Impact of Climate Change on Africa and the Challenges of the Dispute Resolution Regime under the Kyoto Protocol

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Abstract

Nations of the world have designed various strategies and means to protect them from the effect of climate change. One major affirmative action taken by the nations is the agreement to enter into a legally binding Multilateral Environmental Agreement (MEA) towards reducing the effects of climate change. This international environmental treaty is known as the Kyoto Protocol. The Protocol is designed to reduce greenhouse gas emission while allowing parties to implement trade mechanisms to achieve such reductions. An effective dispute resolution regime is thus imperative for the success of this Protocol. However, the Protocol presents special challenges in the operation of its dispute resolution mechanism. For the first time under an international environmental treaty, the private sector and non-governmental organizations (NGOs) are expected to play crucial role, together with nation-states, in fulfilling the Protocol's objectives. Given the Protocol's complexity in the implementation of the flexible mechanisms, any dispute resolution mechanism designed under the Protocol must be flexible, appropriate and provide predictability to its participants. Thus the paper examines the trade mechanism of the Kyoto Protocol and likely disputes under the Protocol. Furthermore, an examination of the challenges that may affect the efficacy of the dispute resolution regime under the Kyoto Protocol is also undertaken.

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Introduction

Scientific findings have increasingly shown that human activities substantially contribute to the atmospheric concentration of green house gases and its consequential effects, which together has led to increased warming of the earth's surface and atmosphere.[1] The rise in temperature has resulted in the frequency and intensity of extreme weather conditions causing climate change. However, even though climate change is a global phenomenon, the negative impact is unevenly felt depending on the adaptive capacity of the individual nations. African nations like most developing nations are most exposed to climate change because they lack the requisite adaptive wherewithal to cope with it.

The emergence of disasters of climate change has moved nations of the world to design some plans and ways to protect them from the effect of climate change; one of which is the agreement to enter into a legally binding Multilateral Environmental Agreement (MEA) that will enhance the beneficial use of the environment and reduce the effects of climate change. Thus, the drafting of an international environmental treaty called the 'Kyoto Protocol to the United Nations Framework Convention on Climate Change'.[2]

The Protocol is designed to reduce greenhouse gas emission while allowing parties flexibility in implementing the trade mechanisms available in the protocol to achieve such reductions. Due to the commercial nature of the compliance mechanisms stipulated under the Protocol, disputes become inevitable[3]; and

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[1] Wang, X. and Wiser, G. 'The implementation and the compliance regimes under climate change convention and its Kyoto Protocol', (2002) 11 (2), *RECIEL*, p.1.

[2] It will be referred to henceforth as "the Kyoto Protocol". The Protocol was adopted in the early hours of 11th December 1997 in Kyoto, Japan, after almost 72 hours of round the clock negotiations and it came into force on 16th February 2005. See Kyoto Protocol to the United Nations Framework Convention on Climate, United Nations 1998. For the protocol to come fully into force, the pact needed to be ratified by countries accounting for at least 55% of 1990 carbon dioxide emissions. With countries like the US and Australia unwilling to join the pact, the key to ratification came when Russia, which accounted for 17% of 1990 emissions, signed up to the agreement on 5th November 2004. See Kyoto Protocol, *http://unfccc.int/resource/docs/convkp/kpeng.pdf* accessed on 26/04/10.

[3] It is a known fact that 'disputes are inevitable in any society' as long as there are interactions and relationship of whatever kind between the persons in that

certain types of likely and actual disputes have been identified.[4] This thus calls for an effective dispute resolution regime for the success of the Protocol. But it is observed that the Protocol inherently carries certain special challenges in the operation of its dispute resolution mechanism due to the fact that unlike many other multilateral international environmental agreements, it permits the participation of the private sector and non-governmental organizations (NGOs) which are expected to play crucial roles together with nation-states, in fulfilling the Protocol's objectives.[5] It is however expected that due to the complex nature of implementation of the flexible mechanisms, any dispute resolution machinery designed under the Protocol must equally be flexible, appropriate and should be predictable.[6]

Consequently, this paper examines the meaning and causes of climate change. Furthermore, the paper examines the effects of climate change particularly with respect to Africa and the need for African nations to be part of global efforts made to stem the effects of climate change. In order to determine, the kind of disputes envisaged under the Protocol, the paper also did an examination of the trade mechanism of the Kyoto Protocol. Finally, an examination of the potential challenges that may affect the efficacy of the dispute resolution regime under the Kyoto Protocol was also undertaken.

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society. See Richard B. Bilder, 'An overview of International Dispute Settlement' (1986) 1 (1) *Emory Journal of International Dispute Resolution*, p.1.

[4] For discussion on the likely and actual disputes that could and have arisen in relation to the Protocol, see: Chester Brown, 'International, Mixed, and Private Disputes Arising Under the Kyoto Protocol' (2010) 1 (2) *J Int. Disp. Settlement*, pp. 447-473 (doi: 10.1093/jnlids/idq004) *http://jids.oxfordjournals.org/content/1/2/447.full#fn-89* accessed on 9 June 2013.

[5] See Simonetti, S. 'Access to Justice for the Private Sector in Joint Implementation Projects under the Kyoto Protocol'- A Brief Study of Possible Disputes and Remedies Available to Private Participants in International Carbon Emission Reduction Projects, EUI Working Papers RSCAS 2010/08, Robert Schuman Centre For Advanced Studies, Florence School of Regulation, p.2; *http://cadmus.eui.eu/dspace/bitstream/1814/13179/1/RSCAS_2010_08.pdf*; accessed on 28/04/10. See also Kalas, P. R. and Alexia, H., 'Dispute Resolution under the Kyoto Protocol' (2000) 27 (1) *Ecology Law Quarterly*, p.53.

[6] Kalas, P.R. & Alexia, H, ibid., p.119.

Climate Change: Meaning and Causes

Historically, the science of climate change has been an uncertain field.[7] In recent time, however, there is a growing scientific consensus on anthropogenic climate, driven in part by the efforts of around 2,500 scientists in the IPCC[8] and its working groups since 1990.[9] It is a known fact that throughout the millions of years of the earth's existence, its climate has not been static. It has changed many times in response to natural causes.[10] However, current discourse on climate change means a change in climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[11]

Major causes of climate change are essentially by natural causes (since time immemorial) and human activities (more recently).[12] Natural activities such as interaction of the oceans and the atmosphere, changes in the earth's orbit, changes in the energy received from the sun and volcanic eruptions have often times varied climate change.[13] Research has however shown that in the last 140 years, human activities have constituted the major cause of

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[7] TFS Green, 'An Introduction to the Kyoto Protocol' *http://www.tfsgreen.com/global-markets/kyoto-protocol/* accessed on 28/04/10.

[8] IPCC means the Intergovernmental Panel on Climate Change. It was established in 1988 jointly by the World Meteorological Organisation and the United Nations Environmental Programme, see Article 1(3) of the Kyoto Protocol.

[9] TFS Green, op. cit.

[10] According to the Secretariat of the United Nations Framework Convention on Climate Changes (UNFCCC), over the last century, atmospheric concentration of carbon dioxide increased from a pre- industrial value of 278 parts to 379 parts per million in 2005, and the average global temperature rose by 0.74°c. See: UNFCCC, Climate Change: Impacts, Vulnerabilities And Adaptation In Developing Countries, p.8, *http://unfccc.int/resource/docs/publications/impacts.pdf* accessed on 26/04/10.

[11] See Article 1(2) of the United Nations Framework on Climate Change (UNFCCC).

[12] Nidirect, 'Causes of climate change' *<http://www.nidirect.gov.uk/index/information-and-services/environment-and-greener-living/climate-change-2/causes-of-climate-change.htm>* accessed on 07/06/13.

[13] Ibid.

climate change.[14] Indeed the parties to the United Nations Framework Convention on Climate Change (UNFCCC)[15] took this into consideration in the preamble to the Convention when they noted with concern 'that human activities have been substantially increasing the atmospheric concentration of greenhouse gases and that these increases enhance the natural greenhouse effect, and this will result on average in an additional warming of the earth's surface and atmosphere'.[16]

Meaning of Greenhouse Gases (GHG)

The earth is enclosed in a layer of gases that acts like the glass walls and ceiling of a greenhouse, which allows sunlight in but traps in heat. GHG[17] are gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infra red radiations.[18] The GHG are necessary to sustain life on earth,[19] because they let the sun's rays enter, but stop much of the heat from escaping, thus keeping the planet warm enough to allow life.[20] However, as a result of human's activities more GHG are released into the atmosphere and the GHG effects become

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[14] The IPCC assessment reports in 1995 noted that 'the balance of evidence suggests a discernible human influence on global climate'. IPCC findings also indicate that the 20th century was characterised by lessened snow and seasonal ice cover and rising sea level and ocean temperature. See IPCC Second Assessment Report in 1995, *http://www.grida.no/climate/ipcc_tar/* accessed on 08/04/10 and IPCC Third Assessment Report in 2001, *http://www.ipcc.ch/pub/sa(E).pdf* accessed on 08/04/10 and IPCC Fourth Assessment Report in 2007.

[15] Hereinafter known as the Convention.

[16] See Preamble to the UNFCC 1992, United Nations 1992, FCCC/INFORMAL/84 GE.05 -62220 (e) 200705, *http://unfccc.int/resource/docs/convkp/conveng.pdf* accessed on 28/04/10.

[17] GHG mainly consist of carbon dioxide (CO2), methane (CH4) and nitrous oxide (N20).

[18] Article 1 of the Convention.

[19] Lauren, B.D, 'United Nations Framework Convention on Climate Change', New York, 9th May, 1992, *http://untreaty.un.org/cod/avl/ha/ccc.html* accessed on 08/04/10.

[20] Nidirect, op. cit. See also UNFCCC, 'Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries', p.8.

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stronger. Thus, more heat is trapped and the earth's climate begins to change unnaturally.[21]

Causes of GHG Effect/Climate Change

Two activities can be identified as major ways by which humans have and are continuing to change the amount of GHG in the atmosphere. The first activity is the burning of fossil fuel like oil, gas and coal. Research shows that in 2005, burning fossil fuels released about 27 billion tonnes of carbon dioxide into the atmosphere.[22] People burn fossil fuels to create energy, which is used for many things including:[23]

- heating homes and buildings,
- growing, transporting and cooking food,
- travelling (by car, plane, bus and train),
- treating water to make it drinkable, heating it and piping it into homes,
- manufacturing, using and transporting products (like clothes, fridges, plastic bags, batteries etc).

The second human activity is deforestation i.e. the rates at which forests are cut down faster than they are replaced. It is known that deforestation causes 5.9 billion tonnes of CO_2 per year to be released into the air, this constitutes about a quarter of all carbon emissions.[24] Forests are the lungs of our planets, breathing in carbon and exhaling out oxygen.[25] Thus as fewer trees are left to absorb CO_2, it builds up in the atmosphere. In addition to the foregoing, modern agricultural practices also constitute a source of climate change. For example, nitrous oxide from chemical

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[21] Ibid; CO_2 is a major component of the GHG and one of the important characteristics of CO_2 is its ability to trap heat. Thus a rise in the concentration of CO_2 causes a rise in the amount of heat from the sun withheld in the earth's atmosphere thus leading to global warming.

[22] Nidirect, op. cit.; see also UNFCCC, op. cit., p.8.

[23] Ibid.

[24] Ibid.

[25] Bob Dewar, 'Climate Change and Nigeria's Forests' Guardian Newspaper, (Nigeria 14 May 2009) *http://www.climateark.org/shared/reader/welcome.aspx?linkid=127520* accessed on 28/04/10.

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fertilisers and methane given off by animals and manure also have significant impacts on the GHG.[26]

Effects and Impacts of Climate Change in Africa

A derivative of climate change is the problem of global warming,[27] which in turn leads to increment in floods and drought. Even though climate change is a global phenomenon, its consequences are not evenly distributed.[28] African nations are vulnerable to the frequency and intensity of these extreme weather conditions.[29] As temperatures increase and rainfall patterns change, it is predicted that millions of people in Africa face shortages of water and food and greater risks to health and life as a result of climate change.[30] The vulnerability of the African nations can also be inferred from the preamble to the Convention which recognises the fact "that low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change."[31] In Oxfam International's briefing paper on food crisis in Africa[32], climate change is identified as one of the 'unprecedented' threat to hunger in the continent and that

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[26] Nidirect, op. cit.

[27] Ibid. It means increasing warming of the earth's surface.

[28] Margaret Chan, 'The Impact of Climate Change on Human Health', WHO; *http://www.who.int/mediacentre/news/statements/2008/s05/en/index.html* accessed on 13/04/10.

[29] Oxfam International, 'Causing Hunger: An Overview of the Food Crisis in Africa', 91 Oxfarm Briefing Paper, July 2006 <*http://www.oxfam.ca/sites/default/files/causing-hunger-the-food-crisis-in-africa.pdf*> accessed on 7/06/13.

[30] Nidirect, op. cit.; UNFCCC, op. cit., p.18; Oxfam International, ibid., pp. 1 and 24 citing Anthony Nygong, 'Impacts of Climate Change in the Tropics: the African Experience', (2005) University of Jos, Nigeria. See also Christian Aid (2006) 'The climate of poverty: facts fears and hope', <*www.christian-aid.org.uk/indepth/605caweek/index.htm.*> accessed on 8/6/13.

[31] See preamble to the United Nations Framework Convention on Climate Change, 1992 but entered into force on 21 March 1994. It is now ratified by 195 states. See UNFCCC, 'First steps to a safer future: Introducing the United Nations Framework Convention on Climate Change' *http://unfccc.int/key_steps/the_convention/items/6036.php* accessed on 8/6/13.

[32] Oxfam International, op. cit.

the most susceptible are the nomadic pastoralists and small landholders who rely mainly on rain-fed agriculture.[33] The report further notes that:

> Climate data for Africa for the last 30–40 years show that the continent has been warming, contributing to more erratic but intense rains, in other words more droughts but also more floods. It is estimated that desertification is advancing at an annual rate of 3.5 per cent in sub-Saharan Africa, with much higher rates in the arid and semi-arid areas. If current trends continue, some climate models predict that by 2050 Africa will be warmer by 0.5–2 degrees Celsius, with less rainfall and higher evaporation rates in northern and Southern Africa.[34]

African nations like other developing nations are vulnerable to climate change because they have fewer resources to adapt socially, technologically and financially.[35] There is a gloomy forecast that climate change is anticipated to have far reaching effects on the sustainable development of African nations including their ability to attain the United Nations Millennium Development Goals by 2015.[36] Nations of Africa have very different individual circumstances and the specific impacts of climate change on a country vary from place to place.[37] However, there are cross cutting issues which apply across countries and

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[33] Ibid., p.1. See also M. Parry *et al.* 'Climate change and world food insecurity: a new assessment', (1999) Global Environmental Change, p.9.

[34] Oxfam International, op. cit., pp. 24 – 25.

[35] UNFCCC, Climate Change: Impacts, Vulnerabilities And Adaptation In Developing Countries, p.18; even though the world's least developing countries contribute only 10% of annual global carbon dioxide emissions, their people will be hardest hit by climate change. See *http://www.nature.org/initiatives/climatechange/issues/* accessed on 13/04/10.

[36] See National communications of non-Annex I Parties and UNFCCC Sixth compilation and synthesis of initial national communications from Parties not included in Annex I to the Convention. Note by the Secretariat, *<http://unfccc.int/documentation/documents/advanced_search/items/3594.php?rec=j&priref=600003578#beg>* accessed on 26/04/10. See also Oxfam International, op. cit.; M. Parry *et al.*, op. cit.

[37] UNFCCC, op. cit. p.18;

regions of Africa.[38] Some areas where the African Nations have commonality of problems and challenges as a result of climate change include amongst others;[39]

- **Food and water shortage**: as temperature increases and rainfall patterns change, crop yields are expected to drop significantly. Furthermore, water available for irrigation and drinking will be less predictable because rain will be more variable.
- **Increase rate of disease**: with rising temperature, spread of climate-sensitive diseases like malaria, West Nile Disease, dengue fever and river blindness will be on the increase.[40]
- **Depletion of rain forests**: If climate change results in big falls in rainfall, large areas of rainforests could be lost in the west and central African rainforest.
- **Flooding and desertification**: the frequency and intensity of extreme weather conditions can cause rising sea levels which can put millions of people in the coastal zones at risk of flooding. Global warming may also lead to drought in some areas thus quickening the rate of desertification.[41]

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[38] Ibid.

[39] Nidirect, op. cit.; see generally, Boko, M., *et al*, 'Africa' in Parry, M. L., *et al* (eds.) *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge University Press, Cambridge, 2007) 433-467 <*http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch9.html*> accessed on 28/04/10. See also Christensen, J. H., *et al*, 'Regional Climate Projections' in Solomon S, *et al* (eds.), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge and New York) pp. 847-940.

[40] See The Nature Conservancy, 'Climate Change Impact, Feeling the Heat' *http:www.nature.org/initiatives/climagechange/issues* accessed on 13/04/10.

[41] Nasiru Idris Medugu, 'Climate Change: A Threat to Nigeria's Development', *Daily Trust* (Nigeria 14 July 2009) *http://allafrica.com/stories/200907140517.html*, accessed on 13/04/10; Elisha Bala-Gbogbo, 'Climate Change Effects Mounts in Nigeria' *http://234next.com/csp/cms/sites/Next/Money/Business/5487305-147/story.csp* accessed on 13/04/2010.

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The foregoing prognoses arising from an increasing but unchecked global warming are rather alarming. The effects of climate change are certainly devastating. As a result of the looming disaster, nations of the world are preparing themselves to be better able to cope with the risk of climate change.[42] They are designing right measures to reduce the effects by making the appropriate adjustments and changes. Africa cannot therefore afford to miss out of any global initiative intended to reduce the causes and effects of climate change.[43]

It is observed that the majority of GHG emissions come from the developed and industrialised countries where large scale industry and factory works go on; and Africa, which harbours mostly underdeveloped and developing countries[44] with few or no industries contributes the least of the GHG emission.[45]

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[42] Segun Imohosen, 'Post-Copenhagen Summit: Nigeria in Perspective' *Weekly Trust* (Nigeria 15 January 2010) *http://weekly.dailytrust.com/index.php?option=com_content&view=Article&id=2208:-post-copenhagen-summit-nigeria-in-perspective&catid=1:comments&Itemid=109* accessed 14/04/2010.

[43] According to the Stern Review, the cost of inaction on climate change far outweighs the cost of action. In his report, Lord Nicholas Stern notes that the world will need only spend one percent to two percent of global GDP on mitigation, but that failure to act, could cost up to 20 percent. See Stern N, 'The Stern Review on the Economics of Climate Change' (HM Treasury, UK, Cambridge University Press 2006) *http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/ sternreview_index.cfm* accessed on 21/04/10.

[44] J.G. Canadell, *et al.*, 'Anthropogenic CO2 emissions in Africa' (2009) 6 Biogeosciences, p. 463 <*http://www.biogeosciences.net/6/463/2009/bg-6-463-2009.pdf*> accessed on 10/6/2013.

[45] According to Grid-Arendal and UNEP's report, "... Africa's contribution through greenhouse gas emissions is insignificant. When comparing the greenhouse gas emissions per capita in the typical African country with the typical European country, the Europeans emit roughly 50-100 times more, while the Americans emit 100-200 times more." See Grid-Arendal and UNEP, 'African emissions: African major sources of GHG, emissions per capita, and comparison with emissions from other countries' <*http://www.grida.no/publications/vg/africa/page/3113.aspx*> accessed on 10/6/13. See also J. G. Canadell, op. cit., and the Report of the 8th Meeting of the Africa Partnership Forum, Berlin, Germany, May 22-23, 2007, titled *Climate Change and Africa*, p. 3, <*http://www.africapartnershipforum.org/dataoecd/57/7/38897900.pdf*> accessed on 10/6/13.

Notwithstanding the minimal contribution of Africa to the climate change, concerns have been growing that the continent is potentially one of the largest contributors to the GHG emissions.[46] It has however been argued that the factors that contribute to this relate more to institutional problems in the continent than direct human activities of the inhabitants. Jarso identifies the institutional factors to include impotent political leadership, corruption and economic mismanagement, continued impoverishment and worsening food insecurity, culture of marginalisation, and global inaction and unreliable pledges.[47]

The Kyoto Protocol

The Kyoto Protocol is a protocol to the Convention, aimed at fighting global warming. The Convention is an international environmental treaty[48] with the goal of achieving stabilization of

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[46] UNFCCC, 'Fact Sheet: The need for mitigation', pp. 2 and 5 <*http://unfccc.int/files/press/backgrounders/application/pdf/press_factsh_mitigation.pdf*> accessed on 10/6/13. See also J. G. Canadell, *et al*., op. cit.

[47] James Forole Jarso, 'Africa and the Climate Change Agenda: Hurdles and Prospects in Sustaining the Outcomes of the Seventh African Development Forum' (2011) Sustainable Development Law & Policy, pp. 41-42. For similar discussion on related topic (sustainable development), see M. K. Imam – Tamim, 'Challenges of Sustainable Development in Nigeria: Legal Perspectives' In Egbewole, W.O., Etudaiye, M. A. and Olatunji, O. A. (eds.) *Law and Sustainable Development in Africa* (Faculty of Law, University of Ilorin: Ilorin, 2012). See also NIALS, 'Communique of a one day Roundtable on Adaptation and Climate Change: Capturing Essential Synergies for Nigeria (Post-Copenhagen)' (held at the Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria on 8th June, 2010) p.1 <*http://www.nials-nigeria.org/round_tables/CommuniqueonMitigationAdaptation.pdf*> accessed on 10/6/2013.

[48] The Kyoto Protocol and the Convention are examples of Multilateral Environmental Agreements (MEAs). MEAs are cooperative means of protecting and conserving environmental resources or controlling pollution that is transboundary in nature. See Aditi, M. and Siddharth, D., 'Multilateral Environmental Agreements versus World Trade Organisation System: A Comprehensive Study' (2009) 1(3) *American Journal of Economics and Business Administration* 219. Some other examples of MEA include: Long-Range Transboundary Air pollution Treaty 1979; United Nations Convention on the Law of the Sea (UNCLOS) 1982; Vienna Convention on the Protection of the Ozone Layer 1985; Montreal Convention; 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal 1987 and the

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greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, to be achieved within a time frame.[49] Under the Convention, industrialised countries are encouraged to meet voluntary targets of GHG reduction. There are however no binding obligations in the Convention on individual States to take action to prevent impacts of GHG emissions originating from their territories. On the other hand, the Kyoto Protocol is the first international treaty to set legally binding emission cuts for industrialised nations,[50] here lies the distinction between the Protocol and the Convention. While the Convention encourages industrialised nations to stabilise GHG emissions, the Protocol commits them to do so.[51] Pursuant to the objectives of the Protocol, developed nation-parties are required to be committed to modest reduction targets over the next few years.

Mechanisms under the Kyoto Protocol

The Protocol quantifies emission limitations and reduction commitments of the greenhouse gases listed in Annex A[52] for the parties listed in Annex I to the Convention.[53] Under the treaty,

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Convention for the Protection of the Marine Environment of the North-East Atlantic 1992.

[49] See Article 2 of the Convention. The Convention was signed in 1992 at the Earth Summit, which took place in Rio de Jeneiro. It came into force on 21st March 1994 and now has 191 parties.

[50] Meinhard Doelle, 'Climate Change and the use of the Dispute Settlement Regime of the Law of the Sea Convention', p.3 *http://law.dal.ca/Files/Climate_Change_and_the_use_of_the_Dispute_Settlement_Regime_.pdf*, accessed on 26/04/10.

[51] Nidirect, op. cit.

[52] Essentially, the Kyoto Protocol seeks to control the following basket of six greenhouse gases i.e. Carbon Dioxide CO2, Methane CH4, Nitrous Oxide N20, Hydrofluorocarbons HFC, Perflurorocarbons PFC, Sulphur hexafluoride SF6. See the IPCC Second Assessment Report in 1995.

[53] Article 3 of the Kyoto Protocol. While each Annex I party is assigned an individual target amount, the aim is that the aggregate Annex I targets will reduce overall emissions of such gases by at least 5 per cent below 1990 levels by the commitment period of 2008 to 2012; see UNEP, 'Comparative Analysis of Compliance Mechanisms Under Selected Multilateral Environmental Agreements' (Nairobi, December 2005) *http://74.6.146.127/search/cache?ei=UTF-8&p=Compliance+Mechanisms+Under+Selected+Multilateral+Environmental*

countries are mandated to meet their targets principally through domestic policies and measures.[54] However, the Protocol provides additional means of meeting these targets using a number of flexibility mechanisms to assist parties to achieve their emission reduction commitments: to wit; Joint Implementation (JI), Clean Development Mechanism (CDM) and Emission Trading (the carbon market).

- **Joint Implementation (JI)**

Under Article 6 of the Protocol, Annex I parties may reach agreements to meet commitments jointly, thus adjusting their relative emissions commitments between themselves, provided their total combined emissions do not exceed the sum of the amounts set out for them in Annex B. It is argued that this mechanism is useful only in the context of a highly integrated economic bloc such as the European Union, which seeks to protect industrial development within particular members.[55]

The Protocol allows Annex I countries to acquire 'emission reduction permits' resulting from projects with other Annex I Parties with the aim of reducing emissions or enhancing natural carbon sinks.[56] In other words, there is provision for Joint Implementation projects which enhance sinks or reduce emissions to be undertaken jointly between Annex I parties. Furthermore the resultant 'emission reduction units' can be transferred from the project's host country to benefit the project's investor country. However, any such project must be supplemental to domestic actions for the purposes of achieving the commitments under Article 3.[57]

+Agreements&fr=slv8-msgr&u=www.unep.org/DEC/docs/Compliance.Mechanisms.comparative.analysis.doc&w=compliance+mechanisms+mechanism+under+selected+select+selection+multilateral+environmental+agreements+agreement&d=UQ7eX-8_Ui2d&icp=1&.intl=uk&sig=1WKb7fh.3FBK7GRY90GA1Q--, accessed on 24/04/10.

[54] Article 2 of the Kyoto Protocol.

[55] See UNEP, op. cit.

[56] Ibid.

[57] Ibid; see also Catherine Redgwell, 'Non-Compliance Procedures and the Climate Change Convention', p.21 *<http://www.geic.or.jp/climgov/03.pdf>* accessed on 26/04/10.

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- **Clean Development Mechanism (CDM)**

The CDM is established under Article 12 of the Protocol. According to Article 12(2) of the Protocol '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'.

What Article 12 accomplishes is to provide a mechanism whereby Joint Implementation between Annex I and non-Annex I Parties may take place, with Annex I Parties implementing quantifiable emission reductions under Article 3 of the Protocol while non-Annex I Parties implement the obligations set forth in the Convention.[58] It is imperative to note that although developing countries (non-Annex I) have no mitigation commitments under the Kyoto Protocol, they must still meet strict monitoring requirements for CDM emission reduction projects.[59] Basically, the CDM allows Annex I parties to invest in projects that enhance sinks or reduce emissions in non-Annex I countries. Annex I parties may use the certified emission reductions accruing from such projects to contribute to compliance with their commitments under Article 3.[60]

- **Emission Trading (the carbon market)**

Article 3 of the Protocol envisages an emissions trading system which will establish a carbon market amongst Annex I Parties in emission credits. Annex I parties are permitted to trade emissions reductions between them.[61] Thus, where a developed country has reduced its emissions beyond its obligations as set out in Annex B,

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[58] Ibid.

[59] Michael Gillenwater, 'The Treaty Compliance Challenge: Enforcement under the Kyoto Protocol', Inside the Institute *http://ghginstitute.org/2010/02/10/the-treaty-compliance-challenge-enforcement-under-the-kyoto-protocol/* accessed on 20/04/10.

[60] UNEP, op. cit..

[61] Ibid; Catherine Redgwell, op. cit., p.21. Any trading is expressed to be supplemental to domestic actions to meet reduction commitments. See Article 17.

it is in 'credit'. It can then sell this credit to a developed country that would find it more expensive to reduce its emissions.[62]

Market-Based Mechanisms in Kyoto Protocol: Potentials for African Nations

The aim of the flexible mechanisms established under the Kyoto Protocol is to help stimulate green investment and help Parties meet their emission targets in a cost-effective way.[63] No wonder, it has been rightly canvassed that the Kyoto Protocol should be considered as much a trade agreement as an environmental agreement.[64] Based on this premise, it is safe to conclude that the enactment of the Kyoto Protocol envisages a green investment regime amongst the contracting parties.

However, a pertinent query arising from the implementation of the flexible mechanisms under the Kyoto Protocol is the extent of the potentials they hold for African nation-parties? In other words, what benefits does the market-driven regime of the Kyoto protocol have for the African nations? The area that readily comes to mind is the window of opportunities available under the green investment regime arising from the creation of a global carbon market. How can the nations of Africa key into the potentials of the green investment regime?

A consideration of the flexible mechanisms discussed above shows that the Clean Development Mechanism (CDM) is the one that holds the most potentials for the African nations in this new investment regime. A major objective of the CDM is to promote flows of capital from developed to developing countries.[65] Article 12 provides that the CDM project activities should assist developing countries in achieving sustainable development, and should promote real, measurable and long-term benefits. The

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[62] UNEP, op. cit.
[63] Nidirect, op. cit.
[64] Meinhard Doelle, op. cit., p.3.
[65] United Nations University, 'Private Sector, Compliance and Standard Forms: Inter-linkages with Private Contractual Regimes' in *Global Climate Governance -A Report on the Inter-Linkages between the Kyoto Protocol and other Multilateral Regimes being A Project of the United Nations University the Global Environment Information Center and the UNU Institute of Advanced Studies.* UNU / GEIC / IAS - Global Climate Governance, p.26, *http://www.geic.or.jp/climgov/Unu_repo.pdf* accessed on 26/04/10.

implementation of the CDM will no doubt stimulate investments in the developing world especially in Africa.[66] It is expected to promote the inflow of Foreign Direct Investments (FDI) thereby leading to the injection of funds into the national economies and the creation of employment opportunities, which will in turn provide opportunities for African countries to participate in the global economy.

It is expected that the private sector will play a significant role in a CDM-investment regime.[67] Two basic reasons have been identified as possible motivating factors for private sector participation in activities related to the Clean Development Mechanism and the other flexible mechanisms.[68] First, in order to achieve their emission reduction targets, national governments will need to allocate rights to emit greenhouse gases among the current and/or future sources of emissions in their own countries, most of which are in the private sector. [69] As a consequence, the private sector will be required to achieve reductions and, if allowed to do so, may choose to meet some of its obligations by carrying out Joint Implementation or clean development projects or through trading emission rights. Secondly, private sector entities may be motivated to participate in project activities or Emission Trading in order to make a profit, if they are engaged in lines of business which are related to these emission reduction activities such as technology development, power generation, contract negotiation and monitoring and commodities trading.

African nations have a lot to benefit from the implementation of the CDM. As already noted CDM projects will of necessity involve arrangements between developing nations and the industrialised Parties, by which the former benefits from project activities resulting in certified emission reductions and the latter may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitment. In practice, this is achievable by the industrialised and developing countries using private and public entities to undertake CDM

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[66] Ibid.
[67] See Sander Simonetti, op. cit., p.4
[68] United Nations University, op. cit., p.26.
[69] See Annex A to the Kyoto for the current sectors and source of emissions.

projects.[70] For instance, it was reported that the Ethiopian government through the Ethiopian Environmental Protection Agency in collaboration with private sector entities (World Bank and World Vision offices in Australia and Ethiopia) facilitated a CDM project (officially referred to as Humbo Project) in some rural parts of the country.[71] According to the report, the project:

> ...has restored more than 2,700 hectares of degraded land in Humbo in south-western Ethiopia since 2007. Registration of the Project by the United Nations enables the future sale of over 338,000 tonnes worth of carbon credits (by 2017), of which the World Bank's BioCarbon Fund will purchase 165,000 tonnes worth of carbon credits.[72]

A study pioneered by the United Nations University opined that the types of contract which entail the participation of private sectors are the ones that are more open to the kinds of transactions envisioned under the CDM.[73] Examples of these contractual arrangements, which can be broadly grouped as Private Public Partnerships (PPP), according to this study, include: Inter-governmental Co-operation Agreements, Concession Contracts, BOT (Build, Operate and Transfer) Project Contracts, and Joint Venture and Service Contracts.

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[70] Some possible contract types which involve private sector participation have been proposed as being amenable to the kinds of agreements envisioned under the CDM. Examples of these contractual arrangements, which can be broadly grouped as Private Public Partnerships (PPP) include; Intergovernmental Co-operation Agreements, Concession Contracts, BOT (Build, Operate and Transfer) Project Contracts, and Joint Venture and Service Contracts. See United Nations University, op. cit., p.26.

[71] World Bank, 'Africa's First Large-Scale Forestry Project Under the Kyoto Protocol',
Press Release No: 2010/279/SDN, 3 March 2010
<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22487653~pagePK:34370~piPK:34424~theSitePK:4607,00.html> accessed on 5/4/2012.

[72] Ibid.

[73] United Nations University, op. cit.

Moreover, various studies[74] have revealed that the advantages accruable to Africa under this market-based regime include economic and environmental benefits although there are fringe instances when the CDM mechanism heralds negative impact for the economy of the developing nations (Africa inclusive). Jindal while examining the potential benefits that carbon sequestration portends for Africa noted that the continent is the poorest among the comity of nations and that carbon trading is now valued at millions of dollars plus financial influx for participating developing nations.[75]

The potential benefits of the CDM to the African nations have been identified to include sustainable development since apart from the fact that the KP stipulated that the CDM projects should strive towards achieving sustainable development in the host country, the bilateral agreement also usually translates into increased income and developmental benefits for the locals whose lands are used to pilot the project. An example is given of the Nhambita Community Carbon Project in Mozambique where the participating families collect $242.60 on every hectare of land used for the project.[76] Another benefit for the African nation under this market-based regime is biodiversity conservation which is achieved as a result of the developed nations (apart from paying for the carbon sequestration) providing financial assistance to the host country to invest in natural resource projects that will assist that country to regain the ones that had been lost due to poor or

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[74] R. Jindal, 'Carbon Sequestration Projects in Africa: Potential Benefits and Challenges to Scaling Up, Earth Trends' <*http://earthtrends.wri.org/pdf_library/feature/cli_fea_csequest.pdf*> accessed on 5/4/2012; NEPAD-OECD, 'Boosting Africa's Energy Sector through Carbon Finance' (Paper presented at the Ministerial and Expert Roundtable of the NEPAD-OECD Africa Investment Initiative, 11-12 November 2009) <*http://www.oecd.org/dataoecd/18/45/49232265.pdf*> accessed on 5/4/2012; C. Polidano, F. Jotzo, *et al*, 'The Kyoto Protocol and Developing Countries: Impacts and Implications for Mechanism Designs', *ABARE Research Report 2000*, Canberra; and World Bank, op. cit.

[75] R. Jindal, op. cit., p.1.

[76] R. Jindal, 'Measuring the socio-economic impact of carbon sequestration on local communities: An assessment study with specific reference to the Nhambita Pilot Project in Mozambique', (unpublished, University of Edinburgh, U.K. 2004)

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lack of conservation.[77] For instance, a major highlight of the Forest Rehabilitation Project in Uganda is the conservation of the forests and biodiversity as well as the protection of the endangered wildlife in the National Parks of Mt. Elgon and Kibale which were destroyed between the seventies and eighties.[78]

Activities such as this turn out to further generate and restore the ecological system like improving water quality and reducing soil erosion and sedimentation.[79] According to a study by NEPAD-OECD, CDM appears as a "win-win" opportunity for Africa and its investors because its implementation will promote new development initiatives like renewable energy projects, import financial benefits and enable effective response to climate change on the continent.[80] The continent is believed to be in an auspicious posture to enjoy the investment prospects related to the mechanism because of its abundant natural resources suitable for sustainable energy production.[81]

The impact of the KP and its mechanism in the developing nation (including African nations) is not a one-way traffic that only leads to positive end.[82] The impact could be both positive and negative depending on the trade and investment pattern of each nation.[83] It was posited that despite the exemption of the developing nations, including African states, from emission abatement, the adoption of the KP and its imbued mechanisms will affect the economic environment of the developing nations.[84] The developing nations are divided into three to determine the level and kind of impact the CDM will have on their economies. The nations are grouped as follows:

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[77] Gutman, P. (ed.), *From Goodwill to Payments for Environmental Services: A Survey of Financing Options for Sustainable Natural Resource Management in Developing Countries*, (World Wide Fund for Nature, Washington DC, 2003)

[78] R. Jindal, op. cit., n. 74.

[79] S. Scherr, A. White, et al, 'For services rendered: The current status and future potential of markets for the ecosystem services provided by forests', *ITTO, Technical Series No. 21* (International Tropical Timber Organization (ITTO), 2004).

[80] NEPAD-OECD, op. cit., p. 5.

[81] Ibid.

[82] C. Polidano, P. Jotzo, et al, op. cit.

[83] Ibid.

[84] Ibid.

(i) Fossil fuel exporters whose trade majorly rests on exportation of fossil fuel to the Annex I countries, e.g. Nigeria. Due to the fact that the achievement of the commitment under the KP requires less reliance on fossil fuel, such countries will experience lesser patronage from the industrialised nations thus, those developing countries will experience negative impact.

(ii) Diverse economies nations are countries such as the southern Africa which engage in diverse trades either in production or export structure. For these countries, the impact will depend on the way the trade goes at a given time.

(iii) Energy intensive exporters which are countries whose economic mainstay is their intensive investment in exportation of energy. Since the developed nations are departing from fossil fuel as a source of energy, these countries will experience higher patronage and thus positive economic impact. However, it is not certain if any African nation falls into this group. An important benefit however identified in Polidano *et al.*'s study is the technology transfer and its impact on investment. Upon the registration of the Africa's first large scale CDM forestry project, Ms Tenagne Lemma who was the National Coordinator of World Vision Ethiopia noted that the CDM has multiple benefits for the community through improved land management and the flow on benefits to the people's health, food security and livelihoods.[85]

Dispute Resolution Regime under the Kyoto Protocol

It is trite knowledge that disputes are a normal part of any investments relationship. This is usually due to a number of factors amongst which are long duration, huge capital and so on[86]. The occurrence of disputes in investment transactions puts all vital interests, goals and stakes implicated in commercial/investment

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[85] World Bank, op. cit.

[86] Amazu Asouzu, *International Commercial Arbitration and African States* (University Press, Cambridge 2003), p.32

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relations at risk[87]. Disputes can be insidious and diversionary; they have negative effects on the good faith, trust and confidence, which are useful ingredients in investment transactions[88]. The role of an effective and efficient dispute resolution mechanism in ensuring the free flow of investment under the flexible mechanisms can thus not be over emphasized. However, the free flow of investments is not the elimination or suppression of dispute in investment transactions but rather the provision of a fair and effective mechanism for resolving the disputes[89].

The dispute resolution regime under the Kyoto Protocol is provided under Article 19 which relates the settlement of the dispute there under back to the method(s) of settlement of disputes adopted under the UNFCCC. According to Article 19, 'the provisions of Article 14 of the Convention on settlement of disputes shall apply *mutatis mutandis* to this Protocol'. Article 14 (1) of the Convention states that 'in the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice'.[90]

Scope of Dispute envisaged under Article 14 of the Convention

Regarding the implementation of the flexible mechanisms under the Kyoto Protocol, the point is again reiterated that it will help stimulate green investment and help parties meet their emission

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[87] ibid; see Bolaji Owasanoye, 'Dispute Resolution Mechanisms and Constitutional Rights in Sub- Saharan Africa' (UNITAR Resource Papers: Alternative Dispute Resolution Methods Document Series No.14, Geneva, 2001) *<http://www.unitar.org/dfm/Resource_Center/Document_Series/Document14/Bolaji/Intro.htm>* accessed 11/08/05.

[88] O'Keefe, P. J., *Arbitration in International Trade* (Proper, Sydney 1975), p.1

[89] Amazu Asouzu, op. cit., p.32; see also R. N. Gardner, 'Economic and Political Implication of International Commercial Arbitration' in Martin Domke (ed), *International Trade Arbitration: a road to world-wide cooperation* (American Arbitratiom Association, New York, 1958), p.15; Herbert Burstein, 'Arbitration of International Commercial Disputes', (1965) 6 (3) Boston College Law Review, p.571.

[90] For a clearer understanding of "other peaceful means of their own choice", see Articles 2 (3) and 33 of the United Nations Charter.

targets in a cost-effective way.[91] It thus seems reasonable and practical to conceptualise disputes involving parties to the Kyoto Protocol as concerning trade related measures in the Protocol, i.e. disputes arising between parties in the implementation of the flexible mechanisms established under the Kyoto Protocol. To view it otherwise is to render the provisions dealing with the dispute resolution mechanism redundant.

However, on the one hand, the traditional dispute settlement mechanism present in Article 14 of the Convention, adopts an approach which conceptualises disputes as arising between two or more Contracting Parties in connection with the interpretation or application of the Convention.[92] On the other hand, the likely nature of 'dispute' arising under the Protocol can most probably only be apprehended within the context of non compliance by contracting parties. It is however difficult to contemplate a dispute arising between two or more parties as a result of a breach of treaty obligations. Furthermore, in common with other transfrontier environmental problems, it may also be difficult to attribute particular harm to the actions or omissions of one state or states.[93] The point being made is that a party will find it difficult to claim for compensation for harm that it has purportedly suffered as a result of another party's breach of its obligations under the Protocol.

It is therefore submitted that the refusal by a Party/State to comply with its emission limitations and reduction commitments of the greenhouse gases under the Protocol is most unlikely to be considered a dispute under the Kyoto Protocol and can thus not be amenable to the dispute resolution regime of the Protocol. A more realistic means of compelling contracting parties to fully implement their treaty obligations is the recourse to the growing trend of adopting non-compliance procedures (NCPs) to address failure by contracting parties. The NCP under the Kyoto is to be found in Article 18[94]. Indeed, with respect to the Convention, it has been suggested that a major reason for including Article 13 of the Convention was the perception that traditional dispute settlement

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[91] Nidirect, op. cit.
[92] United Nations University, op. cit., p.26.
[93] Catherine Redgwell, op. cit., p.15.
[94] See also Article 13 of the Convention.

would have a very limited role to play under the Convention where the likely nature of disputes would not be amenable to such procedure.[95] Article 18 of the Protocol, can thus be said to be a good example of the trend away from total reliance on traditional dispute settlement methods in recent multilateral environmental agreements.[96]

Consequently, it is posited that the dispute resolution regime envisaged under Article 19 of the Protocol (Article 14 of the Convention) dealing with the settlement of disputes between two or more parties under the Protocol should not be limited to mean disputes between states and states only, but should be expanded to cover disputes arising from projects implemented under the flexible mechanisms which involves non-state parties.[97] In support of this position, Ratliff[98] identified potential areas of disputes relating to emissions trading, the Clean Development Mechanism (CDM) and Joint Implementation to include; host-country agreements, lack of procedures for apportioning risk and assigning liability, project design, bilateral agreements, non-State actors involved in CDM brokering, private contracts requiring enforcement where estimated reductions are not actually attained by the project and delivery issues.

Unlike in cases of simple commercial or investment agreements, the proclivity for dispute arising from agreements envisioned under the implementation of the flexible mechanisms of the Kyoto protocol may be very high. The reason for this is not far-fetched, most of the time the agreements expected to be concluded under the flexible mechanisms are contracts involving multinationals, domestic corporation, private sector entities and NGOs and in the bid by parties to protect and safeguard their interest, conflicts are likely to arise.[99]

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[95] Catherine Redgwell, op. cit., p.17.
[96] Ibid.
[97] See Sander Simonetti, op. cit., p.17.
[98] Dane Ratliff, 'Dispute Resolution in the Climate Change Regime', (PCA) http:/www.iisd.ca/climate/cop9/ accessed on 14/05/10.
[99] Kalas, P.R. and Alexia, H., op. cit., p.53.

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Challenges of the Dispute Resolution Regime under the Kyoto Protocol

Article 19 of the Kyoto Protocol (which adopts the dispute settlement regime under Article 14 of the Convention) is yet to be tested, nonetheless, the issue to be determined is whether if ever activated, the dispute settlement procedure envisioned under the Kyoto Protocol will be adequate to settle disputes arising from agreements envisaged under the market mechanisms such as Emissions Trading, Clean Development, and Joint Implementation where large amounts of money will inevitably change hands vis-a-vis states, states and private legal entities, and between private entities and other private entities? In other words, can recourse to Article 19 of the Kyoto Protocol (and consequently Article 14 of the Convention) ensure stability and compliance with the agreements reached by parties under the flexibility mechanisms of the Protocol? The answer requires an examination of Article 14 of the Convention. The full provisions of Article 14 are stated anon.

(1) In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

(2) When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory *ipso facto* and without special agreement, in relation to any Party accepting the same obligation:

   (a) Submission of the dispute to the International Court of Justice; and/or
   (b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration.

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A Party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedures referred to in subparagraph (b) above.

(3) A declaration made under paragraph 2 above shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depositary.

(4) A new declaration, a notice of revocation or the expiry of a declaration shall not in any way affect proceedings pending before the International Court of Justice or the arbitral tribunal, unless the parties to the dispute otherwise agree.

(5) Subject to the operation of paragraph 2 above, if after twelve months following notification by one Party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.

(6) A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith.

(7) Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.

(8) The provisions of this Article shall apply to any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise.

Examination of Article 14 of the Convention

Two dispute resolution regimes are envisaged under Article 14 of the Convention. The first regime consists of non-binding processes

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(i.e. negotiation and conciliation). Recourse is expected to be made to these non-binding processes with respect to existing disputes only. A proper scrutiny of Article 14 (1) would reveal that the need to settle dispute through 'negotiation or any other peaceful means' arises only after the dispute must have arisen between the parties. On the other hand, the second regime consists of adversarial and binding processes (i.e. arbitration and the jurisdiction of the International Court of Justice -ICJ). This second category deals only with future disputes because a careful look at Article 14 (2) and (3) will show that parties would have declared at the time of ratifying the convention (that is, before the convention becomes bound on them) that they will be ready to submit disputes to arbitration or litigation (through the ICJ). This latter point shall be expatiated below.

It is pertinent to note that there cannot be a simultaneous operation of the two regimes (binding and Non-binding) under the Convention. If parties are desirous of activating the 'peaceful settlement' option, they cannot at the same time submit to the jurisdiction of a binding regime. The regimes are mutually exclusive.

It is also worthy of mention that notwithstanding inter-dependence of Article 19 of the Protocol and Article 14 of the Convention, the nature of both the Convention and the Protocol suggests that the methods of dispute settlement suitable under each is diametrically different. While the Convention imposes certain voluntary obligations on the parties, the Protocol entails a binding obligation on the parties thereto. Therefore, while the non-binding settlement regime is more suitable for disputes under the convention, the binding regime suits disputes arising under the Protocol more.

- **The Alternative Dispute Resolution (ADR) and Non-Binding Regime**

As with most international dispute settlement procedures, the overriding obligation on Parties is to resolve disputes through peaceful means.[100] Consequently, the non-binding regime provides

[100] See Article 279 & 280 of the United Nations Convention on Law of the Sea (UNCLOS). See also Meinhard Doelle, op. cit., p.3.

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an opportunity for the parties to engage in bilateral negotiation of the settlement of the disputes or by other peaceful means of their choice.[101] However, if the dispute is not resolved within 12 months and negotiation fails, parties are mandated to refer the dispute to conciliation at the option of one of the parties,[102] after which a conciliation commission is created to hear the dispute and render a recommendatory award, which the parties shall consider in good faith.[103]

Fundamentally, the non-binding regime involves the use of a range of ADR techniques in the settlement of disputes. The

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[101] See Article 14(1) of the Convention. It is submitted that the phrase 'by other peaceful means of their choice' could be interpreted to include mediation process and any other mutually agreed non-binding procedures. Some commentators have contended that the omission of mediation from the provision of Article 14(1) amounts to an express exclusion of the process of mediation under the Protocol (See Kenneth Cloke, 'Mediators Calling For Climate Change Mediation Provision', *Mediate.com* <*http://www.mediate.com/Articles/MBBClimate.cfm*> accessed on 02/05/10.). This argument cannot be valid on the ground that under international law, mediation has always been known as one of the 'peaceful means' of settling disputes among parties. Articles Article 14 (1) of the UNFCCC should be read in perspective of Article 2(3) of the United Nations Charter, which provides that "[a]ll members shall settle their international disputes by peaceful means..." and Article 33 of the same UN Charter that further states that "parties to any dispute ... shall ... seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." (Underline ours for emphasis). The replication of the underlined phrase in Article 14 (1) shows that the UNFCCC chose to follow the peaceful settlement mandate already established in the UN charter. See also Richard B. Bilder, 'An overview of International Dispute Settlement' (1986) 1 (1) *Emory Journal of International Dispute Resolution*, p. 8; Walid Abdulrahim, 'Peaceful Settlement of Disputes' <*https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/14-peaceful-settlement-of-disputes#_ftn1*> accessed on 9/6/13; Ian Brownlie, 'The Peaceful Settlement of International Disputes' (2009) 8 (2) *Chinese Journal of International Law*, pp. 267-283 (doi: 10.1093/chinesejil/jmp015) <*http://chinesejil.oxfordjournals.org/content/8/2/267.full*> accessed on 9/6/13. Merrills had even argued that the peaceful means of choice are not exhaustive and could go beyond the traditional means mentioned in Article 33 of UN charter. See J. G. Merrills, 'International Dispute Settlement' (1984) cited in Richard B. Bilder, ibid., p.2. Merrills is now published as J.G. Merrills, *International Dispute Settlement*, 3rd ed. (Cambridge, 1998).

[102] See Article 14(5).

[103] See Article 14(6).

benefits of ADR are numerous. Alternative dispute resolution process as opposed to the traditional court system has long history in all world cultures.[104] It has over time been established that it serves human, fiscal and natural resources. It opens paths to novel solutions that become blocked and calcified when people resort to legalistic means without the prospect of exploring sundry possibilities that validate the concerns and interests of all parties.[105] Once conflicting parties agree to an ADR process, it is possible to dismantle the barriers and obstacles that have brought their conversations and progress to a standstill.[106] Studies have quantified the benefits of ADR to include;[107]

- wide magnitude of savings
- perceived fairer allocation of costs
- win-win solution that benefits all parties
- agreement as to remedial measures
- greater understanding of opposing parties' interests
- resolution of tough technical issues
- resolution of long-term liability issues
- positive corporate-government relations

Despite the benefits of the ADR regime under the Protocol, a major challenge of the regime is the non-binding nature of the procedures. It is imperative to note that under the Protocol, attempt is made to make submission to conciliation compulsory after a failed negotiation. However, the award of the conciliation commission is not binding on the parties, the effect is merely recommendatory. It is obvious that the end point of the non-binding regime may not lead to a resolution of the dispute since the status of the award is at best a gentleman's agreement of little value. This indeed limits the efficacy of the non-binding regime.

Another limitation of the non-binding regime under the Convention is that it can only be activated to deal with existing

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[104] Kenneth Cloke, 'Mediators Calling For Climate Change Mediation Provision' <*http://www.mediate.com/Articles/MBBClimate.cfm*> accessed on 2/5/2010.
[105] Ibid.
[106] Ibid.
[107] Ibid.

disputes as provided for under Article 14(1). No provision exists under the Convention for referral of future disputes to the non-binding regime.

- **The Adversarial and Binding Regime**

By virtue of Article 14(2), parties may declare in writing that they accept to submit future disputes to the jurisdiction of the International Court of Justice and/or arbitration in accordance "with procedures to be adopted by the Conference of the Parties as soon as practicable". Voluntary submission of dispute under Article 14(2) is an indication of the intention of parties to be bound by the decisions/awards of the tribunals.

In marked contrast to the non-binding resolution procedures, which avoid imposing compulsory and binding decisions on parties, the advantages of arbitration and the judicial process of the ICJ are that their decisions are binding and enforceable on the parties. Parties can also not resile from their agreements to submit disputes to a binding regime.

The arbitration process has the advantage of providing parties with more control over the appointment of members of the tribunal hearing a dispute. Therefore, they have the opportunity of appointing arbitrators of their choice. In addition, the arbitration tribunal process has the advantage of the flexibility to be able to ensure special expertise in the subject matter under dispute.[108] Underscoring the benefits of arbitration, Ratliff, observed that the mere existence of an arbitration clause in agreements can often serve to prevent disputes before they arise, and that an arbitral tribunal composed of Party-appointed neutrals offers assurance of impartiality.[109]

With respect to the International Court of Justice (ICJ), it has the advantage of being a permanent tribunal and, as such, is more likely to make predictable rulings and rulings that take into account the implications of specific rulings for the future of dispute settlement under the Protocol[110].

Despite the potentials of Article 14(2), the operation of the provisions is not without challenges. For example, the provisions

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[108] Meinhard Doelle, op. cit., p.20.
[109] Dane Ratliff, op. cit..
[110] Meinhard Doelle, op. cit., p.20.

can easily be rendered redundant; this is because unlike recourse to negotiation or other means of non-litigious settlement which is made obligatory under Art 14(1), submission of disputes to arbitration or ICJ is voluntary. It is observed that consensus on the mechanism to be used to resolve a dispute will often take the form of a specific agreement reached after the dispute has arisen and not before.[111]

Furthermore, with respect to arbitration, it is submitted that parties may be reluctant to use arbitration, for the reasons that the challenges inherent in the arbitration process may also limit the efficacy of Article 14(2). For example, the formalised procedure of the arbitral process (just like in litigation), can make the arbitral process long and expensive, thus undermining the utility of the mechanism. The adversarial nature of the process (unlike a negotiated settlement) also results in a 'win-lose' solution which is capable of straining relationship.

Parties may also find it difficult to agree to the rules and procedures that will regulate the arbitration proceedings. The Convention and the Protocol have not helped in this regard as there are no particular procedures adopted in the international instruments.[112] Article 14(2)(b) of Convention rather refers to procedures as adopted by the Conference of parties. The COP is yet to come up with one.[113]

Another challenge to Article 14(2) relates to the status of the International Court of Justice. The role of the ICJ is to settle legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies.[114] However, since the private sector is expected to play a significant role in the market mechanisms of the Protocol, Article 14(2) which envisages submission of dispute to the ICJ may not suffice to create a stable and efficient environment to govern this sector's participation in the market mechanisms.

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[111] Ibid.

[112] ICE Coalition, 'An International Court for the Environment', (January 2010), *http://www.climatecommunity.org/documents/AninternationalCourtforthe Environment.pdf* accessed on 11/04/10.

[113] See Sander Simonetti, 'op. cit., p.17.

[114] See ICJ website: *http://www.icj-cij.org/jurisdiction/index.php?p1=5&PHPSESSID=62b30ac29a6580b988a0f3ae68225b45a* accessed on 24/04/10.

The Permanent Court of Arbitration (PCA) will seem to be a more suitable and appropriate forum than the ICJ in the settlement of dispute under the Kyoto Protocol.[115] The PCA offers procedures for, and facilitates, fact-finding, conciliation, and arbitration.[116] According to Ratliff, the PCA's environmental rules provide a 'unified forum' for dispute resolution relating to environmental and natural resources, and are especially important in the context of the Convention and the Kyoto Protocol, as there may be multiple claimant and respondent Parties to a dispute.[117]

The point must also be made that despite the advantages of the binding nature of adversarial regimes, the ADR regimes are the prevalent mechanisms for resolving disputes with international flavour. This is because of the lack of an established international enforcement mechanism which is attributable to the absence of a world government to enforce international law.[118]

Conclusion

Industrialisation carries a price—a price which is poisoning the atmosphere, the effect of which is on all nations, industrialised or not.[119] Unfortunately, the lack of adaptive wherewithal of the non-industrialised nations of Africa to cope with the effect of climate change have made them most vulnerable.

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[115] The PCA is an arbitration body whose dispute resolution rules are based closely on the 1976 UNCITRAL Arbitration Rules and the 1980 UNCITRAL Conciliation Rules. See PCA website; *http://www.pca-cpa.org/showpage.asp?pag_id=363* accessed on 24/04/10.

[116] The PCA has developed Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. See Dane Ratliff, 'Arbitration in Flexible-Mechanism Contracts' in *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work*, (ed., Freestone and Streck, Oxford 2005) 384; *http://www.mcci.org/Photos/document/rulesconciliationarbitration.pdf* accessed on 24/04/10.

[117] Dane Ratliff, op. cit.

[118] Leb, C., 'Arbitration' in Guy, B. & Heidi, B. (eds), *Beyond Intractability* (University of Colorado, Boulders, 2003) *http://www.beyondintractability.org/essay/arbitration/* accessed on11/04/10; Michael Gillenwater, 'The Treaty Compliance Challenge: Enforcement under the Kyoto Protocol'.

[119] Timtiniko Enodien, 'Africans and the Global Warming Argument', *The Guardian Newspaper* (Nigeria, 01 April 2010) 51.

Fortunately a cardinal objective of the Kyoto Protocol is to encourage developed nations to assist developing countries in achieving sustainable development towards coping with the effects of climate change. Although African nations have no mitigation commitments under the Kyoto Protocol they are expected to benefit from the potentials which the implementation of the flexible mechanisms holds under the Protocol.

Though, the dispute resolution regime (Article 19) under the Kyoto Protocol is yet to be tested, it is obvious that it may not adequately protect the legal positions of parties when resourse is made to it. The wholesale adoption of the dispute resolution mechanism of the Convention is capable of undermining the objectives of the Kyoto Protocol. On the one hand, Article 14 of the Convention is designed to deal with disputes between contracting parties to a multilateral environmental treaty which sets voluntary targets for the parties. While on the other hand, contracting parties have binding obligations under the Kyoto Protocol. Consequently, a dispute resolution mechanism under a voluntary regime is most unlikely to be effective in ensuring compliance and enforcement under the binding regime of the Protocol.

As already noted the Kyoto Protocol presents special challenges. Under the Protocol, states and non-states parties are expected to play crucial roles in fulfilling the Protocol's objectives. The implementation of the flexible mechanisms under the Protocol necessitates the creation of a green investment regime. Under this regime, friction and conflicts cannot be totally eliminated from contractual/investment relationships involving the states and non-states entities. Unfortunately the dispute resolution regime (i.e. Article 19 of the Protocol) has not been designed to meet these challenges. Meanwhile, the first commitment period for the Conference of Parties (COP) ended in 2012 and on 8th December 2013, another commitment period[129] was agreed among the COP in

[129] The new period of commitment is now set between 2013 and 2010 during which the parties committed to reduce GHG emissions by at least 18 percent below 1990 levels in the eight-year period from 2013 to 2020. See Article 1, paragraph C of the Doha Amendment to Kyoto Protocol entered into on 1 December 2013. The Article has been incorporated as Article 3, paragraph 1 bis of the 'Informal consolidated version of the Kyoto Protocol', incorporating the

Doha following an amendment to the Protocol.[121] But the amendment does not address the challenges identified in this paper or any other foreseeable challenges to the dispute settlement mechanism in the Protocol despite that various disputes have arisen in relation to the compliance and trading mechanisms under the Protocol[122]. It is, therefore, imperative for the Conference of Parties (COP) to bring to the front burner a more robust discussion on conflict prevention and dispute resolution under the flexible mechanism of the Protocol.

Doha Amendment version made on 16 May 2013 by the UNFCCC secretariat in order to assist the parties. The amendment has not yet entered into force. See UNFCCC, 'Doha Amendment' <*http://unfccc.int/kyoto protocol/doha amendment/items/7362.php*> accessed on 8/6/13. According to Articles 20 and 21 of the Convention on Climate Change, an amendment can only take effect on the ninetieth day after which not less than three-fourths of the COP signs the amendment. Currently, the Protocol has 192 parties (see: UNFCCC, 'Status of Ratification of the Kyoto Protocol' <*http://unfccc.int/kyoto protocol/status of ratification/items/2613.php*> accessed on 8/6/13) and only United Arab Emirates has yet accepted the amendment (see: UNFCCC, 'Doha Amendment' op. cit.). Therefore, the amendment to the protocol has not yet entered into force.

[121] UNFCCC, 'Kyoto Protocol' <*http://unfccc.int/kyoto_protocol/items/2830.php*> accessed on 8/6/13.

[122] Chester Brown, 'International, Mixed, and Private Disputes arising under the Kyoto Protocol' (2010) 1 (2) *J Int. Disp. Settlement*, pp. 447-473 (doi: 10.1093/jnlids/idq004) <*http://jids.oxfordjournals.org/content/1/2/447.full#fn-89*> accessed on 9 June 2013.