

# **AN INTEGRATED LEGAL APPROACH TO GLOBAL ENVIRONMENTAL GOVERNANCE: COMBATING CLIMATE CHANGE, DROUGHT AND DEFORESTATION**

**NICOLA DURRANT AND ROWENA MAGUIRE**

## **ABSTRACT**

This paper presents an analysis of the requirements for good governance in the modern environmental context. This paper identifies four key factors against which modern international environmental regimes may be assessed. These factors encompass: processes for the establishment of global environmental norms and standards; the engagement of public and private spheres; appropriate compliance mechanisms for enforcement; and consistent and complementary interactions with other environmental institutions. This paper presents an evaluation of two emerging international environmental regimes. These are, firstly, the governance of forest use and management, under the Montreal Process and the Forest Stewardship Council and, secondly, the governance of global greenhouse gas emissions under the United Nations Framework Convention on Climate Change and the Kyoto Protocol. This paper concludes that current models of environmental governance fail to meet many of the identified prerequisites for effective legal institutions and presents a series of recommendations for the reform of modern environmental governance.

# **AN INTEGRATED LEGAL APPROACH TO GLOBAL ENVIRONMENTAL GOVERNANCE: COMBATING CLIMATE CHANGE, DROUGHT AND DEFORESTATION**

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In the global environmental arena, there is growing awareness of the need to address the adverse effects of climate change, the effects of reduced water availability and the effects of deforestation and land degradation. These environmental issues are interrelated and cannot be fully managed in isolation. The recently published Stern Review on the Economics of Climate Change highlights the growing need for integration in the management of environmental issues which impact on global environmental, economic and social imperatives.<sup>1</sup> The report recommends, among other matters, the acknowledgement and management of the interrelationship between greenhouse gas emissions and deforestation.<sup>2</sup> It also notes that water is the most climate-sensitive economic resource.<sup>3</sup> In

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<sup>1</sup> Stern Review on the Economics of Climate Change, 2006, [http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/sternreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_index.cfm) at 1 November 2006.

<sup>2</sup> Ibid, Chapter 25.

<sup>3</sup> Stern Review, n1, 97.

particular, the report highlights the significant role to be played by market mechanisms in providing economic incentives for reducing deforestation and addressing climate change.<sup>4</sup>

This paper presents an analysis of those unique factors of good governance which should be present in current international environmental legal systems. It presents four key factors against which modern international environmental regimes may be assessed. These factors encompass: processes for the establishment of global environmental norms and standards; the engagement of public and private spheres in achieving such norms; appropriate compliance mechanisms for consistent enforcement of norms and standards; and consistent and complementary interactions with other environmental institutions.

This paper analyses two key emerging international environmental legal regimes against these four integral concepts of modern environmental governance. Firstly, governance of forest use and management, under the Montreal Process<sup>5</sup> and the Forest Stewardship Council<sup>6</sup> (the Forest Regime) is assessed. This is followed by a critique of the governance of global greenhouse gas emissions under the United Nations Framework Convention on Climate Change<sup>7</sup> and the Kyoto Protocol<sup>8</sup> (the Climate Change Regime).

This analysis concludes that the isolated approach adopted by the international community for regulating these environmental issues prevents the comprehensive management of those key global concerns of climate change, drought and deforestation. The implementation of these separate legal

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<sup>4</sup> Stern Review, n1, Chapter 25.

<sup>5</sup> *The Non-European Working Group on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests* (The Montreal Process), Geneva, Switzerland, 5 July 1994, [http://www.mpci.org/home\\_e.html](http://www.mpci.org/home_e.html) at 14 November 2006.

<sup>6</sup> *Principles and Criteria for Forest Stewardship*, the Forest Stewardship Council, 2000, [http://www.fscus.org/images/documents/FSC\\_Principles\\_Criteria.pdf](http://www.fscus.org/images/documents/FSC_Principles_Criteria.pdf) as at 13 November 2006.

<sup>7</sup> *United Nations Framework Convention on Climate Change*, opened for signature on 4 June 1992, 31 ILM 849 (entered into force on 21 March 1994).

<sup>8</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998 (entered into force on 16 February 2005).

regimes prevents the holistic assessment of policy impacts on all other environmental sustainability values. This paper suggests that one possible solution to enhanced integration is the establishment of a centralised global environmental institution, similar to the promoted World Environment Organisation, which could be better placed to address the prevalent synergies and conflicts between diverse environmental values.

## **I THEORETICAL APPROACHES TO ENVIRONMENTAL GOVERNANCE**

The United Nations Environment Programme (UNEP), a programme of the Economic and Social Council of the United Nations, was created in 1973 as the principal United Nations body in the environmental field. The subsequent proliferation of international environmental agreements and the creation of numerous autonomous institutions have left UNEP with the role of ensuring international cooperation between isolated governing international environmental bodies. General Assembly Resolution 2997 (XXVII) provides the Institutional and Financial Arrangements for International Environmental Co-operation. This resolution merely reaffirms the importance of cooperation between international environmental governing bodies, without providing for specific rules or procedure for international coordination and cooperation. Coordination of international environmental regimes is complicated by the isolated approach adopted by the international community in relation to environment regulation. Dealing with issues based environmental priorities, in isolation, results in complex and specialised instruments being created which operate independently and without reference to other environmental priorities.

Considerations of good governance require an analysis of the underlying legal framework or regime regulating the environmental issue in question. This requires consideration of all processes involved in the framework including agreements, procedures, conventions or policies which define and

describe how power is divided, how decisions are reached and how accountability is ensured. In the context of international environmental governance, there is no legal instrument that defines the division of power in connection with environmental issues, how decisions are to be reached among all governing international environmental institutions or how accountability and transparency of isolated institutional approaches should be achieved.

The United Nations Development Programme created a collection of principles considered imperative for the establishment of international good governance and relevant to international environmental regimes.<sup>9</sup> These principles have been categorised by the Canadian Institute on Governance in the following five broad themes:

- Legitimacy and Voice;
- Direction;
- Performance;
- Accountability; and
- Fairness.<sup>10</sup>

To achieve legitimacy, the international environmental regime must ensure that due process has been followed in the establishment of the rule or norm. As Franck expressed it, legitimacy is:

a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.<sup>11</sup>

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<sup>9</sup> United Nations Development Programme, *Governance for Sustainable Human Development: A UNEP Policy Document* (UN, 1997), <http://magnet.undp.org/policy/> at 11 December 2006.

<sup>10</sup> John Graham, Bruce Amos and Tim Plumptre 'Principles for Good Governance in the 21st Century' (Institution on Governance, Canada, 2003), <http://www.iog.ca/> at 1 December 2006.

<sup>11</sup> Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990) New York, Oxford University Press at 24.

The four elements of rule legitimacy in a community of states are, according to Franck, determinacy, symbolic validation, coherence and adherence to a normative hierarchy.<sup>12</sup> The prerequisites of determinacy are based on 'due process' and, inter alia, on the clarity and transparency of the text in conveying the meaning of the rule.<sup>13</sup> International treaties are notorious for adopting broad, open-ended terminology which is flexible enough to enable a range of interpretations as to meaning and the environmental arena is no exception. Secondly, rules may achieve legitimacy through procedural validation, such as the symbolic validation of the rules by an authoritative institution including a community of states.<sup>14</sup> Thirdly, the environmental legal system must display coherence, and integrity, which requires consistency in the application of the rules within the system in order for those rules to be applied uniformly in all applicable instances.<sup>15</sup> Such coherence is enhanced if the rule or institution is connected to a broader network of rules or norms which are acknowledged by the greater community.<sup>16</sup> Finally, to achieve legitimacy, there must be adherence to a normative hierarchy.

This principle also refers to the need for voice through meaningful public engagement and participation. In this respect, the principles of the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*,<sup>17</sup> provide the ideal procedures for engaging the private sphere in the environmental governance process. Such engagement will include the aim of establishing a shared understanding, between nation States and the public, as to the long-term environmental goals to be achieved.

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<sup>12</sup> Thomas M. Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705 at 712.

<sup>13</sup> Franck, n12 at 713.

<sup>14</sup> Olav Schram Stokke, 'The Interplay of International Regimes: Putting Effectiveness Theory to Work' (FNI Report 14/2001, Fridtjof Nansen Institute, 2001) at 19.

<sup>15</sup> Franck, n12 at 741.

<sup>16</sup> Schram Stokke, n13 at 17; Franck, n12 at 741.

<sup>17</sup> United Nations Economic Commission for Europe, *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998 (entered into force 30 October 2001).

The second principle of direction looks to the institutional structure and the power of the institution, in particular, its leadership, its ability to set future policy directions and its ability to adapt and adjust to changing environmental, economic and social conditions.

The third principle of performance looks to the efficiency and effectiveness of the legal institutions and their regulatory instruments. There are conflicting views as to whether the effectiveness of an environmental regime is dependent on the level of compliance with its terms or, alternatively, on the degree to which the environmental problem itself is improved by the regime. From a lawyer's perspective, it is the performance of the legal system, through the implementation of facilitation and enforcement mechanisms, which is of primary importance. Once a legal system has been designed to operate at an optimal level, then consideration can be given to enhancing its impacts on the environmental problem itself.

The fourth and fifth principles of accountability and fairness are interrelated and are closely linked with the concepts of legitimacy and voice. These principles require a transparent, consistent and accountable model of environmental governance with sufficient public and private participation, equitable allocation of rights and obligations and appropriate protections of such rights within the regime.

The above analysis has identified those aspects which are considered crucial to the creation of an effective system of governance. The growing significance of environmental issues has led to increased emphasis on the strengths and deficiencies of existing and emerging environmental legal systems. It has become apparent that the recent emergence of urgent global environmental issues requires the swift evolution of modern forms of environmental governance, incorporating

appropriate rule-making processes, in order to establish effective normative environmental frameworks.

To achieve the necessary behavioural modifications required, in both public and private spheres, such modern regimes should make provision for the implementation of financial incentive mechanisms to engage the private market.<sup>18</sup> The benefits of market engagement lie in the provision of incentives for the promotion of innovation by public governments, private industries and investors alike.<sup>19</sup> Such innovation includes the crucial mobilisation of investment into new technologies and processes whilst providing the ‘carrot’ of potential financial benefits and investment returns in the market.

In addition, such a regime must be supported by appropriate methods of enforcement which are embedded with the concepts of fairness, justice, and due process. Such enforcement mechanisms must be implemented in transparent and consistent manners in order to gain the acceptance of the global community and to act as a suitable deterrent. In this respect, the use of early warning systems which engage potentially non-compliant entities in discussions to rectify deficiencies assists in the establishment of transparency in the enforcement process.

Finally, modern environmental governance must acknowledge the imperative for a holistic and integrated analysis of the state of the environment and the need for consistent interactions between international environmental regimes. A study carried out on behalf of the United Nations in 1992 found that over 125 separate international legal regimes were in existence to regulate international

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<sup>18</sup> Tom Tietenberg, 'Economic Instruments for Environmental Regulation' (1990) 6(1) *Oxford Review of Economic Policy* 17.

<sup>19</sup> Deborah Stowell, *Climate Trading: Development of Greenhouse Gas Markets* (2005) Hampshire, Palgrave Macmillan at 13.

environmental law.<sup>20</sup> It is currently estimated that there are more than five hundred environment related environmental agreements and associated institutions.<sup>21</sup>

This figure demonstrates the immense fragmentation occurring in international environmental regulation. Regardless of the sophistication and novelty of the emerging environmental regimes to address global environmental problems, these regimes will fail to successfully reduce our environmental footprint if they continue to operate without due regard to the priorities and needs of those other existing environmental systems. Consideration must also be given to integration in terms of those mechanisms implemented to achieve environmental outcomes. Integration in this sense requires that mechanisms developed to solve concerns under one regime do not conflict or disturb mechanisms created under competing regimes. Accordingly, there must be consistent and complementary interactions with those other environmental institutions.

The unique nature of modern international environmental priorities therefore requires novel approaches which cater for that uniqueness rather than the simple replication of traditional models of global governance. In these authors' opinion, the achievement of an integrated global response to the complexities and interrelationships of international environmental issues therefore requires the achievement of the following specific aspects of environmental governance:

- establishment of global environmental norms and standards;
- engagement of public and private spheres in enacting and implementing such norms;
- appropriate compliance mechanisms for consistent enforcement of the norms and standards; and
- consistent and complementary interactions with other environmental institutions.

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<sup>20</sup> Sebastian Oberthur and Thomas Gehring 'Reforming International Environmental Governance: An International Critique of the Proposal for a World Environment Organisation' (2004) 4 *International Environmental Agreements: Politics, Law and Economics* 381 at 360.

<sup>21</sup> United Nations University Institute of Advanced Studies, 'International Environmental Governance, the Question of Reform: Key Issues and Proposals' (United Nations University, 2002) at 6.

The following sections of this paper will assess the existing international Forestry Regime and Climate Change Regime against these concepts and will draw conclusions as to whether these concepts have been achieved in the adopted models.

## **II GLOBAL FOREST REGULATION AND VOLUNTARY STANDARDS**

### **A Contextual Background to International Forest Regulation**

Forests, like many other elements of the natural environment, are essential for human survival. Forests ecosystems are critical in contributing to supplies of air, water, soil, energy and biodiversity levels found in the natural environment.<sup>22</sup> The complex ecological processes carried out in forests serve several important environmental functions.

Forests collect water. This water is then continually supplied to the forest dependent communities including fauna and flora. Forests also prevent soil erosion and land degradation. Along with their ability to store carbon dioxide, the existence of forests directly impacts upon the climatic conditions experienced on earth. During the day, trees reflect and absorb solar energy keeping the ground level cooler and moister. During the evening, trees provide insulation to the ground cover reducing heat loss and preventing extremes in temperature.<sup>23</sup> These climatic conditions support the existence of many types of plants, animals and micro-organisms, thus increasing the levels of biodiversity on the planet. Forests provide humans with many resources such as clean water, resources for construction, resources for energy, food resources and resources for a wide range of human enterprises. They also provide recreational areas where humans are able to experience the beauty and wonder of nature.

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<sup>22</sup> Elaine Hughes, 'Forests, Forestry Practices and the Living Environment' in Stanley Johnson (ed), *Global Forests and International Environmental Law* (1996) United Kingdom, Kluwer Law International.

<sup>23</sup> Elaine Hughes, n22 at 82.

Furthermore forests hold social and cultural values for indigenous and non-indigenous people. So if forests are so important and necessary for human life, what sort of regulation exists to manage these valuable resources?

At an international level, history shows that there is a strong divide between developed and developing countries' perspectives on the management of forests.<sup>24</sup> At the United Nations sponsored Earth Summit held in 1992, State delegates and representatives were unable to reach consensus on a legally binding instrument to regulate the management and use of global forest resources. Forests were the one environmental commodity on which developing countries were unwilling to reach a compromise. Developing countries asserted that a legally binding international instrument regulating forestry would compromise their sovereign rights. Developing countries were also of the view that financial incentives should be offered by developed countries in order to finance the protection of the world's remaining forest stocks. Developed countries, especially Canada, sought a legally binding document to protect the remaining native forest estate, but on the whole developed countries were unwilling to see reason in the developing countries' proposals. This led to the creation of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (the Forest Principles).<sup>25</sup>

The Forest Principles were an attempt to unite and strengthen international political interest and will in global forestry. It could be suggested that the Forest Principles have limited potential to affect the use and management of global forest resources. This is for two reasons, firstly, due the voluntary and weak nature of the principles and, secondly, due to the general vagueness and lack of clarity of the principles. This unsatisfactory outcome, at the United Nations level, has led to the creation of

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<sup>24</sup> See generally David Humphreys, *Forest Politics: The Evolution of International Cooperation* (1996) London, Earthscan Publications Ltd.

<sup>25</sup> Ibid.

various international programmes regulating forestry. However there is currently no single international approach governing the regulation of forestry.

Conceptually, the notion of sustainable forest management has wide support in international forestry regulation. There are, however, several independent international processes regulating progress towards sustainable forest management. The concept of sustainable forest management can be found in principle 2b of the Forest Principles and can also be traced to Agenda 21, Chapter 11: Combating Deforestation.<sup>26</sup> The Helsinki Process<sup>27</sup> explored this concept further and defined Sustainable Forest Management as:

the stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future, relevant ecological, economic and social functions, at local, national and global levels, and that does not cause damage to other ecosystems.<sup>28</sup>

This layered definition suggests that sustainable forest management is not a simple process. It requires consideration of many competing factors at many levels of government. This concept is an attempt to balance the competing environmental, economic and social values with which forests are endowed.

## **B Establishment of Global Environmental Norms and Standards**

Two types of norms can be identified within the regulation of international environmental law. These are norms of conduct and norms of competence.<sup>29</sup> Norms of conduct refer to prescriptions,

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<sup>26</sup> United Nations, *Conference on Environment and Development: Agenda 21*, agreed at Rio de Janeiro, 14 June 1992, <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter11.htm> at 13 November 2006.

<sup>27</sup> Ministerial Conference on the Protection of Forests in Europe, *The Pan-European Ministerial Conference on the Protection of Forests in Europe*, Helsinki (1993).

<sup>28</sup> Rodolphe Schlaepfer, Vincent Gorgerat and Rita Butler, 'A Comparative Analysis between Sustainable Forest Management (SFM) and the Ecosystem Approach (EA)' (Swiss Agency for Environment, Forests and Landscape Swiss Forest Agency, 2004).

<sup>29</sup> Jonas Ebbesson, *Compatibility of International and National Environmental Law* (1996) United Kingdom, Kluwer Law International at 79.

prohibitions and establishment of legal systems including all aspects even vague principles and standards. These norms of conduct impose obligations, rights and responsibilities on participating State parties. Norms of competence are concerned with the capacity of legal systems to implement these norms of conduct. In international forest governance there are limited norms of competence in place to ensure the effective integration of governance and the implementation of accepted environmental norms in all areas of environmental priority regulation.

A significant development in the establishment of standards for sustainable forest management was the normative framework created by the Montreal, Helsinki and Tarapoto Processes in 1993. The Montreal Process is an international agreement between Australia and twelve other countries.<sup>30</sup> The purpose of the Montreal, Helsinki and Tarapoto Processes is to continue and develop the international debate about global forest use and management. The Helsinki Process covers European countries and the Tarapoto Process covers the Amazon Basin. Other than the jurisdictional distinctions between the various process arrangements, the content of each agreement is very similar thus raising potential for further integration of forest related governance and institutional arrangements. The jurisdictional division plays no part in the nature of the principles. All the process arrangements contain very similar wording in their respective criteria and indicators.<sup>31</sup> By establishing standards, these international processes arguably create normative frameworks for countries to assess their ability to promote and achieve sustainable forest management. This normative approach to regulation sets out criteria and indicators for countries to use when implementing sustainable forest management.

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<sup>30</sup> The other countries involved are Argentina, Canada, Chile, China, Japan, Republic of Korea, Mexico, New Zealand, Russian Federation, United States of America and Uruguay. Following the creation of Criteria and Indicators under the three approaches listed above a number of additional processes have developed. These are the Dry Zone Africa Process, Near East Process, Lepaterique Process, International Tropical Timber Process, African Timber Process and the Dry Forests in Asia Process.

<sup>31</sup> David Brand, 'Criteria and Indicators for the Conservation and Sustainable Management of Forests: Progress to Date and Future Directions' (1997) 13(4/5) *Biomass and Bioenergy* 247 at 250.

The Montreal Process involves seven criteria and sixty-seven indicators. A criterion is a category of conditions or processes by which sustainable forest management may be assessed. An indicator is a quantitative or qualitative variable which can be measured or described. The criteria and indicators are designed to identify national trends and patterns in forest conditions and management at the State level. The first six criteria of the Montreal Process concentrate on forest conditions, characteristics and values related to the ecological, social and economic functions that forests provide. Criteria one to six represent particular categories of values considered important for sustainable forest management. It is anticipated that the implementation of criteria and indicators will assist policy formulation at the State level, enhance the quality of existing information concerning forest areas and provide a mutual framework for data collection and reporting, thereby removing duplication in reporting standards.

The most important criterion, from a legal perspective, is criterion Seven which relates to the legal, institutional and economic framework for forest conservation and sustainable management.

The indicators of this criterion include:

- Property rights considerations;
- Tenure considerations;
- Traditional rights of indigenous inhabitants considerations;
- Scientific ecosystem understanding;
- Public participation in decision making;
- Regulation considerations; and
- Law enforcement considerations.

This normative approach is, however, weakened by the fact that it is voluntary in nature. In its favour, it does require parties to report on progress in achieving sustainable forest management. The report is considered by a panel. Under the Montreal Process, participating countries have been requested, to date, to supply only two reports on progress made towards sustainable forest management. These reports allow participating countries to assess and judge their progress in achieving sustainable forest management. However, no mechanisms exist under the Montreal Process to enforce and implement the criteria and indicators of the agreement. Thus the process serves only as a forum for continuing the debate concerning the relevant factors associated with the implementation of sustainable forest management principles.

A major development in international forestry regulation was the creation of a market mechanism for forestry. Known as Certification, this is a mechanism designed to promote consumer awareness regarding unsustainable forest practices. Certification was initially conceived in 1993 by the Forest Stewardship Council which comprised international environmental non-governmental organisations.<sup>32</sup> The Forest Stewardship Council's objective was to set standards for sustainable forest management allowing for Certification and to accredit Certification organisations to carry out assessment on participants, institutions or organisations. Under this mechanism, once standards allowing for Certification have been met, a Forest Stewardship Council logo is available for use on the applicant's product. This logo would represent to consumers the organisation's or institution's commitment to sustainable forest practices.

The major issues for Certification programmes have been:

- Establishing appropriate levels or limits on clear felling;

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<sup>32</sup> See generally Errol Meidinger, 'The Administrative Law of Global Private-Public Regulation: the Case of Forestry' (2006) 17(1) *The European Journal of International Law* 47.

- Duties to protect old growth forests;
- Duties to protect endangered species and habitats;
- The relationship between natural forests and plantations;
- Limits on use of chemicals and genetically modified organisms;
- Limits on the introductions of non-native species;
- Duties to workers;
- Duties to local communities; and
- Duties to indigenous people.<sup>33</sup>

The introduction of Certification programmes for forest products has the potential to deliver significant progress towards the real implementation of sustainable forest management principles. Certification, if promoted in such a way as to capture the attention of the forest industry, has the ability to raise awareness and increase knowledge of sustainable silvicultural methods for cultivating forest lands.<sup>34</sup> This non-State method of regulation also has the potential to involve a wide range of stakeholders with values and interests relating to forestry. Certification under the Forest Stewardship Council provides an enforcement mechanism through third party inspection and assessment, by independent accredited experts, which increases the likelihood of compliance with the Certification guidelines.

Following the original conception and design of forest Certification by the Forest Stewardship Council, various other organisations have created their own certification programmes. The Pan European Forest Council (PEFC), the Sustainable Forestry Initiative of the American Forest and Paper Association (SFI) and the Canadian Standards Association are the three main alternative

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<sup>33</sup> Errol Meidinger, n32 at 63.

<sup>34</sup> Lars Gulbrandsen, 'Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?' (2004) 4(2) *Global Environmental Politics* 75 at 77.

programmes providing Certification for forest operations.<sup>35</sup> These alternative certification programmes tend to offer flexible standards; this flexibility can lower the cost of implementing certification guidelines. The alternative programmes are marketed towards different stakeholders and promote their services as being adaptable to various stakeholder interests. Furthermore the alternative certification programmes do not allow for independent third party assessment. Rather they provide discretionary, flexible performance guidelines and requirements. Institutions regulated under these approaches are self governing and provide their own reports concerning their forest management<sup>36</sup>

Despite these potential benefits for forest managers under the alternative certification programmes, forest managers still seek Forest Stewardship Council certification.<sup>37</sup> This is based on the Forest Stewardship Council's perceived pragmatic and moral legitimacy.<sup>38</sup> Pragmatic legitimacy covers expected benefits associated with certification: that is 'how will this benefit me'. While moral legitimacy covers judgments made on values: that is, 'what is the right thing to do'.<sup>39</sup> The pragmatic benefits associated with certification under the Forest Stewardship Council programme are increased market access and avoidance of environmental campaigns directed towards unsustainable forest practices.<sup>40</sup> The other type of benefit under the Forest Stewardship Council programme is more subjective as it offers moral approval of forest practices.

The Forest Stewardship Council was originally designed by non-governmental environmental groups. These groups generally have wide support and trust from the community, compared to

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<sup>35</sup> Benjamin Cashore et al, 'Private or self regulation? A comparative study of forest certification choices in Canada, the United States and Germany' (2005) (7) *Forest Policy and Economics* 53 at 57.

<sup>36</sup> Ibid.

<sup>37</sup> G Cornelis van Kooten, Harry Nelson and Ilan Vertinsky, 'Certification of sustainable forest management practices: a global perspective on why countries certify' (2005) (7) *Forest Policy and Economics* 857 see table at 859.

<sup>38</sup> Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, London, 2004) at 34.

<sup>39</sup> Benjamin Cashore et al, n35 at 36.

<sup>40</sup> Benjamin Cashore et al, n35 at 35.

groups representing industry interests.<sup>41</sup> The creation of an eco-label with credibility, achieved through transparency and requisite expertise, with consumer recognition and support, has the capacity to influence the forest industry in a significant manner. This is evidenced by the support provided to the Forest Stewardship Council by both forest managers and consumers. These consumers of forest products include individual purchasers from retail outlets, retail businesses and public and private industry, especially the building industry. Forest managers may accept the more stringent guidelines of Forest Stewardship on the basis of public confidence in non-governmental organisations, such as the groups responsible for the creation of the Forest Stewardship Council.<sup>42</sup>

Certification is a private means of regulation therefore participation with such programmes is voluntary. Various studies have been conducted which attempt to calculate the percentage of the world's forests which have been certified.<sup>43</sup> As a rough guide approximately 3-4% of the world's total forest cover is certified at present.<sup>44</sup> It has been suggested by some authors that in order for Certification to work concurrently with other methods of regulation, it requires support from government bodies.<sup>45</sup> To increase government participation with certification programmes, more high level political support needs to be established for certification programmes at the international level. One way to achieve this would be recognition in the 'new', re-drafted, Forest Principles which are to be confirmed at the United Nations Forum on Forestry seventh session to be held in New York in 2007.<sup>46</sup>

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<sup>41</sup> Benjamin Cashore et al n35 at 239.

<sup>42</sup> Benjamin Cashore et al n35 at 238-239.

<sup>43</sup> G Cornelis van Kooten et al n37; Jacek Siry, Frederick Cabbage and Miyan Rukunuddin Ahmed, 'Sustainable forest management: global trends and opportunities' (2005) (7) *Forest Policy and Economics* 551., Steven Bernstein and Benjamin Cashore, 'Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention' in John Kirton and Michael Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004) England, Ashgate Publishing at 77.

<sup>44</sup> Cornelis van Kooten et al n37.

<sup>45</sup> Lars Gulbrandsen n34 at 78.

<sup>46</sup> Ad hoc expert group to consider the content of the non-legally binding instrument, United Nations Forum on Forestry, *Composite draft text for a non-legally binding instrument on all types of forests*, New York. December 2006, [http://www.un.org/esa/forests/pdf/aheg/nlbi/composite\\_text\\_NLBI.pdf](http://www.un.org/esa/forests/pdf/aheg/nlbi/composite_text_NLBI.pdf). at 11 December 2006.

Governments could be further involved with certification in three ways. Firstly, government could provide funding and assistance to institutions who are seeking certification from a government approved programme. This would provide assistance to owners of private forest land, and would provide an incentive for sustainable forest management on private forest land. Secondly, governments could lead the way by gaining certification on public managed State forest land. This would demonstrate the State's support for sustainable timber practices. Thirdly, government could require certification of practices being carried out under private management on State forest land. In the case of leasehold interests, it could be part of the lease agreement to obtain certification or it could be a pre-requisite in order to apply for a leasehold interest on State owned forest land.

The implementation of criteria and indicators and Certification, respectively, has suffered from fragmentation, duplication and lack of co-ordination between the governing bodies involved in each method of regulation. Forest regulation is therefore in great need of further coordination and cooperation between the major governing bodies as well as further integration with the regulatory bodies of other key environmental concerns.

### **C Absence of Global Forestry Norms**

International forest regulation does not have any mutually agreed or accepted forest norms or standards. Concepts such as sustainable forest management have wide reaching acceptance and recognition. It would, however, be difficult to argue that sustainable forest management is an accepted norm or standard in all instruments attempting to regulate international forestry. There are two reasons which prevent such a classification. The first issue lies with the nature of the instruments which provide for sustainable forest management. As outlined above, no legally binding instrument or process exists which regulates international forestry. The two forest

regulatory processes, analysed in this paper, are voluntary in nature and as such there is no avenue to enforce the obligations created by these institutional programmes. The second issue is related to the general overlap and inconsistencies of the meaning of sustainable forest management. At present, sustainable forest management is adopted as the overall aim, but its elements or criteria change according to the purpose of the individual instrument. In other words, the meaning of sustainable forest management and the approach prescribed to achieve it differs under the Montreal Process and the Forest Stewardship Council Guidelines.

So if no accepted legal norms or standards apply in international forest regulation, what type of legal regulation actually exists? It could be suggested that a badly organised uncoordinated approach, with large amounts of fragmentation, duplication and overlap, is the current system provided by the international legal forest regime. The fragmentation exists not only in relation to institutions but also in relation to legal instruments and mechanisms. As discussed above, there is an abundance of international organisations each creating and prescribing international forestry instruments. Some of these organisations focus solely on tropical forests, other organisations focus on physical proximity, whilst other organisations represent separate and diverse stakeholders interests and concerns which are linked with forestry values such as indigenous communities. The United Nations Forum on Forestry is the only international institution which allows for universal membership for all States and all types of forests. Lack of progress at the United Nations level has, however, caused States to identify other mechanisms and cooperate using other means of regulation both public and private.

The existing approaches to world wide deforestation include:

- Soft law approaches: such as Agenda 21, the Non-Binding Forest Principles and Intergovernmental Panel on Forestry, the Intergovernmental Forum on Forestry and the United Nations Forum on Forestry proposals for action.
- Hard law approaches: such as the Convention on Biological Diversity<sup>47</sup>, the Convention on Wetlands of International Importance (Ramsar Convention)<sup>48</sup> and the Convention Concerning the Protection of World Cultural and Natural Heritage Sites (World Heritage Convention)<sup>49</sup> and the International Tropical Timber Agreement.<sup>50</sup>
- Market Mechanisms: including the Certification process instigated by the Forest Stewardship Council.
- Normative Frameworks: such as the criteria and Indicator approach adopted by the Montreal, Helsinki and Tarapoto Processes.
- Standard Setting Procedures: such as the codes of conduct produced by the International Organization for Standardization (ISO Series).<sup>51</sup>

This uncoordinated and fragmented approach to regulation is clearly in need of reform. Forests in some States are regulated by several of these international agreements, all of which are potentially conflicting in nature. Each of the listed approaches to forest regulation has a separate agenda and represents different stakeholder interests. Furthermore, many of the above approaches are not

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<sup>47</sup> *Convention on Biological Diversity* opened for signature on 5 June 1992, UNTS 30619 (entered into force 29 December 1995).

<sup>48</sup> *Convention on Wetlands of International Importance especially as Waterfowl Habitat* opened for signature on 2 February 1971, UNTS 14583 (entered into force 21 December 1975). As amended by the Paris Protocol, 3 December 1982 and Regina Amendments, 28 May 1987.

<sup>49</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage* opened for signature on 23 November 1972, UNTS 1511 (entered into force 15 December 1975).

<sup>50</sup> *The International Tropical Timber Agreement 1994* opened for signature on 26 January 1994, UNTS 33484 (entered into force 1 January 1997).

<sup>51</sup> International Organization for Standardisation: *Environmental Management Systems*, ISO 14001: 2004, International Organization for Standardisation: *Labels and Declarations*, ISO 14020.

legally binding, resulting in States merely formulating policy documents, without making significant changes to the way they govern their forest resources.

#### **D Engagement of Public and Private Spheres in Achieving Norms**

Unlike the Climate Change Regime<sup>52</sup>, the Forest Regime does not provide an institutional structure whereby public and private engagements are incorporated together in a legally binding instrument. The Montreal Process is an example of a public engagement process within international forest governance. The Montreal Process engages State parties initially with the signing of the agreement to accept the obligations outlined in the prescriptive instrument. This normative framework then involves further interaction with public or State bodies with follow-up meetings to discuss and develop new approaches to achieve sustainable forest management. At these meetings, countries may also be required to report on their progress towards fulfilling the criteria and indicators of the agreement. Countries are required to provide documentary evidence, in those reports, to demonstrate satisfactory progress to the management committee.

Under the Montreal Process, private engagement with local communities, including indigenous populations and private interests, is identified as being significant in the management and use of forest lands. Despite this recognition, no explicit mechanisms exist to ensure that such engagement actually takes place. Engagement with private bodies, which could include local groups and businesses, is suggested in Indicator 7.1.C and further engagement with indigenous people is provided for in Indicator 7.1.E. Apart from the recognition of private stakeholders' interests, in forest areas, no further clarification is provided to explain how such engagement should be undertaken.

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<sup>52</sup> See discussion of the Climate Change Regime in Section 3 of this paper.

The Forest Stewardship Council provides an example of forest regulation that incorporates private interests. Through the creation of Certification schemes, private bodies involved with timber supply and management are able to obtain Certification for their silvicultural practices. Once the Certification process has been completed, the contract of Certification is for a 5 year period with annual audits to verify that the terms of the contract are being fulfilled.

In order for Certification to occur under the Forest Stewardship Council, all the Principles and criteria for Forest Stewardship<sup>53</sup> must be adequately addressed. Engagement with local communities affected by forest management operations is required under Principle 4.4 of the Forest Stewardship Principles. This principle requires consultation and input from local communities who are affected by the forestry operations. Principle 3 of the Forest Stewardship Principles requires that legal rights of indigenous people to use forest areas are recognised and requires, under Principle 3.3, that sites of cultural importance be identified in cooperation with indigenous people. The principles could be expanded in the future to include indigenous interests that are not yet legally recognised, but that are mutually acceptable to indigenous and non-indigenous applicants. Applicability of these principles is, of course, dependent upon the existence of local community and indigenous interests. If these private local interests do exist, however, these interests must be accommodated before Certification is given.

In order to become certified under the Forest Stewardship Council a procedure involving a number of steps must be complied with:

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<sup>53</sup> Forest Stewardship Council, *Principles and Criteria for Forest Stewardship*, Germany, 2000, report available at [http://www.fscus.org/images/documents/FSC\\_Principles\\_Criteria.pdf](http://www.fscus.org/images/documents/FSC_Principles_Criteria.pdf) at 1 December 2006.

- Preliminary discussions between applicant and certifiers to identify likely changes to be made before Certification could proceed.
- Submission of application including a cost assessment of Certification.
- On ground assessment of forest area carried out by individuals with expertise in forestry, biology and social science.
- Preparation of draft report by accredited Certifiers to be peer reviewed by two independent specialists.
- Negotiation of possible terms and conditions to be incorporated into applicant's submission for Certification.
- Final Certification including issuance of Certification and finalisation of payments.
- Ongoing annual audits and checks on applicant's management of Certified forest areas.<sup>54</sup>

This can be quite a lengthy and expensive process and it is debatable whether, from an economic perspective, the resulting financial benefits are worthwhile. There is therefore room, within the Certification process, for further public and private engagement including greater government support and enhanced financial incentives to engage in the Certification process.

## **E Appropriate Compliance Mechanisms for Consistent Enforcement of Norms and Standards**

The Montreal Process creates a voluntary procedure for State participation. No real incentives or disincentives exist to induce compliance with criteria and indicators created by the agreement. The reporting requirements prescribed by the Process are designed to encourage State compliance. In

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<sup>54</sup> Process adapted from the works of Errol Meidinger, n32 at 70.

order for forests to be properly managed information must exist as to their biological make-up and the various uses and values associated with each forest in the country. The domestic research carried out for the preparation of the national report may assist a country to identify gaps in its own forestry records. The criteria and indicators are also designed to improve implementation of sustainable forest management by clearly defining the concept within categories (criteria) and sub-categories (indicators).

The criteria of the Montreal Process involve:

- Conservation of biological diversity;
- Maintenance of productive capacity of forest ecosystems;
- Maintenance of ecosystem health and vitality;
- Maintenance of soil and water resources;
- Maintenance of forest contribution to global carbon cycles;
- Maintenance and enhancement of long-term multiple socio-economic benefits to meet the needs of societies; and
- Legal, institutional and economic framework for forest conservation and sustainable management.

These clear explanations are intended to make compliance with the complex concept of sustainable forest management more manageable for participating countries. The criteria and indicators are, however, not enforceable against participating countries beyond mere political pressures.

Similarly, the Certification process instigated by the Forest Stewardship Council is voluntary and requires individual organisations and business to elect to apply for Certification. There is no

requirement for individual businesses to become certified. So the premise of Certification rests on the goodwill of forest industry to embrace its principles and on consumers recognising and supporting the sale of timber from sustainable sources. Once an individual organisation or institution has become involved with a Certification process, an enforcement mechanism exists in the form of a disincentive. If an individual organisation, that has achieved Certification, fails to comply with ongoing responsibilities associated with the Certification they will lose their Certification status, and consequently, their right to use the eco-label. This is a method of increasing accountability in certification. Public naming and shaming is important in the Certification context as forest institutions may be held accountable to the public, by way of bad or good publicity.<sup>55</sup> Loss of Certification status would cause embarrassment for individual companies who have represented to industry and consumers that their timber is supplied from sustainable sources. The threat of undermining their reputation in the market could therefore act as an incentive to comply with the prescriptions laid down by the certifying body. Under the Forest Stewardship Council protocol, an Appeals Panel is established under paragraph 5.4.3 to examine all evidence before a decision is reached upon suspending or withdrawing accreditation.<sup>56</sup>

## **F Consistent and Complimentary Interactions with Other Environmental Institutions.**

The international Forest Regime does not provide for interaction between existing forest related instruments, let alone contemplate or provide for interaction with other environmental regulatory systems and processes. The Montreal Process arguably is consistent with other international regulation concerning forestry as it merely expands upon the meaning and processes required to achieve sustainable forest management. This instrument does, however, fail to explain how it

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<sup>55</sup> Thorstern Benner, Wolfgang H Reinicke and Jan Martin Witte, 'Multiple Networks in Global Governance: Towards a Pluralistic System of Accountability' (2004) 39(2) *Government and Opposition* 191 at 199.

<sup>56</sup> Forest Stewardship Council *FSC Procedure: Processing Appeals by Accredited or Applicant Certification Bodies* (2006) [http://www.fsc.org/keepout/en/content\\_areas/77/135/files/FSC\\_PRO\\_01\\_005\\_V1\\_0\\_EN\\_Processing\\_Appeals\\_by\\_Certification\\_Bodies.pdf](http://www.fsc.org/keepout/en/content_areas/77/135/files/FSC_PRO_01_005_V1_0_EN_Processing_Appeals_by_Certification_Bodies.pdf) at 12 December 2006.

should be integrated with the other existing forms of international forest regulation. The Certification process is also consistent with other forest regulation and provides a new avenue for sustainable forest management through the use of financial incentives and environmental labelling. Future consideration will need to be given, at the United Nations level, to the international establishment and acknowledgement of Certification and its relationship with other forms of forest protections.

The Forest Regime has the potential to impact on, and interact with, a range of existing international environmental institutions. These include programmes related to the protection of biodiversity, combating desertification, preservation of World Heritage sites, indigenous rights, climate change, trade relationships and the achievement of environmental sustainability generally. In particular, the forest regime should consider issues related to water supply as the serious problems associated with water scarcity increase. In the future, plantation forests may have to consist of less water intensive species. The absence of formal acknowledgment of these policy interactions, both within the Forest Regime and within those other environmental institutions, prevents the establishment of an efficient and effective regime for managing deforestation and for achieving the concepts of environmental sustainable development.

One possible solution for strengthening the international regulation of forest resources is through greater incorporation and integration with the Climate Change Regime. Climate change, as a global concern, is currently receiving more focused political and economic interest in the international arena and from the private sector. It may therefore be appropriate to utilise that political mobilisation to address these forest considerations. This could be used to overcome current impediments to achieving a binding convention on forestry including state sovereignty and financing issues. This new international legal instrument could prescribe clearly defined rights and

responsibilities in connection with forestry use and management, provide a consistent framework for enabling market incentives and establish processes for coherent interactions with related environmental policy areas.

### **III GLOBAL CLIMATE CHANGE GOVERNANCE AND MARKET INCENTIVES**

#### **A Context to the Climate Change Regime**

The architecture of the United Nations Framework Convention on Climate Change<sup>57</sup> (UNFCCC) and the Kyoto Protocol<sup>58</sup> has been heralded as ambitious, innovative and evolutionary and is the most sophisticated example of an international environmental regime to date.<sup>59</sup> Together, these instruments are designed to address the environmental and social concerns of adverse climate change through the imposition of obligations to lower global greenhouse gas emission levels.

The UNFCCC was adopted at the Rio Earth Summit on 9 May 1992. The UNFCCC was the first binding international legal instrument to address the issues of climate change and it established the overarching principles and institutional arrangements for the Climate Change Regime. The ultimate objective of the UNFCCC is the *stabilisation of greenhouse gas concentrations, in the atmosphere, at a level that would prevent dangerous anthropogenic interference with the climate system.*<sup>60</sup>

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<sup>57</sup> *United Nations Framework Convention on Climate Change*, opened for signature on 4 June 1992, 31 ILM 849 (entered into force on 21 March 1994).

<sup>58</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998 (entered into force on 16 February 2005).

<sup>59</sup> Inter alia, Suzi Kerr, 'Additional Compliance Issues arising from Trading' in Suzi Kerr (ed), *Global Emissions Trading; Key Issues for Industrialized Countries*, New Horizons in Environmental Economics (2000) 85 at 90.

<sup>60</sup> UNFCCC, n57, Article 2.

At the first Conference of the Parties to the UNFCCC, held in Berlin in 1995, the parties launched negotiations to agree on *specific* greenhouse gas emissions reduction commitments for industrialized countries. The Kyoto Protocol to the UNFCCC was adopted in Kyoto, Japan on 11 December 1997 and came into force on 16 February 2005 following intense international debate as to the economic costs and benefits of the agreement. The Kyoto Protocol has been ratified by 168 states and regional economic integration organizations.<sup>61</sup> Australia and the United States are both parties to the UNFCCC and are bound by its general obligations to reduce global greenhouse gas emissions. Australia and the United States *are not* parties to the Kyoto Protocol and are therefore not obliged to comply with their quantitative emissions reduction commitments under the Protocol.<sup>62</sup>

The Kyoto Protocol contains a range of innovative policy tools which are aimed at assisting parties to meet flexibly their emission reduction obligations at the least economic cost. Known as the Flexibility Mechanisms, these elective measures encompass Emissions Trading, the Clean Development Mechanism (CDM) and Joint Implementation (JI). At the beginning of the first commitment period, each party listed in Annex 1 will be assigned a number of Assigned Actual Amounts (AAUs) based on its permitted level of emissions for the commitment period. Each Assigned Actual Amount represents a permit to emit one tonne of carbon dioxide equivalent. Eligible Annex 1 Parties may then buy or sell their Assigned Actual Amounts through emissions trading.<sup>63</sup> Parties may also create additional allowances through the implementation of eligible emissions reductions projects in developing countries under the Clean Development Mechanism (CDM).<sup>64</sup> Furthermore, Annex 1 Parties may chose to implement such emission reduction projects

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<sup>61</sup> As at 22 November 2006, [http://unfccc.int/essential\\_background/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/essential_background/kyoto_protocol/status_of_ratification/items/2613.php)

<sup>62</sup> As non-parties, they are also not able to use the Flexibility Mechanisms under the Kyoto Protocol to assist them in meeting their *general* emissions reduction obligation under the UNFCCC.

<sup>63</sup> Kyoto Protocol, n58, Article 17.

<sup>64</sup> Kyoto Protocol, n58, Article 12.

in other developed party countries, such as the economies in transition, in return for allowances (JI).<sup>65</sup>

## **B Establishment of Global Environmental Norms**

The terms of the UNFCCC established the overarching environmental objective of achieving the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>66</sup> The vagueness of this obligation and the prevalent scientific uncertainty present at the time rendered quantitative assessment of compliance with that obligation problematic. In any event, it was clear that global emissions were continuing to rise, despite the convention, and that this environmental standard was not being achieved by the parties. The Kyoto Protocol, in contrast, adopted a relatively precise quantitative approach to the establishment of an environmental norm through the imposition of individual binding targets, on certain developed countries, to reduce greenhouse gas emissions.

The first Commitment Period, under the Kyoto Protocol, will run from 2008 to 2012.<sup>67</sup> The targets for that commitment period vary from 92% to 110% of reported 1990 greenhouse gas emission levels, according to the circumstances negotiated by each party.<sup>68</sup>

One effect of the norms established through the UNFCCC and, more significantly, the Kyoto Protocol is the agreed fetter on the sovereign rights of parties to emit unlimited greenhouse gases.

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<sup>65</sup> Kyoto Protocol, n58, Article 6.

<sup>66</sup> UNFCCC, n57, Article 2.

<sup>67</sup> Kyoto Protocol, n58, Articles 3.1 and 3.7. The Kyoto Protocol contemplates additional Commitment Periods beyond 2012 but these are still under negotiation by the parties.

<sup>68</sup> Kyoto Protocol, n58, Annex B. The targets are therefore based primarily on political bargaining rather than on a mathematical calculation of required emissions reductions.

The Climate Change Regime imposes restrictions on the actions of nations, within their territorial jurisdictions, by imposing limits on the level of national emissions. Surprisingly though, the Climate Change Regime does not specify the manner in which those emission reductions must be achieved by the parties beyond broad references to sustainable development and the implementation of certain policies and measures according to the national circumstances of each party.<sup>69</sup> The target itself applies to a group of six greenhouse gases, including carbon dioxide, and provides the parties with a choice regarding the combination of gases to be lowered by domestic mitigation. This is a significant feature of the Climate Change Regime in terms of the broad range of mitigation options made available to the States in conjunction with a firm obligation to achieve a set environmental standard.

#### *Establishment of New Norms and Standards by COP/MOP*

Another unique feature of the Climate Change regime, not present in the Forest Regime, is the creation of processes for the further development of norms and standards. The UNFCCC and Kyoto Protocol contain only the bare bones of the international obligations and this has necessitated their subsequent expansion through the decisions of the associations of representatives of the parties. The Climate Change Regime has therefore created autonomous institutional arrangements which are empowered to create and enforce rules against the parties without the need for the full consensus of all parties to the regime.

The core body of power under the UNFCCC is that of the Conference of the Parties (COP) which is comprised of representatives of all members to the convention. The COP is the primary decision

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<sup>69</sup> Kyoto Protocol, n58, Article 2(1)(a).

making body, the ‘supreme body of the convention’ and, officially, remains the ultimate authority under the UNFCCC.<sup>70</sup> Membership of the Kyoto Protocol does not include all members of the UNFCCC. Accordingly, the Kyoto Protocol establishes the Meeting of the Parties (MOP) but states that the COP shall serve as the MOP.<sup>71</sup> The mandate of the COP is relatively broad and includes the power of the COP to review the implementation of the UNFCCC, including institutional arrangements, and to exercise ‘such other functions as required for the achievement of the objective of the Convention.’<sup>72</sup> The mandate of the MOP is cast in similar terms.<sup>73</sup> The COP and the MOP are therefore empowered by the parties, in accordance with its approved decision-making procedures, to establish policy directions, create new environmental standards and rules and to make adjudicative decisions affecting sovereign rights and interests.<sup>74</sup>

#### *Development of Norms by Subsidiary Bodies*

In addition to the COP and MOP, the UNFCCC and Kyoto Protocol establish a number of subsidiary bodies and expert groups to assist with the implementation of the Climate Change Regime. In particular, the Kyoto Protocol has necessitated the establishment of a range of bodies to facilitate the operation of the Flexibility Mechanisms. Significantly, these include the Executive Board under the Clean Development Mechanism (CDM) and the Joint Implementation Supervisory Committee under the Joint Implementation mechanism (JI). These bodies are responsible for the supervision of the implementation of emissions reduction projects, under the regime, and for the issue of tradeable credits resulting from those projects.

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<sup>70</sup> UNFCCC, n57, Article 7(2).

<sup>71</sup> Any non-parties to the COP will participate as observers for the purposes of the Kyoto Protocol.

<sup>72</sup> UNFCCC, n57, Article 7.

<sup>73</sup> Kyoto Protocol, n58, Article 13.

<sup>74</sup> From this point forward, the term ‘MOP’ will be used to designate the Conference of the Parties (COP) where it acts as the Meeting of the Parties under the Kyoto Protocol.

Developed country parties can create additional credits by implementing eligible emissions reductions projects in developing countries under the CDM. This mechanism is intended to assist Parties to reach their emission reduction targets in a cost-effective manner whilst assisting developing nations to achieve sustainable development. Participation in the CDM must be voluntary and the project must demonstrate not only that it achieves ‘real, measurable and long-term benefits’ related to climate change mitigation but also that the reductions in emissions are additional to those that would have occurred in the absence of the project.<sup>75</sup>

The CDM Flexibility Mechanism is supervised by the Executive Board which acts under the authority and guidance of the MOP and remains fully accountable to that association.<sup>76</sup> The primary role of the Executive Board is to establish modalities and procedures for the operation of the CDM, which are later approved by the MOP, and to monitor observance of those rules by project participants.<sup>77</sup> Those modalities include rules and requirements for the approval of new methodologies for CDM project baselines, registration and approval of project designs, approval and implementation of monitoring plans, verification and issue of credits and the accreditation of operational entities.<sup>78</sup> The Executive Board therefore appears to have been granted a high level of autonomy and is able to create and apply new modalities and procedures to proposed emission reduction projects. This is designed to allow the practical, commercial application of the Flexibility Mechanisms without the impracticability and delay of reverting to the MOP for approval.

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<sup>75</sup> Kyoto Protocol, n58, Article 12.5.

<sup>76</sup> UNFCCC, ‘Decision 3/CMP.1: Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol. Annex: Modalities and Procedures for a Clean Development Mechanism’, (FCCC/KP/CMP/2005/8/Add 1) Section C [5].

<sup>77</sup> UNFCCC, Decision 3/CMP.1, n76, Section C [5](a),(n).

<sup>78</sup> UNFCCC, Decision 3/CMP.1, n76, Section C [5](d),(f).

In terms of the principles of due process, decisions made by the Executive Board are deemed final unless a request for review is made regarding issues associated with the validation requirements. That request for review is limited and may only be made by the project participants or the members of the Executive Board.<sup>79</sup> Although interested private stakeholders are able to be present at the review hearing, they can provide information only if requested by the Executive Board. Moreover, the Climate Change Regime does not articulate an avenue of recourse from a decision of the Executive Board to the MOP although in practical terms this is likely to occur where a nation State has been aggrieved.

Emission reduction projects may also be implemented by developed parties, under the JI mechanism, in other developed party countries.<sup>80</sup> The most likely locations for such projects are the Ukraine and Russia given their status as economies in transition. In return for the implementation of projects, the host country may transfer a proportion of its AAUs to the project developer. JI projects are overseen by the JI Supervisory Committee which, like the Executive Board, is responsible for the establishment of new modalities and procedures for the implementation of projects.<sup>81</sup> The powers of this body are, however, more limited than those of the Executive Board. The reason for this is that, where certain prerequisites have been met, the local host country can accept full responsibility for approving eligible projects and verifying the level of emissions reductions.<sup>82</sup> In such circumstances, the prior approval of the JI Supervisory Committee is not required.<sup>83</sup>

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<sup>79</sup> UNFCCC, 'Decision 4/CMP.1: Guidance to the Executive Board of the Clean Development Mechanism. Annex 2: Procedures for Review as Referred to in Paragraph 41 of the Clean Development Mechanism Modalities and Procedures' (FCCC/KP/CMP/2005/8/Add 1) Section A [2].

<sup>80</sup> Kyoto Protocol, n58, Article 6.

<sup>81</sup> The JI Supervisory Committee was established in 2006 and, to date, no projects have been implemented under this mechanism.

<sup>82</sup> UNFCCC, 'Decision 9/CMP.1: Guidelines for the Implementation of Article 6 of the Kyoto Protocol. Annex: Guidelines for the Implementation of Article 6 of the Kyoto Protocol', (FCCC/KP/CMP/2005/8/Add 2), Section D.

<sup>83</sup> Ibid.

Accordingly, the Climate Change Regime provides for the establishment of agreed norms as well as establishing relative institutional autonomy by enabling the development of further norms and standards by subsidiary bodies without the hindrance of obtaining full consensus to all decisions. The establishment of multiple subsidiary bodies has resulted in a governance structure with some significant fragmentation problems, particularly in terms of the competing CDM and JI mechanisms. The CDM and JI entities both suffer from insufficient resourcing, personnel and funding for their operations. It would be preferable for these entities to merge and to regulate the emissions reduction projects in a more streamlined fashion. For the present, the roles and responsibilities of these bodies are clearly delineated in the legal instruments and this minimises the risks of inconsistency and overlap between the bodies.

The use of delegated, non-consensus regulation by subsidiary bodies is likely to result in less consultation with affected States and individuals as part of the decision-making process. Parties to the COP and MOP should remain aware of the need for legitimacy of both the institutional structure of the Climate Change Regime and of its determinations. Legitimacy of the institution depends, to a large extent, upon acceptance of the regime's claims to authority whilst legitimacy of determinations will depend upon:

a framework of social and institutional conditions that facilitate the expression of citizens' concerns and ensure the responsiveness of political power.<sup>84</sup>

In particular, the quasi-judicial functions and powers of bodies in the Climate Change Regime include relatively broad discretionary powers and their decisions could result in significant financial repercussions for both nation States and private individuals.

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<sup>84</sup> Patrizia Nanz and Jens Steffek 'Global Governance, Participation and the Public Sphere' 2004 *Government and Opposition* 314 at 318. See also Mathew Humphrey, 'Democratic Legitimacy, Public Justification and Environmental Direct Action' (2006) 54 *Political Studies* 310 at 311.

The solution for enhancing legitimacy is unclear. One approach of the Climate Secretariat has been to increase the transparency and public access to decision-making processes. The use of modern internet technologies now allows these deliberations and submissions to be broadcast live over the internet and documents can be posted to the public UNFCCC site whilst the decision-makers are referring to them. Although not a complete panacea for this democratic deficit, this has greatly improved transparency and openness of decisions made under the regime.

### **C Engagement of Public and Private Spheres in Achieving Norms**

All of the Flexibility Mechanisms provided in the Kyoto Protocol are able to be utilised by the parties at a State level. State parties may also provide consent for domestic private entities to engage in these mechanisms independently of the State. Approved private entities may therefore implement emissions reduction projects in other countries and engage in international emissions trading without the ongoing supervision of their national government. Consequently, the Climate Change Regime creates incentives, for both public and private entities, to participate in the research and development of innovative emissions reduction technologies and to gain from the potential rewards of tradeable credits from those technologies. By creating the new commodity of tradeable rights in emissions, the regime has captured the attention of many private industries keen to harness new technologies and to benefit from the potential profits of carbon trading. In this respect, the Climate Change Regime is commendable for providing a catalyst for both public and private engagement.

In addition to the engagement of public bodies and private investors, the Climate Change Regime establishes advisory roles for accredited private experts in the approval of emission reduction projects.<sup>85</sup> These independent verifiers are responsible for reviewing project specifications and for certifying the level of actual emission reductions achieved by the project. If an accredited private expert is found to have verified credits in excess of those created by the project, be it through fraud, malfeasance or incompetence, then the expert is held liable for this error and must acquire credits from the market equivalent to the excess and surrender these to the Secretariat.<sup>86</sup> This penalty holds private experts accountable for the real ramifications from their failure to perform their duties properly by requiring the purchase of credits at market rates, which are subsequently cancelled from the market, rather than simply requiring the payment of financial compensation. This is another remarkable feature of the Climate Change Regime: namely the empowerment of subsidiary bodies to impose sanctions directly against private entities without prior recourse to the State.

Decisions may thus be made within the Kyoto Protocol which impact, positively or adversely, on the interests of private individuals and entities and on the level of national compliance. For example, the ability of public and private entities to engage in the Flexibility Mechanism of Emissions Trading is dependent on the status of compliance by the State party with certain eligibility requirements.<sup>87</sup> These include requirements to submit annual estimates of emissions and to maintain a certain level of reserve allowances within the party's national registry.<sup>88</sup> The Kyoto Protocol permits the trade of allowances by private entities where they have been authorised to

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<sup>85</sup> For example, Article 12(5) of the Kyoto Protocol.

<sup>86</sup> UNFCCC, Decision 3/CMP.1, n76, Section D [22].

<sup>87</sup> UNFCCC, 'Decision 11/CMP.1: Modalities, Rules and Guidelines for Emissions Trading under Article 17 of the Kyoto Protocol, Annex: Modalities, Rules and Guidelines for Emissions Trading under Article 17 of the Kyoto Protocol', (FCCC/KP/CMP/2005/8/Add 2) at [2].

<sup>88</sup> Ibid.

trade allowances on behalf of a State. In this case, the State remains ultimately responsible for compliance with its obligations and with the prerequisites for eligibility to trade.<sup>89</sup>

Whether a party is eligible to trade is determined by the Facilitative Branch of the Compliance Committee and is communicated to the Secretariat. Where a private or public transaction of allowances between registries is proposed, an International Transaction Log (ITL), established through the Climate Change Secretariat, verifies the validity of the transaction prior to allowing it to proceed.<sup>90</sup> In the event of an identified discrepancy by this automated system, such as the ineligibility of a State to trade, the transaction will be cancelled.<sup>91</sup> Any resulting losses to private transacting parties, from the cancellation, will prima facie lie where they fall and affected entities will have to rely on contractual provisions and national administrative law principles to address any resulting inequities.

In the interests of global engagement, the Kyoto Protocol also defines a role for local host countries in relation to the implementation of emission reduction projects. The creation of a formal decision-making function for the host country is a direct acknowledgment of the sovereign rights of nations to regulate development within their national territory according to their particular national priorities. Projects implemented under the JI and CDM are therefore subject to approval locally in the country where the emissions reduction projects are to be implemented. In the case of the CDM, this is done through the nationally established body of the Designated National Authority.<sup>92</sup> With respect to JI, this is termed the Designated Focal Point.<sup>93</sup> Under the CDM rules, project participants

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<sup>89</sup> UNFCCC, Decision 11/CMP.1, n87, at [5].

<sup>90</sup> UNFCCC, 'Decision 13/CMP.1: Modalities for the Accounting of Assigned Amounts under Article 7, paragraph 4, of the Kyoto Protocol: Annex II: Registry Requirements' (FCCC/KP/CMP/2005/8/Add.2), Section D [38].

<sup>91</sup> UNFCCC, Decision 13/CMP.1, n90, Section D [43].

<sup>92</sup> UNFCCC, Decision 3/CMP.1, n76, Section F [29].

<sup>93</sup> UNFCCC, 'Decision 9/CMP.1: Guidelines for the Implementation of Article 6 of the Kyoto Protocol. Annex: Guidelines for the Implementation of Article 6 of the Kyoto Protocol', (FCCC/KP/CMP/2005/8/Add 2), Section D[20].

must undertake an environmental impact assessment in accordance with the procedures required by the host country.<sup>94</sup> Prior to validation of the emissions reductions of the projects, the parties must also provide written approval of voluntary participation and confirmation from the host country that the project activity assists it in achieving sustainable development.<sup>95</sup> These designated local entities therefore play a significant decision making role in the selection of projects for approval, in the specification of the level of environmental assessment required and in determining whether the principles of sustainable development have been met. In terms of consultation with local communities, the project design documents must identify that local consultation has been carried out.<sup>96</sup> Regrettably, these requirements are silent on the level of consultation required and whether such submissions must be adequately addressed by the project proponents.<sup>97</sup> In this respect, the Climate Change Regime is quite deficient in establishing processes, including the approval or modification of project specifications, without the full engagement of those directly affected by those decisions such as host country institutions and local communities.

The Climate Change Regime is quite unique in its use of direct State commitments, combined with the Flexibility Mechanisms, which enable private entities to elect to assist in the implementation of emission reduction activities. In addition, by creating tradeable rights in emissions, the regime provides financial incentives for greater public and private engagement in achieving the emission reduction objectives of the Climate Change Regime. The regime is by no means perfect and there are several key areas in which improvements can be made, including providing rights of appeal from decisions for private entities and enhancing the quality of community participation in the

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<sup>94</sup> UNFCCC, 'Decision 3/CMP.1' n76, Section G [37](c).

<sup>95</sup> UNFCCC, 'Decision 3/CMP.1' n76, Section G [40] (a).

<sup>96</sup> Institute for Global Environmental Strategies, Japan Ministry of the Environment, *CDM and JI in Charts* (4 ed, 2005) Attachment 1: Contents of the Project Design Documents (v3) at Section F regarding the processes required to be undertaken according to host country requirements.

<sup>97</sup> This deficiency raises issues of adequacy of host country consultation and local community involvement in the project development process.

decision-making process. Nevertheless, this regime does set the groundwork for future and enhanced environmental models which utilise complementary public and private expertise and resources and benefit from market mechanisms acting as a catalyst for technology diffusion and behavioural modification.<sup>98</sup>

## **D Appropriate Compliance Mechanisms for Consistent Enforcement of Norms and Standards**

### *Monitoring and Compliance*

The Climate Change Regime establishes a relatively sophisticated process for monitoring compliance with rules and obligations by those public and private entities participating in the regime. Parties are required to establish national systems for estimating their greenhouse gas emissions and removals by sinks and must submit regular National Communications outlining those estimates.<sup>99</sup> The submission of these reports is a prerequisite to engaging in trade in the international market. It is also used to demonstrate progress in achieving the implementation of obligations under the Climate Change Regime. These reports are reviewed by the Facilitative Branch established under the regime. The role of the Facilitative Branch is to act as an early warning system and to assist parties which have the potential to fail to comply with their obligations. This body is specifically aimed at addressing non-compliance through inadvertence resulting from lack

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<sup>98</sup>See Benner et al, those authors promote the emergence of new forms of governance along the public-private frontier which harness the transfer and use of knowledge and resources, n55 at 193 and 197.

<sup>99</sup> Kyoto Protocol, n58, Article 5.

of institutional or financial capacities and to provide clarification regarding the interpretation and application of treaty principles.<sup>100</sup>

The MOP established the Compliance Committee which functions through a Plenary, Bureau, Facilitative Branch and an Enforcement Branch.<sup>101</sup> Where a party falls into non-compliance, the Enforcement Branch is responsible for applying the consequences of non-compliance. The parties have agreed to a strict liability penalty to be applied in the event of any identified non-compliance with a party's obligations.<sup>102</sup> The automatic penalty comprises two components. Firstly, tonnes of carbon dioxide emissions in excess of the surrendered allowances must be restored at a rate of 1.3 to 1 which will result in a 30% shortfall of allowances for the following Commitment Period.<sup>103</sup> Secondly, until restitution is made, a party, including its private operatives, is ineligible to sell credits.<sup>104</sup>

This determinative mechanism was designed to minimise the discretion of the Enforcement Branch to determine the non-compliance ramifications for each party. In reality, the Enforcement Branch may exercise some discretion in deciding whether to find a party non-compliant with its obligations. This determination will rely, to a large extent, on the analysis of information provided by the parties in their national reports. These reports are based predominantly on indirect estimates of emissions by sources and each of those estimates will be subject to varying levels of scientific uncertainty.

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<sup>100</sup> UNFCCC, Decision 27/CMP 1 'Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, Annex: Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol' (FCCC/KP/CMP/2005/8/Add 3), Section 4. Jacob Werksman, 'Designing a Compliance System for the UN Framework Convention on Climate Change' in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (1996) London, Earthscan Publications 85 at 93-94.

<sup>101</sup> UNFCCC, Decision 27/CMP 1, n100, Section 2[2].

<sup>102</sup> Parties are also granted 100 days grace, following completion of the expert review of their final annual emissions inventory, to remedy any shortfall through the purchase of additional allowances.

<sup>103</sup> UNFCCC, Decision 27/CMP 1', n100, Section 15[5].

<sup>104</sup> Sonja Peterson, 'Monitoring, Accounting and Enforcement in Emissions Trading Regimes' (Paper presented at the OECD Global Forum on Sustainable Development: Emissions Trading, Greenhouse Gas Emissions Trading and Project Based Mechanisms, Paris, 2003) at 198.

The high rates of uncertainty of these estimates, around +/- 4%, will play a significant part in these determinations of non-compliance given that the required emissions reductions are themselves only 6-8% of reported 1990 levels. Accordingly, the Enforcement Branch will also possess some discretion in determining the *level of non-compliance* and the actual tonnage of carbon dioxide equivalent repayable.

The Kyoto Protocol is exceptional in applying strict penal mechanisms to States for non-compliance with an international environmental agreement. Unfortunately, those penalties provisions have been undermined by the failure of the MOP to comply with its own agreed amendment procedures. The Kyoto Protocol required these penalty provisions to be adopted through the ratification of an amendment to the Protocol. Instead, they were adopted by a decision of the parties.<sup>105</sup> There are therefore concerns that these provisions are not legally binding on the parties and this will be a significant issue of contention when the Enforcement Branch first seeks to enforce these provisions.<sup>106</sup> Furthermore, the regime fails to impose any deterrent on parties discontinuing their membership of the regime. Accordingly, a non-compliant party may simply elect to withdraw from the Kyoto Protocol or UNFCCC or both, after providing one year's notice, without penalty.<sup>107</sup>

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<sup>105</sup> Article 18 of the Kyoto Protocol provides that measures with binding consequences may only be adopted through an amendment to the Protocol itself.

<sup>106</sup> Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (2004) Cambridge, Cambridge University Press at 397 and Jon Hovi, Olav Schram Stokke and Geir Ulfstein, 'Introduction and Main Findings' in Olav Schram Stokke, Jon Hovi and Geir Ulfstein (eds), *Implementing the Climate Regime: International Compliance* (2005) London, Earthscan at 5.

<sup>107</sup> UNFCCC, n57, Article 25. Kyoto Protocol, n58, Article 27. This provision applies three years from the date on which the UNFCCC or Kyoto Protocol, respectively, entered into force. A party cannot withdraw from UNFCCC and remain a party to the Kyoto Protocol.

## *Due Process under the Regime*

The Kyoto Protocol seeks to provide procedural protection, similar to due process in domestic hearings, for those parties who may be found to be non-compliant.<sup>108</sup> The potentially non-compliant party has a right to be represented before a hearing of the Enforcement Branch and to have access to and respond to information provided by others.<sup>109</sup>

The Enforcement Branch is composed of members from parties to the Kyoto Protocol including one member from each of the five regional groups of the United Nations, one member from the small island developing States, two developed country members (Annex 1) and two developing country members (non-Annex 1).<sup>110</sup> Each member of the Enforcement Branch must serve in his or her individual capacity and must act in an independent and impartial manner.<sup>111</sup> In reaching its decision, the Enforcement Branch must seek to reach consensus. If this does not occur then it may reach a decision by a three-quarters majority of those members present and voting provided that decision amounts to a double majority of both Annex 1 and non-Annex 1 members.<sup>112</sup>

Recourse is permitted from a decision of the Enforcement Branch back to the MOP. If it is shown that due process has not been followed by the hearing of the Enforcement Branch, the MOP may override the decision of the Enforcement Branch by a three-quarters majority vote.<sup>113</sup> However,

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<sup>108</sup> Jon Hovi et al, n106 at 3.

<sup>109</sup> UNFCCC, Decision 27/CMP 1, n100, Section 9. UNFCCC, Decision-/CMP.2: 'Compliance Committee, Annex: Rules and Procedures of the Compliance Committee of the Kyoto Protocol' (FCCC/KP/CMP/2006/6) Section 10.

<sup>110</sup> UNFCCC, Decision 27/CMP 1, n100, Section 5(1). In electing members of the Enforcement Branch, the MOP must be satisfied that the members have 'legal experience'. This is not defined further.

<sup>111</sup> UNFCCC, Decision-/CMP.2, n109, Section 3. This obligation of impartiality applies to all members of the Compliance Committee including the Facilitative and Enforcement Branches.

<sup>112</sup> UNFCCC, Decision 27/CMP 1, n100, Section 2[9].

<sup>113</sup> UNFCCC, Decision 27/CMP 1, n100, Section 11.

under the rules of procedure, the MOP cannot reach a decision on the merits of the matter and may only agree to return the matter to the Enforcement Branch for a new determination.<sup>114</sup>

### *Rights of Appeal for Participants*

In the event of an unresolved dispute regarding implementation or interpretation generally, the UNFCCC and Kyoto Protocol provide for the parties to declare, at the time of ratification, whether they recognise the jurisdiction of the International Court of Justice (ICJ) and/or arbitration in accordance with procedures adopted by the COP.<sup>115</sup> The jurisdiction of the ICJ was not recognised in any instruments of ratification but a handful of States did recognise the procedures of arbitration to be developed by the COP.<sup>116</sup> Both the COP and MOP are yet to approve such dispute resolution procedures but it is envisaged that the parties will eventually adopt procedures which refer to the Permanent Court of Arbitration, Environmental Arbitration and Conciliation Rules.<sup>117</sup>

The monitoring and enforcement mechanisms under the Climate Change Regime have built upon the model established under the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>118</sup> In terms of protection of procedural rights, the Climate Change Regime addresses rights of State parties in a reasonably comprehensive manner. The key flaw in the decision-making and appeal processes is found in its treatment of non-State entities. The Climate Change Regime provides no dispute resolution mechanisms for those private individuals and entities aggrieved by decisions under the regime. These persons could potentially include private participants authorised to

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<sup>114</sup> Ibid.

<sup>115</sup> UNFCCC, n57, Article 14, Kyoto Protocol, n58, Article 19.

<sup>116</sup> UNFCCC 'Status of Ratification',

[http://unfccc.int/files/essential\\_background/convention/status\\_of\\_ratification/application/pdf/ratlist.pdf](http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/ratlist.pdf) at 22 October 2006.

<sup>117</sup> The PCA Environmental Arbitration Rules are also currently included in most standard form contracts for international emissions trading under the Climate Regime, see <http://www.pca-cpa.org/ENGLISH/EDR/> at 22 October 2006.

<sup>118</sup> Agreed at Montreal, 16 September 1987, 26 *International Law Materials* 1550 (1987) (entered into force 1 January 1989).

participate in CDM or JI activities, non-party investors, accredited verifiers, legal entities involved in the transfer of allowances and persons directly or indirectly affected by the implementation of CDM and JI projects within host countries. It is therefore currently necessary for private persons and entities to seek relief in domestic courts outside of the rules of the Climate Change Regime. The Secretariat has acknowledged the need to resolve this issue and is considering imposing a mandatory declaration on all participants and entities acknowledging that all disputes will only be addressed under the procedures approved by the MOP.

## **E Consistent and Complementary Interactions with Other Environmental Institutions.**

### *International Interactions with the Climate Change Regime*

The Stern Review has identified that climate change is becoming central to international economic relations and to issues including trade, development and energy security.<sup>119</sup> Accordingly, addressing climate change involves managing numerous other environmental, economic and social policy areas. There are few formal processes provided in the Climate Change Regime to manage those institutional and policy interactions and this regime is not necessarily best placed to dictate the preferred environmental policy directions.

At the level of international agreements, the disposal of carbon dioxide in underground sea beds potentially conflicts with the implementation of those conventions restricting the dumping of wastes at sea.<sup>120</sup> However, the legal position is uncertain and yet to resolved. Thirdly, as mentioned, the Climate Change Regime creates tensions with the priorities of the Biological Diversity Convention

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<sup>119</sup> Stern Review, n1 at 454.

<sup>120</sup> These are the *United Nations Convention on the Law of the Sea* 1982, *London Convention* of 1972, the *London Protocol* of 1996 and the *OSPAR Convention* of 1992. Delegates have requested that these regimes consider providing an exemption for the subsurface storage of carbon dioxide.

through the encouragement of forest plantations with high carbon emission absorption rates rather than encouraging plantations with diverse tree species.

The Climate Change Regime does not directly address issues of water availability and drought. However, decisions made under the regime will indirectly affect other approaches to water management. In particular, core decisions regarding the level of accepted emissions, and society's ability to adapt to increases in global temperatures, will determine the severity of global water scarcity. The lack of an overarching international regime to address water scarcity places increased emphasis on the mitigation and adaptation priorities of the Climate Change Regime.

A recent United Nations Development Programme report on water scarcity states that water, unlike other scarce resources, underpins all aspects of human society from ecology to agriculture to industry, and it has no known substitutes.<sup>121</sup> Competition for water as a collective resource is intensifying with the collapse of water-based ecological systems, declining river flows and large-scale groundwater depletion. Water scarcity has been intensified by poor water management policies and long-term underpricing.<sup>122</sup> The emergence of adverse climate change will aggravate this existing global water insecurity. This climatic change will amplify the unpredictability of water availability due to the increasing prevalence of droughts, floods and other adverse weather events.<sup>123</sup> The United Nations report concludes that the international response to the water security threat posed by climate change has been inadequate.<sup>124</sup> From a water perspective, the report states that priorities should focus on deeper emission cuts which restrict global warming to no more than a two degrees Celsius increase and on the provision of international aid for adaptation.<sup>125</sup> There is

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<sup>121</sup> United Nations Development Programme, 'Human Development Report 2006, Beyond Scarcity: Power, Poverty and the Global Water Crisis' (United Nations, 2006), <http://hdr.undp.org/hdr2006/> at 10 November 2006, at 204.

<sup>122</sup> United Nations, n122 at 14-15.

<sup>123</sup> United Nations, n122 at 161-162.

<sup>124</sup> United Nations, n122 at 15-16.

<sup>125</sup> Ibid.

therefore a clear need for the Climate Change Regime to step into this institutional void and to promote awareness of the inherent tensions between climate policy and water availability.

The Climate Change Regime also intervenes in the policy scope of the Forest Regime by establishing its own detailed policies, guidelines and enforceable rules regarding the management of carbon stocks in forests, especially where they are registered as projects under the CDM. This has been done without acknowledgement of the existing Forest Regime and without formal consultation with its institutions. The first CDM afforestation/reforestation project, which will take place in Huanjiang County in China, was registered by the Executive Board in November 2006. The absence of detailed guidelines, within the Forest Regime, concerning afforestation and reforestation activities necessitated the creation of new norms and standards by the climate change institutions. The level of consideration given to the preparation of these afforestation and reforestation guidelines is commendable. However, from a governance perspective, these matters should be addressed within international forest institutions in order to avoid excessive fragmentation and to ensure consistency of principles and standards across forest projects. If lack of progress by the Forest Regime continues to prevent a consistent international approach to regulation then other non-forest institutions will also be compelled to step into this regulatory void.<sup>126</sup>

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<sup>126</sup> Two examples of this can be found in the following reports, released by non-forest institutions, which seek to provide guidance on addressing global forestry issues. The first report deals with the integration of thematic elements from the Convention on Biological Diversity (which encompasses forest issues) with other multilateral environmental agreements. The report provides methods and tools for planning and implementing climatic adaptation activities that include biodiversity considerations. See Secretariat of the Convention on Biological Diversity *Guidance for Promoting Synergy Among Activities Addressing Biological Diversity, Desertification, Land Degradation and Climate Change* (2006) [www.biodiv.org/doc/publications/cbd-ts-25.pdf](http://www.biodiv.org/doc/publications/cbd-ts-25.pdf) at 12 December 2006. The second report explores the relationships between international forest policy and international climate policy. See Simon Dresner, Paul Ekins, Kate McGeevor, Julia Tomei *Forests and Climate Change: Global Understanding and Possible Responses* (2006) <http://www.forestry.gov.uk/climatechange> at 12 December 2006.

### *Domestic Influences of the Climate Change Regime*

The scope of the Climate Change Regime indirectly extends to the domestic activities and environmental, economic and social outcomes in both developed party countries and developing nations. In terms of developing countries, the funding policies of the World Bank will impact on the ultimate choice of emission reduction technologies and choice of developing country for the location of projects. This has led to disparity in terms of those developing countries which are selected to receive this financial assistance in the form of local investment. Moreover, the imposition of general obligations on developing countries to reduce their greenhouse emissions has greater sustainability implications. The Indian government, for example, has identified its key priority areas of reducing childhood mortality, reducing poverty, increasing education, providing reliable energy sources and access to clean water. These are all legitimate aspirations but the government has stated that their achievement will necessarily result in an increase in national emissions.

The Climate Change Regime also has implications for domestic policies in developed party countries. Despite the silence of the Kyoto Protocol on the manner of achieving national emissions reductions, views and opinions at the international level will have some level of influence on domestic policy settings. The domestic scope is far reaching and extends beyond mere energy use to policies regarding research and development, renewable energy subsidies, regulation of the resources industries including electricity, natural gas and mining, agriculture and land management practices, forest management, energy efficiency in the design of buildings and appliances and management of the transport and aviation industries. Furthermore, the creation of a global market in carbon credits, at an international level, has led to the domestic development of emission abatement schemes combined with carbon trading markets. Many of these markets have been designed with

the aim of future linkages with the international market. However, the absence of direction regarding the optimal design of these markets has resulted in a mosaic of models which may not ultimately be compatible with the Climate Change Regime. Given that the Climate Change Regime is so influential in the domestic sphere, it would appear preferable for clear guidance to be provided to national governments on the effective achievement of these international priorities.

#### **IV TOWARDS INTEGRATED ENVIRONMENTAL GOVERNANCE**

The above analysis of the Forestry Regime and the Climate Change Regime demonstrates the deficiencies inherent in the current approach to environmental governance which is resulting in inconsistencies, overlap and incoherence. The issues of climate change, reduced water availability and deforestation are very much interrelated. The prevailing approach of addressing each of these environmental problems within separate environmental regimes is therefore problematic with ongoing issues of fragmentation, duplication and policy gaps. Poor inter-linkages between these environmental regimes also prevent information exchange and policy learning across issue boundaries and restrict the development of shared expertise between these environmental institutions.

A more integrated approach to the governance of international environmental problems is therefore essential to the effective management of those environmental issues. As a minimum, there should be greater consultation and coordination between existing environmental institutions which would improve efficiencies, promote policy synergies, intensify information exchange and enhance the overall operation of the global environmental regime.

One proposal to address the deficiencies in the current approach to global environmental governance is the establishment of a centralised supervisory body in the form of a World Environment Organisation (WEO). The submission for an international environmental body is not new and has been recommended, in various forms, since the recommendation to establish an ‘International Environment Agency’ in the 1970s. The reasons behind the establishment of an international body are threefold. Firstly, such an institution would provide a coordinated regime to address global environmental problems. The environmental governance benefits of a WEO lie in the reduction of the prevalent fragmented approach to the management of environmental issues. A WEO would promote coordination and policy integration which would enhance policy coherence and cohesion and would minimise the occurrence of conflicts between multilateral environmental institutions. This would result in improved policy learning, enhanced synergies and intensified exchanges of information between bodies. It could also overcome current problems of inadequate resourcing as multiple environmental institutions compete for sufficient funding and resources to carry out their functions.

Secondly, a WEO would enable the creation of an international institutional structure to comprehensively address global environmental problems. There is currently no body with sufficient information and oversight to address all key environmental concerns in a coherent fashion. By enhancing a single institution with the expertise and power to identify and address environmental problems in a holistic manner, solutions can be identified which benefit all environmental values. Of course, the actual scope and power of this institution would depend upon its mandate and on the allocation of responsibilities under its constitution. Such a constitution could make clear those matters which properly fall under the banner of ‘environmental concerns’ as well as specifying processes of engagement with other multilateral institutions and the private sphere.

Thirdly, a WEO would provide a centralised body able to establish and enforce environmental norms and standards consistently at an international level.<sup>127</sup> Common processes could be established, in a central forum, for the creation of new rules and standards, the reporting of activities by member States, the assessment of the state of the environment and evaluation of compliance and the imposition of dispute resolution procedures.

Many suggestions have been made regarding the form of a new WEO. Some promote the upgrade of the United Nations Environment Programme (UNEP) into a strengthened specialised United Nations agency with its own budget and legal personality.<sup>128</sup> This environmental umbrella organisation would include all existing environmental agreements with UNEP as the central pillar.<sup>129</sup> Such a cooperation model would provide a strengthened body, with adequate resourcing, able to better fulfil its functions of policy setting and capacity building.<sup>130</sup>

Others promote the replication of the World Trade Organisation (WTO) model through the consolidation of existing multilateral environmental agreements and environmental programmes into a single, streamlined structure.<sup>131</sup> In the case of the WTO, membership of the institution was made conditional on the acceptance of new GATT agreements.<sup>132</sup> This WEO model would possess enhanced norm-setting capabilities and would be equipped to establish regulations which bind all members of the organisation. Such a system would also promote efficiency and minimise policy conflict and duplication.

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<sup>127</sup> Daniel C. Esty, 'The Case for a Global Environmental Organization' in Peter B. Kenen (ed), *Managing the World Economy: Fifty Years After Bretton Woods* (1994) Washington DC, Institute for International Economics 287 at 289-91.

<sup>128</sup> Frank Biermann, 'The Emerging Debate on the Need for a World Environment Organization: A Commentary' (2001) 1(1) *Global Environmental Politics* 45 at 46.

<sup>129</sup> United Nations University Institute of Advanced Studies, 'International Environmental Governance, the Question of Reform: Key Issues and Proposals' (United Nations University, 2002) at 7.

<sup>130</sup> *Ibid.* A similar proposal includes the establishment of UNEP within a WEO with the ultimate absorption of UNEP into the new organisation.

<sup>131</sup> Biermann, n129 at 46.

<sup>132</sup> United Nations University, n130 at 8.

A third suggestion is the establishment of a WEO based on the International Labor Organisation (ILO). The ILO model is generally regarded as having achieved a good balance between universality and effectiveness and provides for more egalitarian representation with members allowed to send a number of delegates to participate in its discussions.<sup>133</sup> This reflects the realities of national governments where issues may fall across a number of domestic governmental divisions.

The fourth, and preferred, form of WEO is much more ambitious and seeks the establishment of a supranational body to protect the global environment, enriched with powers of enforcement.<sup>134</sup> This hierarchisation model builds upon the strengths of the existing United Nations Security Council structure and would absorb many (if not all) of the existing environmental institutions.<sup>135</sup> Under this approach, this body would include a judicial branch with an independent World Environmental Court possessing compulsory environmental jurisdiction and the capacity to issue legally binding decisions.<sup>136</sup>

This WEO model could also incorporate some form of global environmental Parliament to address legitimacy and accountability concerns regarding community participation and representative governance.<sup>137</sup> This would provide a legitimate forum for the transparent review of operations by the representatives of all member countries.<sup>138</sup> Such representatives could be nominated by the elected government of each State. Alternatively, the representatives could be elected domestically,

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<sup>133</sup> Ibid.

<sup>134</sup> Biermann, n129 at 47.

<sup>135</sup> United Nations University, n130 at 24. There are alternate proposals to simply expand the mandate of the United Nations Security Council to encompass acts of environmental degradation and resource depletion where they present a threat to peace and stability.

<sup>136</sup> United Nations University, n130 at 22-23.

<sup>137</sup> Mathew Humphrey, 'Democratic Legitimacy, Public Justification and Environmental Direct Action' (2006) 54 *Political Studies* 310 at 311. Nanz and Steffek, n84 at 318.

<sup>138</sup> Steve Charnovitz, 'A World Environment Organization' in W Bradnee Chambers and Jessica F. Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (2005) Tokyo, UNU Press 93 at 109.

by the people, although this option has significant resourcing implications. Meaningful participation of scientific experts, non-government organisations and affected local communities could also be incorporated into these arrangements through the establishment of advisory groups and other access opportunities.<sup>139</sup> The use of expert committees has been suggested as an effective remedy to legitimation concerns in international governance due to their enhancement of the knowledge underpinning the decision-making process.<sup>140</sup>

The creation of a strong WEO could provide the much needed counterweight to the operations of the WTO by including environmental considerations within broader trade and economic priorities.<sup>141</sup> However, suggestions for a WEO have been criticised on a number of grounds. Some commentators assert that the existing fragmented approach to environmental governance fosters innovation and diversity.<sup>142</sup> The complex nature of environmental problems requires various specialised agencies and responses. Furthermore, such responses must be adjusted according to the characteristics of the local environment.<sup>143</sup> It is also stated that the problems and weaknesses of the current approach are primarily due to a lack of funding and expertise within existing environmental institutions rather than the institutional structure itself.<sup>144</sup> An alternative solution is to cluster existing institutions, by issue, function or region, which would promote coordination and coherence without the need for complete centralisation.<sup>145</sup> Ultimately, however, any global reform is dependent upon achieving political acceptance to a new form of environmental governance and political processes will determine the preferred model.

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<sup>139</sup> Ibid.

<sup>140</sup> Nanz and Steffek, n84 at 318.

<sup>141</sup> United Nations University, n130 at 11.

<sup>142</sup> Calestous Juma, 'The Perils of Centralizing Global Environmental Governance' (2000) 42(9) *Environment* 44 at 45.

<sup>143</sup> Ibid.

<sup>144</sup> Peter Newell, 'A World Environment Against: The Wrong Solution to the Wrong Problem' (2002) 25(5) *World Economy* 659 at 665.

<sup>145</sup> Sebastian Oberthur, 'Clustering of Multilateral Environmental Agreements: Potentials and Limitations' in W Bradnee Chambers and Jessica F. Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (2005) Tokyo, UNU Press 40 at 41. cf. Frank Biermann, 'Strengthening Green Global Governance in a Disparate World Society: Would a World Environment Organisation Benefit the South?' (2002) 2(4) *International Environmental Agreements: Politics, Law and Economics* 297 at 308.

Given the growing tensions regarding energy and water security it is possible that this WEO model could gain political acceptance in the future. However in the current political context, it is unlikely that member States would agree to the delegation of such significant power and discretion, and an associated fetter on their sovereign rights, to a new global order with the potential to impact on their economic production and competitiveness. This is especially so when considered in light of the limited scope of power currently allocated to most environmental authorities at a national level.

## **V CONCLUDING COMMENTS**

In the absence of a new global environmental architecture, such as the WEO, some reforms to the existing approaches of the Forest Regime and Climate Change Regime would significantly enhance their operations.

This paper has analysed the models of environmental governance adopted in the Forest Regime and the Climate Change Regime and assessed them against the following four factors of good environmental governance:

- establishment of global environmental norms and standards;
- engagement of public and private spheres in enacting and implementing such norms;
- appropriate compliance mechanisms for consistent enforcement of the norms and standards; and
- consistent and complementary interactions with other environmental institutions.

This analysis has demonstrated that the current Forest Regime lacks legally enforceable environmental norms and standards and contains only guiding principles. To create such norms and

standards requires the establishment of a strong regulatory entity which is empowered to create and enforce these rules in a consistent manner. The Forest Regime does provide some voluntary avenues for public and private participation. However, it fails to provide any real financial incentives for involvement in the programme. Further financial incentives, for private industry involvement, could be provided through streamlining Certification processes to reduce transaction costs. In addition, governments could consider providing financial rewards, in the form of a sustainability bonus, for achieving and maintaining Certification standards.

With respect to compliance mechanisms, the Forest Regime does not establish any means of formal enforcement of its principles. This is due to the fact that the regime utilises voluntary, non-binding, mechanisms to achieve its objectives. The Forest Regime could learn from other, more successful, environmental models. In particular, it could build upon the facilitation and enforcement mechanisms provided for in the Climate Change Regime. Finally, in terms of institutional interactions, the political tensions existing in the Forest Regime have prevented it from achieving progress in the development of new sustainability standards. This has resulted in other non-forest institutions establishing their own principles and regimes which apply to forest areas. Within the Forest Regime itself, there is a real need for greater coordination and facilitation between existing forest institutions to achieve greater consistency across their sustainability standards. In terms of interactions with other institutions the Forest Regime should, as a minimum, be more proactive in its participation in forest-related discussions to ensure that its aims and objectives are taken into account.

In contrast, this analysis has shown that the Climate Change Regime does establish clear norms and standards applicable to climate change issues. The establishment of an autonomous body, empowered to create new rules and procedures, also enhances the normative capabilities of this

regime. The engagement of the private sphere is innovative in the establishment of global trading mechanisms in the Climate Change Regime. However, engagement of local communities could be greatly improved through further consultation in the project approval process. Affected private individuals should also be provided with access to the dispute resolution processes under the Climate Change Regime.

The Climate Change Regime introduces a sophisticated compliance regime with strict penal consequences for non-compliance. However, these mechanisms may be undermined by the ability of parties to withdraw from the regime without penalty and by the failure of the parties to ratify the compliance procedures. Both of these deficiencies need to be addressed promptly by the parties to the UNFCCC and the Kyoto Protocol. The institutional interactions of the Climate Change Regime are wide-reaching and the regime impacts on the operation of a number of other institutions including the Forest Regime. There is a real risk that the regime will overstep its mandate and interfere in environmental policy areas which are not strictly within its jurisdiction. In this respect, the Climate Change Regime should establish formal forums for consultation with institutions in those other environmental areas, in order to acknowledge the competing rights and interests of those regimes.