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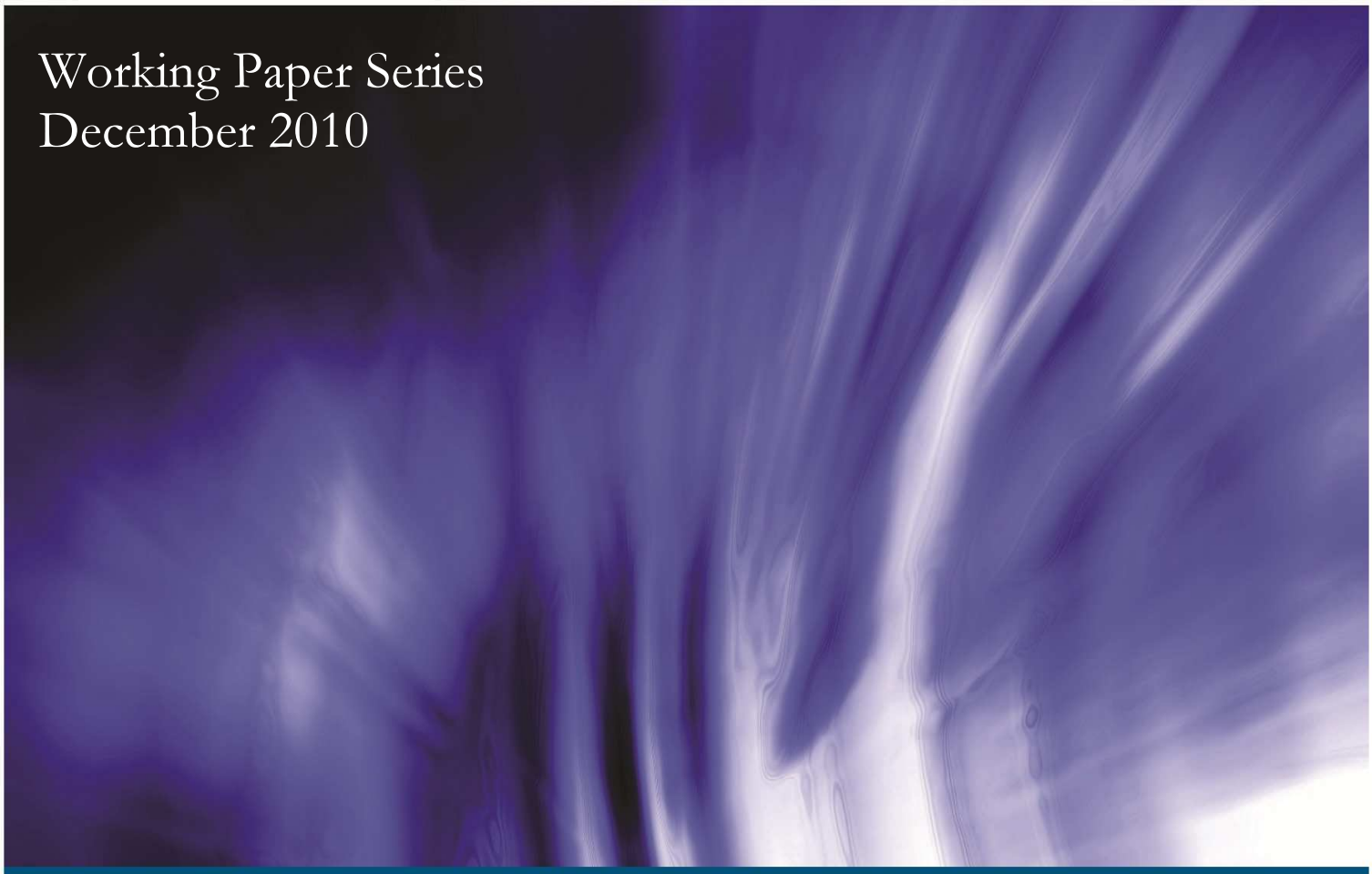

CISDL

The Center for International Sustainable Development Law
& The International Development Law Organization

present:

International Law
&
Climate Finance

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International Law & Climate Finance

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1. Introduction

At its most basic, climate change is attributed to the emission of greenhouse gases (GHGs) into the atmosphere. However, there are underlying socio-political drivers of climate change that are highly complex and inseparable from the global economic system. Mitigation will require the revision of existing practices across diverse sectors including transportation, industry, energy, forestry and agriculture. By all accounts, substantial financial investments are needed to foster those revisions without hampering economic development.

Climate finance has increasingly become the focus of myriad international trade and investment rules, treaties, and other institutions. The past two decades have seen the emergence of hundreds of new climate finance instruments across the world worth billions. Among others, they have taken form as investment funds, emission trading and offset schemes, product standards, debt-reduction swaps and treaty obligations.

Those instruments are not only within the purview of the United Nations Framework Convention on Climate Change (UNFCCC) but are also found in regional, multilateral and bilateral agreements as well as in voluntary financial markets. They are growing and evolving rapidly.

No matter the source or the form, international law plays a crucial role in realizing climate finance. International law establishes global governance structures through which decisions on climate finance are made, such as the UNFCCC and agreements thereunder. It also guides other state and non-state regimes affecting climate finance through the principles of sustainable development.

Nevertheless, domestic attempts to attract climate finance also interact with continuing global negotiations to redefine international law and climate finance through feedback loops. To function effectively, international sustainable development law must respond to domestic demands and practical project experiences because legal preparedness and capacity at the ground level are equally essential for real and measurable results.

2. Purpose

This paper has been prepared in anticipation of the 16th edition of the Conference of the Parties of the United Nations Framework Convention on Climate Change (COP16) and the 6th Conference of the Parties to the Kyoto Protocol (CMP6). The authors' purpose is to provide a general summary of select finance instruments for climate change mitigation as well as the international law principles that inform them.

3. Global Climate Regime

3.1. Global Climate Negotiations

The **UNFCCC** is a global intergovernmental agreement that seeks to stabilize GHG concentrations "at a level that would prevent dangerous anthropogenic interference with the climate system."[3] It was adopted on May 9, 1992 and opened for signature at the UN Conference on Environment and Development in Rio de Janeiro that same year. In force

[3] United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84 (1992), Article 2 online: http://unfccc.int/2860.php.

since 1994, the UNFCCC boasts 194 signatory Parties, including 193 States and the European Union (EU).[4] The UNFCCC recognizes the concept of 'sustainable development' within the context of climate change mitigation and adaptation.

The **Kyoto Protocol** was adopted further to the commitments of the Parties to the UNFCCC to develop measures to limit GHG emissions and enhance sequestration. The Kyoto Protocol sets binding targets for 37 industrialized countries and the EU to reduce GHGs at an average of 5% below 1990 levels over the five-year period 2008-2012.[5] Pursuant to the Marrakesh Accord implementation 'rulebook,' the Kyoto Protocol allows Parties to engage in market-based climate finance instruments, including emissions trading and offset schemes as amongst industrialized countries, countries with economies in transition and developing countries (detailed below).[6]

Commitments for periods subsequent to 2012 must be established as amendments to the Kyoto Protocol. The intergovernmental negotiation process consists of the **Conference of the Parties** (COP), the **Meeting of the Parties to the Kyoto Protocol** (CMP) and Subsidiary Bodies meetings. The COP and CMP meet at least annually to assess past implementation and to progressively plan future action on climate change.

The last COP and CMP took place in December 2009 in Copenhagen (COP15/CMP5). Of central concern at COP15/CMP5 were emission target commitments for the post-2012 period. In the result, the COP took "note" of the **Copenhagen Accord**, agreed upon by 114 Parties (26 additional countries have since communicated their intention to be listed as agreeing to the Copenhagen Accord, bringing the number to 140).[7] Related to the Copenhagen Accord, several Parties have provided various quantified economy-wide targets for 2020. However, according to the Executive Secretary, the Copenhagen Accord does not have legal standing within the UNFCCC process.[8] Therefore, obligations in the post-2012 commitment period remain unsettled.

3.2. Other Relevant International Accords and Institutions

3.2.1. International Institutions

International institutions oversee the design, implementation and enforcement of climate finance instruments through a wide-range of activities, including research and data collection, policy development, investment partnerships, direct funding and capacity building.

The **UN** is host to numerous programmes that seek to mitigate climate change through research and information sharing, policy advice and ground-level local capacity development. The **UN Environment Programme** (UNEP) provides broad leadership in addressing climate change for the rest of the UN system, international organizations, national governments, civil society and the private sector, including by helping to develop international agreements (i.e. UNFCCC) and by promoting energy efficiency, renewable

[4] UNFCCC "Status of the Ratification of the Convention", online: http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php.
[5] UNFCCC "Kyoto Protocol" online: http://unfccc.int/kyoto_protocol/items/2830.php.
[6] UNFCCC "Kyoto Protocol Bodies", online: http://unfccc.int/kyoto_protocol/kyoto_protocol_bodies/items/2772.php.
[7] UNFCCC "Copenhagen Accord", online: http://unfccc.int/home/items/5262.php.
[8] UNFCCC Executive Secretary "Notification to the Parties: clarification relating to the Notification of 18 January 2010" (Bonn, 25 January 2010) online: http://unfccc.int/home/items/5262.php.

energy and carbon markets.[9] The **UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation** (UN-REDD) is a collaborative initiative among various UN departments to create a financial value for carbon stored in forests, thereby offering incentives to developing countries to reduce deforestation and forest degradation and enhance forest carbon stocks.[10] The **UN Development Programme** (UNDP), with its goals of sustainable development and poverty reduction, assists communities to reconcile climate change mitigation and adaptation with poverty reduction strategies, including through ground-level projects for sustainable energy and land management, and through facilitating Clean Development Mechanism partnerships under the Kyoto Protocol of the UNFCCC.[11]

Intergovernmental organizations, such as the **International Renewable Energy Agency** (IRENA) and the **International Energy Agency** (IEA), act as policy advisors to member countries with an emphasis on mitigating climate change through energy efficiency and renewable energy technologies. Their activities include research and data compilation; capacity building; advice on financing mechanisms; and the development of technical standards and best operational practices.[12]

The **World Bank** and other **regional development banks** (i.e. Inter-American Development Bank, African Development Bank) seek to strengthen and build investment partnerships between developing countries and a wide array of organizations, including international financial institutions, developed countries and the private sector. The World Bank aims to support economic and social development while offsetting costs that stem from climate change through climate-dedicated finance (i.e. funds, loans, grants).[13]

3.2.2. Regional, Multilateral and Bilateral Treaties

Regional, multilateral and bilateral treaties facilitate cooperation for environmental protection among states with shared interests, including sectoral practices and trade channels.

Several regional **Free Trade Agreements** contain environmental provisions or have been supplemented by Environment Co-operation Agreements with a range of commitments, including: obligations to enforce domestic laws; consultations and exchange of information; formal dispute mechanisms; and public participation in environmental matters (i.e. North American Agreement on Environmental Co-operation, MERCOSUR Framework Agreement on Environment). Some agreements specifically call for capacity building to foster climate change mitigation, for instance, through the Clean Development Mechanism under the Kyoto Protocol of the UNFCCC (i.e. Canada-Chile Agreement on Environmental Co-operation; Japan-Mexico Agreement).[14]

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[9] UN Environment Programme, online:
http://www.unep.org/climatechange/UNEPsWork/tabid/237/Default.aspx.
[10] UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation online:
http://www.un-redd.org/AboutREDD/tabid/582/Default.aspx.
[11] UN Development Programme online: http://www.undp.org/energyandenvironment/.
[12]International Renewable Energy Agency, online: www.irena.org; International Energy Agency online: www.iea.org..
[13] The World Bank online: http://beta.worldbank.org/climatechange/overview.
[14] Organisation for Economic Co-operation and Development, *Environment and Regional Trade* (Paris: OECD Publications, 2007), online:
http://oberon.sourceoecd.org/vl=2773286/cl=29/nw=1/rpsv/~6678/v2007n15/s1/p1l.

The Energy Charter Treaty (ECT) together with the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) recognizes the goal of sustainable development and the role of domestic governments in taking precautionary measures to mitigate climate change through energy efficiency. To that end, PEEREA (a) requires participating States to formulate and implement policies to improve energy efficiency and to reduce negative environmental impacts; (b) provides transition economies with a menu of best practices; and (c) endorses energy-efficient strategies such as market mechanisms and energy pricing, technology transfers, taxation, and subsidies.[15]

4. Climate Finance Instruments

4.1. Carbon Market Flexibility Mechanisms

Carbon market flexibility mechanisms treat GHG reductions as a commodity to be bought, sold or traded in accordance with specified valuations measurable as CO2 equivalents.

Under **regional and international emissions trading schemes** (i.e. European Union Emissions Trading Scheme, Kyoto Protocol, Western Carbon Initiative), participating members agree to greenhouse gas emission targets, which are divided into commodity units and are tracked, priced and traded, depending on the members' relative capacity vis-à-vis their targets (i.e. cap-and-trade).[16]

The Kyoto Protocol **Joint Implementation** mechanism allows specified countries with emissions targets (Annex B Parties) to earn credit towards their targets by participating in emission reduction or removal projects in similarly situated countries (other Annex B Parties), thereby providing a cost-efficient means to fulfil Kyoto Protocol commitments while also facilitating investment and technology transfer.[17]

The Kyoto Protocol **Clean Development Mechanism** (CDM) allows countries with emissions targets (Annex B Parties) to earn credit towards their targets by participating in emission reduction projects in developing countries, providing a cost-efficient means to fulfil Kyoto Protocol commitments while also facilitating investment and technology transfer for sustainable development. The CDM is an emission 'offset' instrument because developing countries *do not have targets* under the Kyoto Protocol and because CDM projects must provide emission reductions that are *additional* to what would otherwise have occurred. The majority of registered CDM projects relate to the energy industries, while only a small minority have successfully registered as Agriculture, Forestry and Other Land Use (AFOLU) projects because of the rigorous baseline and monitoring methodologies approved to date.[18]

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[15] Marshall, F. et al, *Climate Change and International Agreements: Obstacles or opportunities?* (International Institute for Sustainable Development, 2010), online: http://www.iisd.org/publications/pub.aspx?pno=1295; Energy Charter Secretariat, *Market Trading Mechanisms for Delivering Energy Efficiency* (Brussels: Energy Charter Secretariat, 2010) online: http://www.encharter.org/index.php?id=483&L=0.

[16] UNFCCC Kyoto Protocol Mechanisms, online: http://unfccc.int/kyoto_protocol/mechanisms/emissions_trading/items/2731.php; Western Climate Initiative, online: http://www.westernclimateinitiative.org/; European Commission -Climate Action, online: http://ec.europa.eu/clima/policies/ets/index_en.htm.

[17] UNFCCC Kyoto Protocol Mechanisms, online: http://unfccc.int/kyoto_protocol/mechanisms/joint_implementation/items/1674.php.

[18] *Clean Development Mechanism Executive Board Annual Report 2009* (Bonn: Climate Change Secretariat UNFCCC, 2009) online: http://cdm.unfccc.int/index.html; Seeberg-Elverfeldt, C., *Carbon Finance Possibilities for Agriculture, Forestry and Other Land Use Projects in a Smallholder Context* (Rome: Food and Agriculture Organization of the United Nations, 2010), online: http://www.fao.org/docrep/012/i1632e/i1632e00.htm.

4.2. REDD and REDD+

Reducing Emissions from Deforestation and Forest Degradation (REDD) and REDD *together with* sustainable forest management and enhancement of carbon stocks (REDD+) link the mitigation potential of forests to financial incentives for conservation, reforestation and afforestation. REDD and REDD+ projects may be developed, financed and administered in conjunction with various organizations, including the World Bank (Forest Carbon Partnership Facility) and the UN (UN-REDD). Measurable emission reductions from realized projects can lead to performance-based payments, for instance through funds or carbon markets. The UN-REDD seeks inclusion of a REDD+ mechanism in the post-Kyoto international climate change regime under the UNFCCC.[19]

4.3. International Funds

Financial institutions manage centralized funds to support transactions between investors and administrators of climate change mitigation projects around the world.

The **Global Environmental Facility** (GEF) is an independent financial institution that links member governments with international organizations, NGOs and the private sector to provide grants to developing countries, countries with economies in transition, NGOs and community organizations for projects related to global environmental issues. The GEF serves as a financial mechanism to facilitate transactions under the UNFCCC by managing special funds established by member Parties, including the Special Climate Change Fund, the Least Developed Countries Fund and the Adaptation Fund.[20]

The **World Bank Carbon Finance Unit** (CFU) uses money contributed by governments and companies in OECD countries to purchase project-based greenhouse gas emission reductions in developing countries and countries with economies in transition. The emission reductions are purchased through one of the CFUs carbon funds on behalf of the contributor, and within the framework of the Kyoto Protocol's CDM or JI. There are numerous carbon funds and facilities each with a specialized focus and together with a total capital of $2.5 billion USD (i.e. Prototype Carbon Fund—the first carbon fund, now with 23 out of 24 projects generating emission reductions—Community Development Carbon Fund; Carbon Fund for Europe and BioCarbon Fund).[21]

Other international climate funds have proliferated under the purview of the UN, international organizations, multilateral banks and regional development banks. UNFCCC maintains catalogues of those funds with particulars as to, *inter alia,* the fund (i.e. African Development Fund), funding source (i.e. African Development Bank), nature of the disbursement (i.e. grant, technical assistance), and sectoral focus (i.e. forestry, agriculture). UNDP also administers Multi-Donor Trust Funds established to support specific country

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[19] Gordon, A. et al, *Forest Carbon Partnership Facility: Demonstrating activities that reduce emissions from deforestation and forest degradation* (Washington, DC: The World Bank), online: http://www.forestcarbonpartnership.org/fcp/node/13; Parker, C. et al, *The Little REDD+ Book: A updated guide to governmental and non-governmental proposals for reducing emissions from deforestation and degradation* (Oxford: Global Canopy Foundation, 2009) online: http://www.theredddesk.org/redd_book.

[20] Global Environment Facility, online: www.thegef.org.

[21] The World Bank, *Carbon Finance for Sustainable Development 2009 Annual Report* (Washington, DC: Carbon Finance at the World Bank, 2010), online: http://wbcarbonfinance.org/Router.cfm?Page=DocLib&ht=38&dtype=79&dl=0; The World Bank Carbon Finance Unit, online: http://wbcarbonfinance.org.

and/or global level strategic priorities, including emission reductions. Other recent international climate funds include the Climate Investment Fund of the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group; the Abu Dhabi Fund for Development administered in cooperation with IRENA; and a possible International Civil Aviation Organization green fund to purchase offsets from aviation-related industries.[22]

4.4. Debt-for-nature swaps

Early **debt-for-nature swaps** were typically an exchange between a developing country and a third party (i.e. NGO), whereby the third party purchased a portion of the country's unpaid debt on the secondary market in exchange for a commitment to replace natural resource exploitation with conservation of biodiversity or forests. Bilateral debt-reduction swaps between states are now also common (i.e. Enterprise for the Americas Initiative between the U.S. and seven Latin American countries worth $860 million). Swaps have also evolved into large-scale multi-donor investment funds backed by commitments to abate carbon intensive activities and to reinvest in sustainable energy (i.e. Ecuador's oil field Yasuni ITT Trust Fund administered by the UNDP Multi-Donor Trust Fund Office).[23]

4.5. Voluntary Instruments

Voluntary instruments are developing in parallel with state and interstate climate finance. They are similarly market-based but regulated by private standards and institutions.

Ecolabels and **voluntary sustainability initiatives** (VSIs)[24] are a market-based, voluntary approach to sustainable commodity production and trade, linking producers to consumers through certification regimes or unregulated advertising (i.e. Chilean organic, biodynamic and ISO 14001 wines). Support is growing in the private sector, government and international institutions for investment in and regulation of VSIs as a source of climate change mitigation. Suggested indicators to standardize environmental impact assessments of VSIs include energy, waste and GHG indexes.[25]

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[22] UNFCCC Funding for Adaptation, online: http://unfccc.int/adaptation/implementing_adaptation/adaptation_funding_interface/items/4638.php; UN Development Programme Multi-Donor Trust Fund Office, online: http://mdtf.undp.org; International Renewable Energy Agency, *Decision on the 2010 Work Programme and Budget* (IRENA/PC.3/dc/6) online: http://www.irena.org/ourMission/workProg.aspx?mnu=mis&page=3; Climate Investment Fund, online: http://www.climateinvestmentfunds.org/cif/; International Civil Aviation Organization, *Environmental Report 2010,* (Montreal: ICAO, 2010), online: www.icao.int.

[23] UN Development Programme Multi-Donor Trust Fund Office, online: http://mdtf.undp.org/yasuni; Reilly, W., "Using International Finance to Further Conservation: the first 15 years for debt-for-nature swaps" in Jochnick, C. & Preston, F.A., *Sovereign Debt at the Crossroads – Challenge and Proposals for Resolving the Third World Debt Crisis* (New York: Oxford University Press, 2006), online: http://www.oxfordscholarship.com/oso/public/content/economicsfinance/9780195168006/toc.html.

[24] The term 'voluntary sustainability initiative' is adopted from Potts et al, *The State of Sustainability Initiatives Review: 2010 Sustainability and Transparency* (International Institute for Sustainable Development and International Institute for Environment and Development, 2010), online: http://www.iisd.org/markets/.

[25] State of Sustainability Initiatives, *Preliminary List of Indicators – October 2009* (Sustainable Commodity Initiative, 2009), online: http://www.sustainablecommodities.org/front; Trade Standards Practitioners Network (TSPN) Conference on Climate Change and Standards Nov. 17-18, 2010, Bern Switzerland online: http://www.tradestandards.org/en/Article.154.aspx.

Carbon Exchanges (i.e. Chicago Climate Exchange, Montreal Climate Exchange, European Climate Exchange, Brazil Mercantile and Futures Exchange) facilitate a variety of carbon market trading activities, including matching buyers and sellers and holding auctions. Carbon exchanges may trade in voluntary market credits (where emitting members participate in a voluntary but legally binding cap-and-trade system including an offset program), European Union Allowances under the EU ETS (EUAs) and Kyoto Protocol Certified Emission Reductions (CERs).[26]

Voluntary offset purchase schemes are unregulated, project-based, voluntary initiatives that are verified and registered by certification organizations in order to be traded for voluntary carbon credits. Certifying organizations diffuse registration lists (i.e. Voluntary Carbon Standard, Gold Standard). Examples of offset schemes include the Qori Q'oncha Improved Cook Stove Diffusion Programme in Peru and the Babilonia Hydropower Project in Western Honduras.[27]

4.6. Valuing Ecosystem Services

Beyond valuing industrial and energy related GHG emissions, **valuing ecosystem services** could have a key role to play in future climate change mitigation. Natural ecosystems deliver services to human beings such as freshwater and food. Protecting and restoring ecosystems can also do much to regulate climate. Examples include the carbon sequestration potential of forests and emission reductions in agricultural production. Investment in 'ecological infrastructure' is a newly emerging climate finance instrument, recently synthesized in The Economics of Ecosystems and Biodiversity (TEEB) report hosted by, among others, UNEP and the European Commission. TEEB was welcomed at COP10 to the Convention on Biological Diversity.[28]

5. Contribution of International Law

5.1. Guiding provisions in UNFCCC agreements

The UNFCCC and agreements thereunder have contributed significantly to climate finance from the establishment of guiding principles to the creation of binding positive obligations. For instance, the Kyoto Protocol flexible mechanisms are mirrored in other regional and voluntary emissions trading and carbon offset schemes. Furthermore, although the Executive Secretary has stated that the Copenhagen Accord does not have legal standing within the UNFCCC process, its signatories did make financial commitments for the 2010-

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[26] Chicago Climate Exchange, online: http://www.chicagoclimatex.com/content.jsf?id=821; Mondo Visione Worldwide Exchange Intelligence "A survey of carbon exchanges" online: http://www.exchangehandbook.com/index.cfm?section=articles&action=detail&id=78451.

[27] Qori Q'oncha Improved Cook Stove Diffusion Programme in Peru, online: http://www.myclimate.org/en/carbon-offset-projects/international-projects/detail/mycproject/31.html; Babilonia Hydropower Project in Western Honduras online: http://www.southpolecarbon.com; Gold Standard Registry online: http://goldstandard.apx.com/index.asp; Voluntary Carbon Standard online http://www.v-c-s.org/.

[28] TEEB, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: a synthesis of the approach, conclusions and recommendations of TEEB* (2010), online: http://www.teebweb.org/; UNEP Green Economy Initiative, online http://www.unep.org/greeneconomy/; TEEB, *The Economics of Ecosystems and Biodiversity: Climate Issue Update* (2009), online: http://www.teebweb.org/InformationMaterial/TEEBReports/tabid/1278/Default.aspx; UN Conference of the Parties to the Convention on Biological Diversity, *Updating and Revision of the Strategic Plan for the Post-2010 Period Decision as Adopted (advance unedited version),* Art. 8, online: http://www.cbd.int/.

2012 period, including for REDD+. Some of the key UNFCCC related articles are reproduced below.

5.1.1. UN Framework Convention on Climate Change[29]

Article 2 Objective

> *The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*

Article 3 Principles

> *In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, INTER ALIA, by the following:*
> *1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*
> *2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.*
> *3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.*
> *4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.*
> *5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.*

[29] United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84 (1992), Article 2, online: http://unfccc.int/2860.php.

5.1.2. Kyoto Protocol[30]

Article 3

> *The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.*

Article 12 – Clean Development Mechanism

> *The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.*

Article 17 – Emissions Trading

> *The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article.*

Article 6 – Joint Implementation

> *For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy…*

5.1.3. Copenhagen Accord[31]

Article 8

> *Scaled up, new and additional, predictable and adequate funding as well as improved access shall be provided to developing countries, in accordance with the relevant provisions of the Convention, to enable and support enhanced action on mitigation, including substantial finance to reduce emissions from deforestation and forest degradation (REDD-plus), adaptation, technology development and transfer and capacity-building, for enhanced implementation of the Convention. The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010 - 2012 with balanced allocation between adaptation and mitigation. Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa. In the context of meaningful mitigation actions and*

[30] Kyoto Protocol to the UNFCC, 1/CP.1 (1998), online: http://unfccc.int/essential_background/kyoto_protocol/items/1678.php.

[31] UNFCCC, *Decision 2/CP.15 Copenhagen Accord,* FCCC/CP/2009/11/Add.1 (2009), online: http://unfccc.int/documentation/decisions/items/3597.php?such=j&volltext=2/CP.15#beg.

transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. New multilateral funding for adaptation will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed countries. A significant portion of such funding should flow through the Copenhagen Green Climate Fund.

5.2. Principles of Sustainable Development Law

Sustainable development law principles inspire and guide the process of design and implementation of climate finance. Sustainable development was defined in the Report of the Brundtland Commission (1987) as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[32]The UNFCCC recognizes the concept of sustainable development as well as related principles, such as 'common but differentiated responsibility' and 'precaution.' Those principles were expanded upon in the International Law Association *New Delhi Declaration on the Principles of International Law Related to Sustainable Development* (2002).[33] The **New Delhi Declaration** identifies a non-exhaustive list of seven interpretative principles, reproduced and annotated below.[34]

Duty of States to ensure sustainable use of natural resources: the environment, including the climate system, is a common concern of all humankind. States have sovereign management over their natural resources as well as responsibility to ensure that activities within their control do not cause significant damage to the environment in areas beyond their national jurisdiction. States are under a duty to manage natural resources in a sustainable manner for present and future peoples and ecosystems.

Common but differentiated responsibility: all States are under a duty to cooperate to achieve sustainable development and environmental protection. Differentiation of responsibilities is based on historic contributions to environmental problems and present socio-economic capacity of States. Developed countries bear a special burden to address environmental concerns and contribute to capacity building in developing countries.

Equity and poverty eradication: equity includes both inter-generational (present and future generations) and intra-generational (all peoples within the current generation) aspects. The right to development is realized by meeting the needs of present and future generations, including through poverty eradication.

Good governance: governance structures must adopt democratic and transparent decision-making procedures, take effective measures to combat corruption, respect due process and observe the rule of law, and implement a public procurement approach.

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[32] United Nations World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), online: http://www.un-documents.net/ocf-02.htm#I.

[33] ILA Resolution 3/2002: *New Delhi Declaration of Principles of International Law Relating to Sustainable Development,* in ILA, Report of the Seventieth Conference, New Delhi (London: ILA, 2002), online: http://www.ila-hq.org (New Delhi Declaration).

[34] Analysis taken from *The Principles of International Law Related to Sustainable Development,* (Montreal: CISDL, 2005) online http://www.cisdl.org/programmes.html.

Integration: the social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development are interdependent. All levels of government and all sectors of society must implement the integration principle with a view to resolving conflicts between competing considerations.

Public participation and access to information and justice: civil society must be empowered to participate in environmental decision-making processes; to access appropriate, comprehensible and timely information held by governments; and to access judicial or administrative procedures so as to challenge or enforce environmental decision-making.

Precaution approach: States, international organizations and civil society must take a precautionary approach to avoid human activity that negatively affects human health, natural resources and ecosystems, even in the face of scientific uncertainty.

5.3. Legal Principles in Other International Regimes

International legal principles, and in particular the principle of 'integration,' pressure other international regimes affecting climate finance towards coherence with practices for climate change mitigation and adaptation.[35]

Sectoral, investment and trade agreements can restrict business-as-usual activities in order to account for, or promote, sustainable development. Examples include provisions for socio-economic impact assessments; interpretive approaches to free trade and investment rules; and regulations in favour of low carbon policy priorities. Those instruments may be established in specific environmental cooperation accords (i.e. North American Agreement on Environmental Co-operation), in comprehensive environmental chapters (i.e. Central America-Dominican Republic-United States Free Trade Agreement) or in exception clauses to general obligations (i.e. World Trade Organization General Agreement of Trade and Tariffs, Article XX).[36] Moreover, adjudicative bodies may take public policy on environmental protection into account in interpreting the protections provided to investments in "like circumstances" (i.e. Bilateral Investment Agreements) or trade in "like products" (i.e. Free Trade Agreements).[37]

5.4. International Law and Domestic Legal Preparedness

Continuing global climate negotiations and domestic attempts to attract climate finance interact to create feedback loops. International law and climate finance respond to States' demands for financial assistance. For the global climate regime to function effectively, however, **domestic legal and institutional preparedness** is essential. In particular, developing countries require strengthened legal capacity to overcome common barriers to

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[35] S. Jodoin, "Draft Working Paper: The Principle of Integration and Interrelationship in Relation to Human Rights and Social, Economic and Environmental Objectives" in *A Legal Working Paper in the CISDL 'Recent Developments in International Law Related to Sustainable Development' Series* (Montreal: CISDL, 2005), online: www.cisdl.org/pdf/sdl/SDL_Integration.pdf.

[36] Organisation for Economic Co-operation and Development, *Environment and Regional Trade* (Paris: OECD Publications, 2007), online: http://oberon.sourceoecd.org/vl=2773286/cl=29/nw=1/rpsv/~6678/v2007n15/s1/p1l; The General Agreement on Tariffs and Trade (1947) online: http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm.

[37] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report), online: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm#r58.

climate finance. Issues of particular concern include land rights, anti-corruption, compliance and enforcement of law and contracts and adherence to human rights.[38] Together with organizations such as the International Development Law Organization (IDLO) and the CISDL, several countries are developing new laws and legal reforms to address those barriers. The IDLO and CISDL have an ongoing joint project to enhance "the capacity of developing countries to implement domestic and international law on sustainable development law [which] requires clarification of the relevant legal principles and diffusion of useful, practical legal best practices and innovations."[39]

6. Conclusions

A complex web of public and private international instruments governs climate change mitigation and adaptation, and socio-economic development. Despite the multifaceted and dynamic nature of climate governance, however, there are at least two constants: finance and legal structure. This CISDL Working Paper provides a general summary of select climate finance instruments as well as related international law principles.

Climate finance is necessary to effectuate revisions to existing patterns of production and consumption that are needed for sustainable development. International law guides, designs and reinforces climate finance, whether under the UNFCCC process or under myriad other regional, multilateral and bilateral institutions.

Not only do principles of international law give guidance to climate finance instruments but they also have potential to influence the global economic system as a whole. For instance, the Kyoto Protocol flexibility mechanisms have given life to an entirely novel financial market based on a new form of currency: CO2 equivalents.[40] Moreover, in placing restrictions on business-as-usual investment and trade activities, the concept of sustainable development may well eventually alter what business-as-usual is.

Nevertheless, international law and climate finance instruments must be receptive to feedback from lessons learned in domestic regulation and practical project experiences. Legal preparedness on a domestic level must equally receive due attention for international instruments to achieve the objective of sustainable development. To that end, several international organizations, including the IDLO and CISDL, are increasingly focusing their efforts on the intersection between international law, climate finance and domestic legal preparedness for real and measurable results.

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[38] International Development Law Organization, "IDLO Warns Climate Change Mechanisms Will Fail Without Strengthened Legal Capacity in Developing Countries" IDLO (15 December 2009), online: www.idlo.int/DocNews/407doc.pdf.

[39] CISDL, *The Scope, Objectives, Partners and Audience of Sustainable Development Law Capacity-Building Manuals in Water Management, Desertification/Land Reform and Climate Change* (Montreal: CISDL, 2005).

[40] S. Bernstein et al, "A Tale of Two Copenhagens: Carbon Markets and Climate Governance" (2010) 39(I) Millennium: Journal of International Studies 161.

The mission of the Centre for International Sustainable Development Law (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

The CISDL is an independent legal research centre which collaborates with the McGill Law Faculty in engaging students and interested faculty members in sustainable development law research and scholarly initiatives. The CISDL also works in cooperation with a network of developing country faculties of law, and is developing closer ties with the Cambridge University Faculty of Law, the Université de Montreal, Capetown University and the University of Costa Rica. It has guidance from the three Montreal-based multilateral treaty secretariats, the World Bank Legal Vice-Presidency, the United Nations Environment Programme and the United Nations Development Programme, and a memorandum of understanding with the International Institute for Sustainable Development (IISD).

With the International Law Association (ILA) and the International Development Law Organisation (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership Initiative, International Law for Sustainable Development that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity about international law on sustainable development.

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