however, the dynamics of the environmental challenge especially the climate menace demands a unique way of dealing with the situation. The continue reliance on institutional and legal barriers inherent in the international legal order, as an excuse of failure for involving the non-state actors in taking obligations/commitments is a set back in the global mitigation and adaptation efforts as far as the climate politics is concerned. Through robust legal engineering within the climate change legal framework, the non-state actors can be engaged in a more positive and pragmatic way than the current undefined and loose way of their involvement. The Northern nations, within the UNFCCC/Kyoto mandate, under certain encoded legal principles, inter alia, are obligated to provide adaptation aid to Southern nations that helps in ameliorating the drastic effects of climate change in their respective dispositions and idiosyncrasies. Several writers have commented on the profit motive of non-state actors in their involvement in the climate change adaptation mechanisms to the detriment of the targetted people. To the extent of their involvement, private actors contributing to the climate change mitigation and adaptation processes, ought to be contained within the same legal strictures as states providing such aid.. This will obviously curb the wealth creating agenda of the private actors that disinvest poor people (mostly the developing nations) of their means of livelihood and the massive net transfer of wealth from South to the North. The generalised principles of conduct inherent in multilateralism, in a given case, exhort general modes of relating to other players on the basis of situational exigencies. The global climate change presents a genuine situational exigency that calls for a change in relating to the non-state actors as hitherto upheld in the global governance.

Over concentration on states as the primary actors on the international platform, has negative consequences as far as efforts in combating the climate change are concerned. As evidenced in the global efforts to confront the challenge of climate change and other environmental issues, matters affecting global commons must be approached diligently.

### 4.3 Preventative Principle

The idea behind the preventative principle as embodied in the Principle 21 of the 1972 Stockholm Declaration is a requisite kind of due diligence, or state responsibility to ensure that activities within their territories or control do not cause damage to the environment of other States or of areas beyond their control and jurisdiction.<sup>79</sup> The duty to avoid transfrontier pollution obligates states to exercise "due diligence" which means to act reasonably and in good faith and to regulate public and private activities subject to its jurisdiction or control that are potentially harmful to any part of the environment.<sup>80</sup> The case law precedent of 1937 Trail Smelter Arbitration<sup>81</sup> is credited to be the originator of this principle which has become one of the foundational norm of international environmental law affirmed in various environmental law treaties and instruments.<sup>82</sup> The anticipated preventive element is relative to both damage to territory, and the health of persons living in that territory. As a cornerstone of customary international environmental law, the preventative principle has been reified by the UNFCCC's preamble reiterating that while states have "the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies," they nonetheless must refrain from "causing damage to the environment of other States or of areas beyond their national jurisdictions"<sup>83</sup> In the context of climate change, this principle can serve as the basis for the development of more comprehensive legal framework on the international front, to control the activities of the non-state actors either in promulgating or implementing adaptation processes across national boundaries. Having underscored the fact that, government of most developing nations do not have the capabilities, or the needed incentives to monitor and control those activities of the private actors likely to infringe this basic customary norm of international

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<sup>79</sup> U.N. Env. Progr. [UNEP], Declaration of the United Nations Conference on the Human Environment (June 5-16, 1972), Principle 21, available at <http://www.unep.org/Documents/Multilingual/Default.asp?>

<sup>80</sup> Alexander Kiss, *supra note 4*

<sup>81</sup> Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (Trail Smelter Arb. Trb. 1938 & 1941).

<sup>82</sup> 1992 Convention on Biological Diversity Art 2, 1982 UNCLOS Art 192 etc.

<sup>83</sup> 1992 UNFCCC Preamble.



environmental law. It is also an equity argument that FCOs and other mechanisms formenting adaptation across nations should not cause damage to the host country's environment.<sup>84</sup>

#### 4.3.1 Common But Differentiated Responsibilities (CBDR)

The concept of CBDR has come to be part of the modern international environmental law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.<sup>85</sup> It is estimated that 75% of the global emission of carbon dioxide is released by industrialized countries, which make up 25% of the world population. On the other hand, the 75% of the population emit only 25% of carbon dioxide. The concept of CBDR, therefore, dictates that, while everyone in the world has a responsibility to reduce the carbon dioxide emissions into the air that we breathe, the burden of limiting the emissions is not equal. Naturally, those who emit more have a greater responsibility to do more. Thus, while the responsibility is common to all countries, the burden to be assumed is not the same.

The basis of the concept is the inequality levels of socio-economic and technological development of the different countries of the world. While the responsibility is common, the burden of bearing the responsibility is differentiated according to their capabilities and contribution to the degradation. The concept is regarded more of a rule than principle because it attempts to direct conduct towards a particular goal.<sup>86</sup>

I argue here that the specific duty inherent in the concept, as reified under the Principle 7 of Rio Declaration, is the duty of cooperation. In the context of climate regime, it specifies the objectives of cooperation among states and again, sets out a guidance criteria for assessing the performance of interstate cooperation. This obviously dictates the imposition of

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<sup>84</sup> David Takacs, *supra note 58*

<sup>85</sup> Charlotte Streck, *Forests Carbon Markets and Avoided Deforestation: Legal Implications* 2008 CCLR,239  
British Institute of International Comparative Law.

<sup>86</sup> Sand P, *Principles of International Environmental Law* 2<sup>nd</sup> Ed. Cambridge: Cambridge University Press (2008)

differeing obligations on states, both developed and developing. In a multilateral sense, the developing nations, under this concept are equally obligated to contribute to the efforts against global warming. A financially-poor but ecological-weathy nation like Phillippines bears a heavier responsibility to protect its rich forests. The "differentiated" responsibility takes into account the particular circumstances and capabilities of nations. Therefore, even though economically and technologically poor, the developing nations, can still contribute meaningfully to the fight against global warming. The current arrangements under the climate treaty regime that the developed nations or "consumptive" societies must take the lead in combating climate change and its adverse, almost calamitous, effects on humankind,<sup>87</sup> though consistent with the guiding principle of CBDR, must be critically looked at in the context of multilateralism that projects the idea of diffused reciprocity. The fact that the developed countries are legally obligated to fund mitigation and adaptation strategies in the South that will avoid human rights and ecological cataclysms that results from the North's responsibility for creating climate change, does not in itself absolve the South from responsibility in curbing the menace where they have capabilities to do so, more especially when economically pushed by the North in that direction. The long run benefits from contributing their quota amidst their deprived conditions and capabilities, is far better than the lethal effects that are likely to occur when they sit back leaving only the North to shoulder the responsibility of the challenge of global warming. The equity-enhancing underpinnings of the CDBR notwithstanding, the developing countries will largely contribute to the amelioration of the impacts of climate change if they genuinely embrace the idea of diffused reciprocity inherent in the concept of multilateralism by offering what their capabilities afford in the struggle against the global warming. The committed involvement of the developing nations will also check any abuse of the CDM projects that allow the North to evade legal responsibility to reduce their own emissions, and that further undercut the South's ability to adopt to tha hazards of the climate change. It is therefore, possible under the umbrella of the CBDR, for the Southern nations to go

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<sup>87</sup>1992 UNFCCC.Art 3

beyond the establishment of Designated National Authority (DNA) for purposes of assisting CDM project developers by approving or rejecting proposed CDM projects.<sup>88</sup>

If developing nations initiate efforts themselves, within their peculiar circumstances and capabilities, then can the Northern nations come to their aid in fulfilment of their legal obligation to fund mitigation and adaptation projects with the aim of ameliorating the lethal effects of the climate change. The current trend of executing the legal obligation placed on the Northern nations to assist the developing nations is likely to benefit an insignificant number of them to the detriment of a wide range of Southern nations.

The probability of private actors and other project developers, directing almost all CDM projects, and infact any such projects meant for adaptation in Southern nations to few developing nations with advanced infrastructure equipped to undertake the bureucratic and technical requirements of CDM is high. It is estimated that more than 80 per cent of CDM projects have been directed towards China, India, Mexico and Brazil.<sup>89</sup> The initiatives on the part of the developing nations themselves has the potency to avert the imbalance in the reception of mitigation/adaptation projects from the developed nations.

## **5 The Post Kyoto Debate and Developing Country's Contribution**

### **5.1 The Post Kyoto Debate and Multilateralism**

Both UNFCCC and the Kyoto Protocol seek to advance the spirit of multilateralism in the climate change regime. In the preambular paragraph six of the UNFCCC, the text calls for

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<sup>88</sup> Potvin Catherine and Bovarnick Andrew, *Reducing Emissions from Deforestation and Forests Degradation in the Developing Countries: Key Actors, Negotiations and Action* 2008 3CCLR 298. British Institute of Comparative Law.

<sup>89</sup> U.N Env. Progr. [UNEP] Riscoe Centre, CDM projects by host region (Oct. 1, 2008), at <http://cdmpipeline.org/cdm-projects-region.htm>.

”the widest possible cooperation by all countries and their participation in an effective and appropriate international response”<sup>90</sup>

The Convention, however, reiterates that contributions from various countries should take into consideration, their respective capabilities and their social and economic conditions while cooperating towards a common but differentiated responsibilities of meeting the dreadful impacts of climate change.<sup>91</sup> Guided by this acknowledgement, parties to the UNFCCC, in pursuit of the ultimate objective of the Convention, identified and tasked some country parties, under the Kyoto mandate, to take the lead in the implementation of policies and measures to address the climate change phenomenon.<sup>92</sup>

Under the Kyoto Protocol to the UNFCCC, developing countries were excluded from taking on emissions limitation measures. Apart from equity related rationale, styled on the international arena as interstate justice for the exclusion, the developing countries were not mandated to take on commitments because of their incapacities in terms of financial and technological resource base readily available to industrialized nations(in the context of the Kyoto Protocol, Annex 1 countries). The above treatment of the developing countries under the Kyoto Protocol to the UNFCCC, is in accordance with the dictates of ordinary organisational mechanisms.

That analysis falls short, however, when multilateralism is viewed in a broader context. Multilateralism, distinguishes itself from other nominal organizational forms of cooperation on the basis of certain principles of coordinating policies among states(and to some extent non state actors) towards the achievement of a common goal. If multilateral climate cooperation is to be successful, its different actors need to understand that they are working towards a greater future benefit that will require certain sacrifices to be made, to different extents, by the different actors.

To this end,responsibility should not be the only factor, but both developed and developing countries will have different roles to play in cooperative efforts, given their different needs

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<sup>90</sup> 1992 UNFCCC Preambular para.6

<sup>91</sup> See 1992 UNFCCC.Preamble

<sup>92</sup> Article 4 of the UNFCCC makes a distinction between two groups of countries referred to as Annex 1 and non Annex 1 countries. Countries included in the Annex 1 to UNFCCC are largely developed countries.

and capabilities, and based upon these differences, the benefit of cooperation will seem more immediate to some actors than to others. For all, however, the ultimate goal is the stabilization of the GHGs concentration in the atmosphere coupled with other objectives of mitigation and adaptation.

These goals can only be achieved as set out in the UNFCCC and the Kyoto Protocol, if the principle of diffused reciprocity is recognised and developing countries, especially those rich in ecological landscape, make changes or even sacrifices in their contributions towards climate change (ie their treatment of the environment especially forestry and certain agricultural practices) for their own, albeit not immediate benefit.

Indubitably, because of their weak financial and technological resource base, developing countries find it most difficult to comply with internationally (multilaterally) determined policy changes, and in fact such policy directives are less of a priority for them to implement than more fundamental policies, for example to reduce poverty and improve access to basic services. As this paper has alluded to already, the fact is that, the requirements of multilateral agreements can hinder further development in developing countries, by demanding the reduction or termination of activities that would facilitate more rapid economic growth and development. This is very particularistic to climate issues. The economies of developing countries are highly dependent on the use of natural resources especially forestry. To put international restrictions on resource use in these nations is tantamount to threaten the livelihood and basic rights of many people. Equally, land use regulation has the potential to cut local dwellers off from water, fuel and other resources essential to their subsistence.

However, multilateralism, if properly recognized and practised to its logical conclusion, may mitigate, if not iron out completely, whatever risks associated with the coordinating of national efforts to address a common challenge. The diffused reciprocity principle demands changes that may be sacrificial in nature in a short term but the benefit in the long run is too enormous to compensate for the short term or immediate sacrifices made to accommodate the implementation of internationally determined policies. In the context of climate change, the developing countries may be required to change the manner in which natural resources for example forests are exploited. Until now, efforts directed at international environmental

management based on cooperation among states have been sporadic and ineffectual, but the time has come for the acceptance of the notion, that the right of states to exercise unbridled jurisdiction over their resources ought to take into account the various limitations dictated by the current state of earth's environmental degradation that respects no man-made or artificially marked "political boundaries".

It is sobering that the developing countries (the least contributors to the climate change), are expected to suffer most from the negative impacts of climate change. Changing rainfall patterns, for example, threatens to severely impact agricultural activity in Africa (in the Sahel, East Africa and Southern Africa) by 2020 reducing the variability of rain-fed agriculture by as much as 50 per cent in some countries.<sup>93</sup>

This is just one reason why, like all other developing countries, in the midst of their deprived conditions and incapacities, they ought to utilise whatever they have as their genuine contribution towards the fight against the devastating effects of the global warming. In this sense, I argue that, forestry and agriculture may play a pivotal role, not only in the international efforts to reduce GHGs emissions, but also as a way of galvanizing the interest of developing countries in contributing their quota within the climate change regime.

Multilateralism is also characterised with the principle of indivisibility which can be thought of as the scope over which costs and benefits are spread among its players. In the climate context, under this principle, when the developing countries identify areas of possible contribution (ie forestry and agriculture), it is incumbent upon their developed counterparts to offer all the necessary support in terms of funding and technology transfer to help maximize their efforts. Here too the developed countries may seem to gain nothing or less, in the immediate term, but the long term benefit to the international community as an aggregate whole, especially within the climate change treaty regime, binds them under the principle of diffused reciprocity to be more committed in any supportive measures. As stated by the Chinese president, Hu Jintao, at the 15 Economic Leaders' Meeting of the

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<sup>93</sup> IPCC (2007) Climate Change 2007: the physical science basis. Summary for policymakers. Contributions of Working Group 1 to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. February 5

Asia-Pacific Economic Compact(APEC) forum Sydney, Australia that "in tackling climate change, helping others is helping oneself, and only cooperation can bring about win-win progress". In the preceding sections, the paper will focus on how climate change negotiations in a multilateral fashion, can offer the needed opportunity for developing countries to strategically take action on mitigating climate change and simultaneously achieving their defined development goals. The success of this, however, will largely depend on the preparedness of the developed North to assist them in their efforts.

Recently, ministers from 10 African countries met in Ethiopia to try to agree a common position on climate change, months before a crucial UN conference in Copenhagen this December. Among the discussed suggestions was that developed countries should cut emissions by 40 per cent by 2020 and that richer nations should provide \$67bn a year to help the least well-off cope with rising temperature.<sup>94</sup> The basis of their demand is not far fetched; African nations, like most developing nations, are among the lightest polluters but the analysts say they will suffer the most from climate change and on that score, they demand compensation.

Indisputably, the international community has acknowledged, as compelled by empirical evidence, that the industrialised nations are largely responsible for the global warming. However, using that as a basis to demand compensation at all cost defeat the essence of multilateral cooperation required to confront the climate change menace.

Multilateralism, as Caporaso reminds us, postulates generalised principles of conduct which usually takes the form of norms exhorting general modes of relating to other states, rather than differentiating relations case-by case on the basis of, among other things, prior particularistic grounds. Nations cooperate in a multilateral context because they will benefit in the aggregate, not to settle scores. Developing countries, therefore, need to accept that, certain compromises are imperative in charting a common course of meeting the challenges of climate change. Obviously, more short-term benefits may be feasible from demanding mere compensation, however, the imminent lethal impacts of climate change on developing

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<sup>94</sup> BBC Science Reporter on August 26, 2009 at <http://www.myjoyonline.com/tools/print/printnews.asp?contentid=34329>.

countries requires concrete and concerted action on their part far beyond compensation, albeit to be supported by their developed counterparts.

## 5.2 Forestry and Developing Country's interest in Climate Change

International community's interest in seeking a cosmopolitan approach in dealing with climate change was given a boost at COP 13, held in Bali December 2007.<sup>95</sup> At the conference, the global relevance of forests to climate change mitigation and adaptation was prioritised.<sup>96</sup>

Forests play a vital role in the global carbon cycle. It is estimated that deforestation contributes about 20 per cent of global greenhouse gas (GHG) emissions-more than the transport sector.<sup>97</sup> According to the IPCC 2007 report, of particular concern in the global climate context is the conversion and degradation of tropical forests which account for about 90 per cent of total GHG emissions from deforestation.

According to Food and Agriculture Organization(FAO), the main threats to tropical forests, mostly in developing countries, are unbridled rapid population growth and the associated need for farming and grazing land.<sup>98</sup> Other drivers of deforestation and degradation of tropical forests include indiscriminate mining activities, cattle ranching, over-exploitation of timber, road construction and to some extent the production of biomass for biofuels. The global attention given to forests and related issues, may be accounted for under the climate change for two vital reasons.

First, the overarching convention, UNFCCC, recognises the essence of carbon sinks and reservoirs in terrestrial and marine ecosystems.<sup>99</sup> On a global scale, it is empirically estimated that, forest ecosystems contain about 80 per cent of above-ground and 40 per

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<sup>95</sup> See COP 13, Bali in Dec 2007

<sup>96</sup> Ibid

<sup>97</sup> IPCC (2007). The Fourth Assessment Report, Geneva, Switzerland.

<sup>98</sup> FAO, State of the World's Forests, 2007, at <http://www.fao.org/dorep/oo9/a0773e/>

<sup>99</sup> UNFCCC,Preamble, para. 4.



cent below-ground terrestrial carbon.<sup>100</sup> Meaning, at present, there is more carbon stored in forests than in earth's atmosphere. That makes forestry an important carbon reservoir. Despite its potentials in contributing to the realization of the UNFCCC's objective of "stabilization of greenhouse gas concentration in the atmosphere at a level that would prevent anthropogenic interference with the climate system",<sup>101</sup> both the Convention and the Kyoto Protocol do not define a system for creating strong and attractive incentives for biological carbon storage and mitigation of emissions from tropical forests. The above hiatus, coupled with the indiscriminate treatment of forests in the developing countries, which has the potential of off-setting any gains that may be made from the stringent measures by the developed nations, make it imperative to vigorously consider ways of halting the degradation of forests and find ways of maximising their potentials for the purposes of realization of climate treaty regime.

Again, the current consensus as far as forests are concerned, is that the failure to fully integrate forestry in any future climate mechanisms risks the chance of meeting the set goals in the climate change regime. This notion is grounded in the conviction that forest ecosystems could play a key role in whipping the interest of developing countries to contribute to the efforts towards fighting climate change. At the same time, forests serve as an excellent medium in helping people in the developing countries, whose economies are virtually dependent on natural resources and for that matter, are expected to weather the most lethal effects of climate vicissitudes, to adapt to and be buffered from such devastating impacts of climate change.

In this context, I argue that, proper consideration of issue of forests could afford the developing countries opportunity to achieve their developmental goals and at the same time enhance their adaptation and mitigation capabilities.

Adaptation, in the developing countries, could be effectively managed if it is linked with sustainable forests conservation which at the the end of the day, serves as effective tool to mitigate climate change at comparatively low costs. Forests protection and sustainable use

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<sup>100</sup> Stern N. "*Key Elements of a Global Deal on Climate Change.*" London School of Economics and Political Science, London, UK.

<sup>101</sup> 1992 UNFCCC, Art. 2.

schemes have the potency to reduce emissions from deforestation and degradation as growing trees take up carbon through photosynthesis, which is then stored in trees biomass, deadwood, litter and the soil. The IPCC defines adaptation as "initiatives and measures to reduce the vulnerability of natural and human systems against actual or expected climate change effects." The role, forests ecosystems is expected to play in helping people in developing countries to adapt to climate change and ultimately contribute to the achievement of the objective of the climate change treaty regime, will demand a paradigm shift in the status quo of treatment and management of forests especially in the developing countries.

The tripling effects of such a change in treatment and management of forests, obviously will be felt by the economies of the developing countries and in the livelihood of their people because of the pivotal role forestry(natural resources) play in the scheme of things in the developing countries, both at the national and local levels. Poverty and inequity that exist between the South and the North must feature prominently in the international community's drive to maximise the forests potentials and secure the fullest and genuine contribution from the developing countries. World Bank estimates that, almost half of world's population survives on \$2 a day.<sup>102</sup> This is notwithstanding the strong economic growth of China and India in the recent past which has lifted unprecedented number of people out of poverty in developing countries. In Sub-Saharan Africa and South Asia, 77 per cent and 59 per cent of the population, respectively, do not have homes access to electricity.<sup>103</sup>

As with the efforts to combat climate change, there is clear international consensus on the need to address the crisis in development.<sup>104</sup> Economic growth is a means to development and the development in the developing countries is inextricably linked to the utilization of natural resources(ie forestry and other agricultural practices), hence the potential conflicts

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<sup>102</sup> World Bank, 2006

<sup>103</sup> World Bank, 2006

<sup>104</sup> In 2001, global leaders agreed on set of goals that defined a way forward: the Millennium Development Goals (MDGs), to be achieved by 2015.

between economic growth and action on climate change that calls for fairer treatment of and management, of forestry and agriculture respectively.

Nonetheless, there are synergies between climate change action and development yet unharnessed. To this end, for the purposes of securing total commitment of developing country partners in fighting climate change, mechanisms(actions) aimed at both adaptation and mitigation should be fashioned in a manner capable of contributing to economic development in those countries. Such packages could effectively attract the attention of the developing countries to climate change because unchecked climate change has the ability to undermine development goals and economic growth in the developing countries. As suggested by Nobel Laureate, Amartya Sen that "advancing development goals in a sustainable way should thus be a central part of efforts to address climate change in all countries."<sup>105</sup>

Efforts to enhance the potentials of forest's contribution to the climate in terms of galvanising the needed efforts from the developing country partners as well as boosting the mitigation and adaptation capabilities would, therefore, require sound financial flows to forests in the form of incentives and other verified mechanisms to arrest the various drivers of degradation of the forests. Any future climate deal that seeks to address the issue of deforestation and developing country's contribution in furtherance of climate change objectives ought to be significantly reflective of modalities for advancing sustainable development as well.

### 5.3 The Issue of Deforestation

Avoiding and reversing deforestation is likely to be a priority concern for discussion this December in Copenhagen as international community meets to map up treaty strategy as a successor to the Kyoto Protocol. Emissions and removals of carbon from land-use change are significant part of human contributions to the global carbon cycle.<sup>106</sup> The Kyoto Protocol to the UNFCCC, highlighted afforestation and reforestation efforts in developing

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<sup>105</sup> Amartya, Sen. "Development as Freedom" New York. 1999 Anchor Books.

<sup>106</sup> Aaron, Cosby *supra* note 72

countries under its Clean Development Mechanism(CDM). Reduced deforestation was excluded from the 2008-2012 commitment period because of lack of consensus on issues of methodological inaccuracies in accounting from emissions reductions, concerns of sovereignty and conflict with fossil fuel reduction targets.

Deforestation, mostly in the developing nations is caused for cultivation purposes or pasture. It is estimated that carbon emissions from "cultivational deforestation" every year during the first commitment period under the Kyoto arrangements, would amount to almost twice the reduction the combined efforts of the Annex 1 nations had achieved in their annual GHG emissions between 1990 and 2004.<sup>107</sup> It is, therefore, not a misplaced priority that avoiding and reversing tropical deforestation has gained a focal point on the negotiations table of the international community in the quest for mitigation solutions. Environmental experts believe that forestry has the highest potential than any sector to contribute to low-cost mitigation between now and 2030.<sup>108</sup>

At least, in the developing countries, sequestration of carbon in forests is an achievable objective which success would be much less costly than other approaches aimed at reducing atmospheric carbon. Forests carbon sequestration, equally offers the potential platform for the developing countries' participation in any post Kyoto arrangements for the reduction of atmospheric carbon.

In a multilateral perspective, the realization of UNFCCC's main objective is a common goal of all parties-developed or otherwise. Designing mechanisms for the achievement of such a goal ought to take into account the dispositions of the parties in terms of their capabilities to participate in efforts towards that goal. When discovered, the designed mechanisms, must be largely reflective of avenues of exploiting those capabilities for meeting the ultimate goal of climate change mitigation whilst simultaneously supporting sustainable development. Kyoto Protocol's exclusion of deforestation from mechanisms meant for the reduction of atmospheric carbon could be seen as closure of multiplicity of key doors capable of utilization for the purposes of achieving the Protocol's reduction

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<sup>107</sup> Calculations of emissions reductions taken from UNFCCC, 2006.Dialogue on Long-

<sup>108</sup> Enkvist P-A et al. A cost curve for greenhouse gas reduction. The McKinsey Quarterly 1(2007)

targets at a relatively low-costs and convenience as far as developing countries are concerned.

That justifies the inclusion of mandate on avoided deforestation in the Bali Action Plan<sup>109</sup> for possible inclusion in any future climate deal. Since 2005 at the 11th Session of the Conference of Parties to the UNFCCC, put forward by governments of Papua New Guinea and Costa Rica,<sup>110</sup> countries have been negotiating an agreement aiming at reducing emissions from deforestation and forest degradation in developing countries (REDD). REDD offers capability for a comprehensive approach to forest related issues under the UNFCCC. Again as Edwardo Reynes of Panama declared at the initial plenary session in Bali, "if emissions from deforestation and forest degradation account for 20 per cent of the problem, they also represent 20 per cent of the solution." The benefits of REDD activities to the developing countries are enormous. It could serve as a tool for enhancement of soil and water conditions and sustain or improve livelihood and food security for local dwellers.<sup>111</sup> The preoccupation of the international community come December this year is what form the agreement on avoided deforestation is going to take. As an issue at the root of the interests of developing countries, major players within the developing world for example, Brazil, India and China are very instrumental in the form any such agreement should take. The developed nations and other non state actors are equally taking sides depending on strategic positions and ideological stance of these players within the climate change regime.

#### 5.4 In Search of a Mechanism to Integrate REDD into the UNFCCC

Recognition of the huge potential of forests in mitigating GHG emissions and facilitating adaptation efforts accounts for the varying global interests in the sector that has been

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<sup>109</sup> COP 11 to the UNFCCC in Montreal, 2005

<sup>110</sup> See the submissions of Papua New Guinea and Costa Rica, "Reducing emissions from deforestation in developing countries: approaches to stimulate action" UN Doc.FCCC/CP/2005/MISC.1

<sup>111</sup> UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries FAO, UNDP, UNEP April 2008

hitherto overlooked. Positions adopted by the stake-holders on the modalities for their comprehensive inclusion into the global climate treaty regime are influenced either by reason of their own participatory objectives, ie the feasibility of realising their own reduction targets or achievement of their own programme objectives.

To this end, some Annex 1 parties, for example European Union (EU) participation in REDD negotiations is largely influenced by its official position on post-Kyoto climate regime. At Luxembourg 2007, the EU has clearly stated its emissions reduction target for the period 2012-2020 to be 20 per cent.<sup>112</sup> Some concerned Annex 1 parties are also of the view that REDD activities serve to engage some major developing countries like China, Brazil, India, Mexico and South Africa in the global climate change efforts. That in itself would serve as a basis to confront the US who has maintained the exclusion of some developing countries in taking commitment under the Kyoto arrangements as one of its reasons for non-cooperation with other players in the global climate change efforts.

Aside country positions, a plethora of non-state actors including international organisations, non-governmental organizations(NGOs), and multilateral corporations are also interested in the REDD activities for varying reasons. Some perceive REDD as an option for effective carbon emissions reduction while others see it as a tool for forest conservation. Depending on their institutional positions and programme strategies, these non-state actors prefer one form of mechanism to the other. The World Bank, for example, has been following REDD activities from the outset and has been establishing pilot projects and funding them. Apart from the Biocarbon Fund,<sup>113</sup> the World Bank has also established Forest Carbon Partnership Facility(FCPF) with target volume of US\$300 million to spend on REDD.<sup>114</sup> In an interview on the subject "Going Beyond the Carbon Market", the World Bank lead economist for the Latin America and the Caribbean, John Nash, reiterated the institution's position in the REDD negotiations when he said "the World Bank will provide

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<sup>112</sup> European Union, EU Action Against Climate Change: Leading Global Action to 2020 and Beyond, Luxembourg 2007

<sup>113</sup> See [carbonfinance.org/Router.cfm?Page=BioCF](http://carbonfinance.org/Router.cfm?Page=BioCF) Biocarbon fund.

<sup>114</sup> See World Bank, available at [carbonfinance.org/router.cfm?Page=FCPF&FID=34267&ItemID=34267&ft=About](http://carbonfinance.org/router.cfm?Page=FCPF&FID=34267&ItemID=34267&ft=About).

technical assistance for pilot programmes to prepare for the extension of the trade of carbon credits.”<sup>115</sup> United Nations Development Program (UNDP), United Nations Environment Program(UNEP), and the Food and Agriculture Organizations are all working outside the REDD negotiations table to influence the outcome of the discussions.

## 5.5 Country Positions

At the conference in Bali, the variety of interests, combined with national circumstances, led to distinct national priorities shaped by both antecedents and expectations within the climate change regime. Consequently, various diplomatic alignments and coalitions emerged in the global climate change efforts to fashion out the appropriate mechanisms for addressing the issue of forestry and related matters. How many mechanisms may fit in the current framework of the UNFCCC and/or the Kyoto Protocol remains unclear. However, views, expressed so far on methodological issues<sup>116</sup> reveals five major camps among the actors.

First among the camps is an informal coalition, known as the Rainforest Coalition, led by Papua New Guinea. The coalition favours mechanism that is built on emissions trading and the power of global carbon market on the notion of compensated reductions that would grant developing countries the possibility of selling carbon credits internationally for emissions avoidance.<sup>117</sup>

Second group, is a flexible alliance of Spanish Speaking Latin American Countries. Their concerns have to do with the use of national baseline estimation criterion as enshrined in the Rainforest Coalition’s proposals. They favour sub-national REDD base-line for reasons

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<sup>115</sup> United Nations Environment Programme and the World Bank available at <http://ipsnews.net/print.asp?idnews=46363>.

<sup>116</sup> Views on outstanding methodological issues related to policy approaches and positive incentives to reduce emissions from deforestation and forests degradation in developing countries. Submissions from parties, UN Doc.FCCC/SBSTA/2008/MISC.4

<sup>117</sup> Santilli/Moutinho/Schwartzman et al. ‘Tropical Deforestation and the Kyoto Protocol’ Climate Change 2005 pp. 267-276

of monitoring convenience and plausibility of provision of direct benefits to the forests dwelling people.

The third and fourth actors with strong opposing positions, are Brazil and India. These two countries, because of the international community's pressure on them to adopt emissions reduction targets, makes them key actors at this stage of the negotiations. Brazil's position favours a sovereign level administered fund-based approach rather than market-based one with national baseline to address leakage.<sup>118</sup> India, on the other hand, roots for the broadening of the REDD negotiations to explicitly take into account forest conservation. While REDD aims at rewarding countries for reducing emissions, i.e, sources, forests conservation seeks to reward countries for maintaining a carbon stock, i.e, sink. Again, many perceive implementation of any rigorous mechanism for forest conservation globally, as a way to dwarf the funds needed for REDD because the carbon stock is incomparable to the emissions at the frontier.

The last of the camps is a loose coalition of countries of the Congo River Watershed. They host the second largest track of untouched forests in the world. They see threats to forests in the form of degradation rather than deforestation and therefore favours schemes for sustainable forests management.

## 5.6 Practical Considerations in Conducting Avoided Deforestation Projects

Deforestation is caused by poverty and over population<sup>119</sup> and often occurs over lands that do not have clear rights of tenure or ownership title, or where the historical claims of ownership are under dispute.

Designing the appropriate mechanisms for that purpose, though vital, is not the end in itself. Implementors of whatever mechanisms that may be agreed upon will need to grapple with a range of practical issues to ensure the ultimate viability and security of the various projects. It is, therefore, equally important, to identify and map up strategies for dealing with those fundamental issues for conducting avoided deforestation projects.

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<sup>118</sup> UN Doc.FCCC/SBSTA/2006/10.

<sup>119</sup> FAO, *supra note 98*



National impediments to the achievement of the objectives of pursuing forestry related projects, especially with respect to deforestation, under the climate change regime may include but not limited to the following identified areas.

### 5.7 Ownership of Environment Benefits

In many of the developing countries where forestry projects are likely to be carried out, there is an uncertainty of ownership of environmental benefits. Therefore, carbon rights in those communities require a clear legislative framework to support any contractual arrangements for that purposes. For example, in Australia, each of the states has in place a legislation to create a form of "carbon sequestration rights" which landowners may register on title in favour of another party.<sup>120</sup> Countries likely to host deforestation and other forestry related projects ought to be proactive in their legislative treatment of the issue of carbon rights as a prerequisite for a robust implementation of those projects. Land property rights are the rights of individuals, group of individuals or community to control the management and the use of the resources of the land in question. They possess characteristics of exclusivity, inheritability and enforcement mechanisms, all of which require sound legal and social institutions to define and secure them to the right holder through both formal rules and institutions.<sup>121</sup> Clarity and certainty in definition and scope of these rights are indispensable under any projects for avoiding deforestation.

### 5.8 Uncertain Land Tenure System/Arrangements

In poorer countries, economic growth drives the demand for land, both for infrastructure and agriculture, and for forests produce; this leads to deforestation and forests degradation. One fueling factor for the deforestation in these communities, is lack of or uncertain ownership of land and so companies take advantage of that and exploit the resources. The situation is likely to pose a major hurdle to projects participants in the forestry sector. A survey of

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<sup>120</sup> View the Greenhouse Friendly website, available at: <http://www.climatechange.gov.au/greenhousefriendly>

<sup>121</sup> Oliveira, Property rights, Land Conflicts and Deforestation in the Amazon, Forest Policy and Economics 2008, pg 303-315

unclassified forests, in India for instance reveals a challenge that needs attention in the current negotiations on reducing deforestation and forests degradation in developing countries. Out of a total surface of 77.474.00ha of recorded forests, as much as 13.399.300ha remain unclassified forests with undefined ownership and unsettled rights and privileges.<sup>122</sup> Securing clear land tenure in areas likely to host deforestation projects is fundamental to ensure the long term permanence of the environmental benefits to be accrued. The complexity of the issues demands total commitment of potential projects host countries to overhaul their legal framework in respect of land administration. Aside ownership issues, there are a host of other legislative restrictions likely to hamstring the project activities for avoiding deforestation. Host countries of deforestation projects must establish clear possible interests available to the participants especially foreigners. Removal of conflicts among various bodies responsible for forestry resources as well as bureaucratic practices in the administration of land, and hurdles in information acquisition must all be properly considered and managed. In pursuit of national interest, the developing countries have as part of land administration, several land encumbrances, some guaranteed by their constitutions. For purposes of smooth implementation of climate policies, some of these encumbrances may warrant adjustments necessary for the participation of interested stakeholders. Availability of information in respect of existing licences, leases, agreements, developmental projects, logging, concessions that might vest oil, gas, mineral, timber and plantation interests, is very vital for the purposes of entering into agreements where necessary with all relevant parties to ensure their commitment to the projects and the protection of carbon or other rights. A solution of the problem of forests loss under such conditions in the developing countries may, therefore, lie in creating a system of economic rights over these forests resources in line with the modern pattern of individual or nuclear family-oriented rights over property.

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<sup>122</sup> FSI (Forests Services of India), 2007. State of Forests Report, 2005, Ministry of Environment and Forestry, Dehradun.

### 5.8.1 Indigenous/Customary Rights to Lands.

Safeguards must be put in place to be followed in the preparation and the execution of projects. One of such safeguards should be for the protection of indigenous or native title claims. In most developing countries, forests are owned by customary clan groups. In this case, issues regarding property and sovereignty may rise, especially whether non-natives can "purchase" or own carbon stocks in standing forests that are held collectively under customary laws rather than the state. Such as in Papua New Guinea, where approximately 97 per cent of all land is held as communal or clan commons, a status guaranteed by the constitution of the land.<sup>123</sup>

The success of any projects, in such cases, may be undermined by failure to properly handle the interests of these groups where they exist. In Bali, and subsequently, the International Forum of Indigenous People on Climate Change has voiced its concern regarding REDD.<sup>124</sup>

### 5.8.2 Investments Restrictions

Foreign ownership and investment restrictions in the area of land management in the developing countries may differ from one country to the other. However, the question of the level of participation that should be afforded foreign corporations must be looked at as an effort to embrace the holistic treatment of forestry for the global climate mitigation and adaptation purposes.

Some parts of forests may be seen as a sovereign assets and must be solely owned by the nation to provide basic services to its citizenry. In such cases admission of projects participants as an interested parties in such a vital areas may be met with some challenges.

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<sup>123</sup> See International Tropical Timber Organization, Status of Tropical Forests Management 2005, 2006 available at <http://www.itto.org.gp/live/PageDisplay-Hadler.pagelId=270>

<sup>124</sup> IISD, Earth Negotiations Bulletin: COP 13 and COP/MOP 3 Highlights 5Dec. 2007 available at <http://www.iisd.ca/down-load/pdf/enb12346e.pdf>

A case in point is Brazil's position on the Amazon rainforest.<sup>125</sup> Some developing countries have legislations actively restricting foreign ownership of land or environmental service right or permits. And where no such restrictions exist, imposition of conditions on foreign ownership of land is disincentive to any investment drive.

In a multilateral perspective, and for the purposes of developing credible projects that will enable private funds to flow into avoided deforestation projects, it is imperative that these issues raised above are addressed comprehensively at both national and international levels. Multilateralism demands contributions not only when the contributor stands to benefits in isolation, but the common interest of all should sometimes be exalted, which has a tripling effect of registering an aggregate benefits benefits to all. In this sense, potential host countries of projects under any mechanisms designed for deforestation in the developing countries ought to undertake a policy, institutional and legal reforms required to allow the associated environmental benefits to be created and traded.

## **6 Conclusions**

Climate change is taking place; action to address it is imperative and globally-oriented in nature. The compelling effect of empirical body of scientific evidence, has led to the conclusion of two landmark treaties to deal with the menace and its lethal effects on mankind.

This paper, however, has argued that the efficacy of the global efforts to combat climate change lies not only in designing modalities for the purpose, but in the preparedness of the stakeholders embracing multilateralism in its true sense. To this end, the paper advanced the argument that multilateralism goes beyond mere cooperation by distinguishing itself with

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<sup>125</sup> Gaier and da Costa, Brazil Launches Ambitious Fund for Amazon Rainforest, Reuters, 1 August 2008 available at <http://www.reuters.com/article/sphereNews/idUSN142868820080801?sp=true&view=sphere>.

certain distinctive characteristics or properties: indivisibility, generalised principles of conduct, and diffuse reciprocity. Under multilateralism, therefore, both individual strengths and weaknesses of the players are harmonised to deal with any perceived fear of combining efforts for an aggregate benefits.

Multilateral engagement for the purposes of dealing with such a delicate global issue like climate change, can not be conducted without defined and supportive role of non-state actors. Non-state actors, in their various categorizations, have by reason of their areas of specialties, the necessary capabilities which warrant exploitation through legal engineering under the UNFCCC. This paper, therefore, in line with the current ongoing negotiations for possible expansion of the existing climate agreements to comprehensively deal with the climate change phenomenon, has suggested that, the developing countries have an important role to play in shaping the post-Kyoto climate change regime so as to take advantage of the support of the North. This is due to the international focus on the issue of reducing deforestation and forests degradation in the developing countries, thereby making forestry an indispensable tool in the climate change efforts.

Comprehensive mechanisms for the treatment of forestry under the UNFCCC mandate has the potential of ironing out the entrenched conflict between economic growth objectives and action on climate in the developing countries. Projects for avoided deforestation can be designed and executed to serve multiplicity of puposes in the developing countries. Here, the paper was of the view that international community addressing climate change by advancing development goals sustainably with a focus on helping developing countries take action that simultaneously serve global climate change goals and nationally defined development goals. This is feasible when the nexus of environment (i.e, forestry and for that matter deforestation projects) and development with particular focus on that subset of linkages involving climate change is understood and exploited.

The shape of any regime that may be agreed upon for multilateral approach in implementing climate change policies in respect of forests, especially those of avoided deforestation needs to consider certain practical issues in the various countries likely to host such projects including title to lands, governments' interventions in the area of administration of land and forestry issues.



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