

## EXPLORING THE LESSONS OF THE KIMBERLEY PROCESS FOR CLIMATE CHANGE ACTION

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### ABSTRACT

There has been a great deal of academic discourse about policy and governance choices embedded in the UNFCCC-based regimes for Climate Change action, and they point to the inefficiency and ineffectiveness of such regimes, which is often attributed to the fact that they hinge on the political authority of State actors and lack meaningful enforcement mechanisms. Against this backdrop, this paper argues that an alternative regime may be needed; and that for an effective regulatory framework for Climate Change action to emerge there needs to be a regulatory imperativeness similar to that upon which the Kimberley Process was created, where Non-State Actors play a leadership role. It also argues that in addition to regulatory imperativeness, the making and enforcement of the Kimberley Process provides helpful lessons towards crafting a more effective Climate Change remedial regime.

**Keywords:** Climate change; Hard law; Kimberley Process; Non-state actors; Soft law

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### 1. INTRODUCTION

This article seeks to stimulate a discussion regarding a Non-State-Actor-centered soft law approach to governance of Climate Change by revisiting the Kimberley Process Certification Scheme (KPCS) - a global diamond industry's soft law regime that has had significant success in its application to the diamond industry because of its unique model for a legislative prescription. It examines the circumstances under which the KPCS was created, its key features, and its regulatory model. It emphasizes that "regulatory imperativeness" and "the involvement of Non-State Actors in the regulatory framework" are some of the key factors that distinguish the KPCS as a special soft law regime. It argues that, for an effective regulatory framework for Climate Change action to emerge, a similar regulatory imperativeness that created the KPCS must be awakened, and in which Non-State Actors have a more meaningful role to play. It further argues that, given the current regulatory style for Climate Change action based on the UN Framework Convention on Climate Change<sup>1</sup> (UNFCCC), which has been critiqued as being ineffective and inefficient because of its hard law approach hinging on the political authority of State actors, a better climate-change-remedial regime may be one, which is based on or co-opts some elements of a soft law governance model involving Non-State Actors. Essentially, this article acknowledges the important role that NGOs have played in the negotiation of the UNFCCC and its regimes<sup>2</sup> and which they continue to play in connection with their implementation,<sup>3</sup> but it takes the position that a new role or involvement of different Non-State Actors has become expedient, as in the KPCS example.

Without a doubt, one cannot imagine any environmental issue in our world today, which is as great a threat to mankind as Climate Change, sometimes referred to as global warming. The scourge of global warming

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<sup>1</sup> The UNFCCC was adopted at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. It entered into force in 1994 following its ratification by 50 states. The UNFCCC was meant to provide the framework for stabilizing greenhouse gas concentrations in the atmosphere at a sustainable level and thus counteracting serious environmental consequences. See myclimate, "What are the Kyoto Protocol and the Paris Agreement?" (Accessed 2 June 2020), online: *myclimate* <<https://www.myclimate.org/information/faq/faq-detail/what-are-the-kyoto-protocol-and-the-paris-agreement/>>.

<sup>2</sup> See Chiara Giogette, "The Role of Nongovernmental Organizations in the Climate Change Negotiations" (1998) 9 *Colo J Intl Envtl L & Pol'y* 115 at 126-136 (discussing the role of NGOs in the negotiation of the UNFCCC).

<sup>3</sup> See Chandra Lal Pandey, "Managing Climate Change: Shifting Roles for NGOs in the Climate Change Negotiations" (2015) 24 *Envtl Values* 799 at 807-811 (discussing the efforts of Greenpeace, Climate Action Network and 350.Org in mobilizing governments to take climate action serious). See also Julie Doyle, "Climate Action and Environmental Activism: The Role of Environmental NGOs and Grassroots Movements in the Global Politics of Climate Change" in Tammy Boyce & Justin Lewis, eds, *Climate Change and the Media* (New York: Peter Lang Publishing, 2009) 103 (discussing the activities of environmental NGOs in shaping public policy and opinion about Climate Change).

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seems to be increasing by the day.<sup>4</sup> On the international front, the UNFCCC, and its Kyoto Protocol of 1997<sup>5</sup> (now obsolete), and the Paris Agreement of 2015,<sup>6</sup> form the core legal framework for global Climate Change action. The Kyoto Protocol required state parties to reduce emissions by complying with its set target.<sup>7</sup> The Paris Agreement formulates an overall Climate Change goal and calls on State parties to commit to this goal.<sup>8</sup> For instance, under Article 2, paragraph 2, and Article 4, paragraphs 2, 3, and 19 of the Paris Agreement, the State parties are to decide how and to what extent they can contribute to meeting the overall Climate Change goal based upon the principle of common but differentiated responsibility and respective capabilities, according to their different national circumstances.<sup>9</sup> In other words, State parties can decide what their goals are going to be – the so-called nationally determined contributions (NDCs).

There has been a great deal of academic discourse about policy and governance choices embedded in the UNFCCC-based regimes, and they point to the inefficiency and ineffectiveness of the regimes, which is attributed in part to the fact that the regimes, like a typical treaty, are unenforceable by any party, as they have no sanctions and no disincentives for non-compliance. The Paris Agreement in the whole of its 29 Articles, contains no provision concerning holding a State party accountable for non-compliance with its prescription, or for failing to fulfil its undertaking to cut down on its emissions level. Likewise, the Kyoto Protocol had no mandatory provision in all its 28 Articles. The two treaties may be likened to non-binding commitments or non-binding co-operation agreements.

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<sup>4</sup> See NASA, GLOBAL CLIMATE CHANGE: Vital Signs of the Planet, “Facts” (accessed 2 May 2021), online: [NASA <https://climate.nasa.gov/effects/>](https://climate.nasa.gov/effects/).

<sup>5</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/1997/L.7/Add.1 (10 December 1997) (Original English version), online: <https://unfccc.int/sites/default/files/resource/docs/cop3/107a01.pdf>. The Kyoto Protocol was adopted on 11 December 1997, and it entered into force on 16 February 2005. See United Nations, “What is Kyoto Protocol?” (accessed 8 June 2021), online: *United Nations Climate Change* [https://unfccc.int/kyoto\\_protocol](https://unfccc.int/kyoto_protocol).

<sup>6</sup> The Paris Agreement was adopted on 12 December 2015, and it formally entered into force on 4 November 2016. See, United Nations, “The Paris Agreement” (accessed 8 June 2021), online: *United Nations Climate Action* <https://www.un.org/en/climatechange/paris-agreement>. For a copy of the Paris Agreement, see United Nations, online: [https://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf).

<sup>7</sup> The set target was 5% below the 1990 levels, particularly for Annex I countries only. See Kyoto Protocol, *supra* note 5, Article 3, para 1.

<sup>8</sup> Charlotte Streck, Paul Keenlyside & Moritz von Unger, “The Paris Agreement: A New Beginning” (2016) 13 J Eur Envtl & Planning L 3 at 5.

<sup>9</sup> The Paris Agreement, *supra* note 6. See also, Streck, Keenlyside & Unger, *supra* note 8. For more reviews on the Paris Agreement, see Annalisa Savaresi, “The Paris Agreement: a new beginning?” (2016) 34:1 J Energy & Nat Resources L 16; Daniel Bodansky, “The Legal Character of the Paris Agreement” (2016) 25:2 RECIEL 142; Lavanya Rajamani, “Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics” (2016) 65 ICLQ 493; and Alexandra Lesnikowski et al., “What does the Paris Agreement mean for adaptation?” (2017) 17:7 Climate Policy 825.

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In failing to live up to its expectations during its era of governance, the Kyoto Protocol was often referred to as being a “baby step” in reducing global carbon emissions<sup>10</sup> and was further described as “disappointing”, essentially because as a hard law regime it depended on State-based political authority.<sup>11</sup> Jaye Ellis has suggested that an alternative initiative that creates an economic incentive for actors to meet higher standards for environmental protection may achieve more desirable results than the States could accomplish through the domestic or international hard law system.<sup>12</sup> The Paris Agreement has not been seen to be much better. Maintaining that nothing has changed under the Paris Agreement, Clive Spash opines that substantive impacts of global warming will continue instead of being avoided.<sup>13</sup> As he explains, the provisions for adaptation under the Agreement do not portend meaningful change, and the Agreement is silent on responsibility for forcing States to engage in adaptation approaches, as well as on liability and compensation.<sup>14</sup> Robert Falkner weighs in to argue that while the Paris Agreement creates a more realistic approach to international partnership on Climate Change mitigation, it is still not clear whether the treaty can meaningfully deliver on the pressing need to decarbonize the international economy.<sup>15</sup> But he notes that the framework, which the Agreement creates for States to make voluntary pledges, is fashioned with the hope that global commitment can be escalated through naming and shaming.<sup>16</sup>

Arguably, any naming and shaming activity based on the current regime, which lacks any economic detriment or disincentive to polluters, may not produce a desirable result. A “naming and shaming” strategy lacking civil society activism or consumer boycott is less likely to provide the bite that would compel a recalcitrant party to conform to a requisite standard of behaviour. Such is often achieved under Non-State-Actors-led governance initiatives as opposed to State-centric hard law systems. This indeed alludes to one of the tenets of soft law governance, and one of the reasons for examining the lessons of KPCS: the involvement of the civil society and the private sector in a way that makes the regulation a grassroots endeavour.<sup>17</sup> A soft law approach is also attractive because the heavily legalized and

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<sup>10</sup> Reuven S. Avi-Yonah & David M. Uhlmann, “Combating Global Climate Change: Why a Carbon Tax Is Better Response to Global Warming Than Cape and Trade” (2009) 28:3 *Stan Envtl LJ* 3 at 18.

<sup>11</sup> Jaye Ellis, “Constitutionalization of Nongovernmental Certification Programs” (2013) 20:2 *Ind J Global Leg Stu* 1035 at 1036.

<sup>12</sup> *Ibid.*

<sup>13</sup> Clive L. Spash, “This Changes Nothing: The Paris Agreement to Ignore Reality” (2016) 13:6 *Globalization* 928 at 929.

<sup>14</sup> *Ibid.*

<sup>15</sup> Robert Falkner, “The Paris Agreement and the New Logic of International Climate Politics” (2016) 92:5 *Intl Affs* 1107 at 1108.

<sup>16</sup> *Ibid.*

<sup>17</sup> Martin-Joe Ezeudu, “From a Soft Law Process to Hard Law Obligations: The Kimberley Process and Contemporary International Legislative Process” (2014) 16:1 *Eur J L Reform* 104 at 111.

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bureaucratically cumbersome hard law apparatus of a United Nations-led initiative is not nimble enough to respond promptly to pressing issues that proliferate in the international system. For instance, the Kyoto Protocol was adopted in 1997 and it took another seven to eight years to come into force, in 2005. And that was after a complex ratification process. Likewise, the Paris Agreement was adopted in 2015, but it took another year to come into force in 2016, being one of a few international agreements to come into force that early. In contrast, a soft law regime is created and implemented faster and requires none of the bureaucracy for ratification that normally accompanies, and sometimes stifles a traditional treaty.<sup>18</sup> While it is acknowledged that the Climate Change crisis demands an effective regulatory innovation, it is by no means suggested that a soft law alternative would be the silver bullet for addressing the crisis. However, considering the apparent inefficiencies of a hard law regime based on State-authority, an alternative soft law approach should be explored. Thus, the contribution to the literature that this paper makes is to expound on a possible soft law governance model for Climate Change by focusing on the lessons of the KPCS.

This paper consists of five parts, including this introduction, which is the first part. The second part explores the Canadian approach to Climate Change action to provide insight into the application of the Paris Agreement at a domestic level, including its shortcomings, thus reinforcing the argument for an alternative soft law solution. While the Paris Agreement is an international law instrument, its application is done at the domestic level (like other treaties), where its ineffectiveness is directly manifested. The Canadian example is representative of some of the key regulatory efforts taken domestically in several Global North countries to combat Climate Change, which commonly takes the form of carbon pricing, either by way of an emission trading system (cap-and-trade) or a carbon tax.<sup>19</sup> The third part explores the KPCS as an exemplary soft law model regime that has demonstrated swift response and regulatory success on a terrain where conventional hard law mechanisms based on the political authority of States have failed. It also discusses the rationale for focusing on the KPCS for possible lessons, as well as the nature of the lessons for Climate Change action. The fourth part examines how the lessons of the KPCS may be useful in developing a better regime for Climate Change action. The lessons, in a nutshell, are: (a) lessons in imperativeness - meaning that unless some adversity is created to deprive both the State authorities and corporate entities of the economic gains made from the current carbon pricing regime, nothing will change in the way Climate Change is being regulated at the

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<sup>18</sup> *Ibid* at 107.

<sup>19</sup> For a comprehensive analysis on the cap-and-trade and carbon tax systems, see Paul Ekins & Terry Barker, "Carbon Taxes and Carbon Emissions Trading" (2001) 15:3 J Economic Surveys 325; Erik Haites, "Carbon Taxes and Greenhouse Gas Emissions Trading Systems: What Have We Learned?" (2018) 18:8 Climate Pol'y 955; and William D. Nordhaus, "To Tax or Not to Tax: Alternative Approaches to Slowing Global Warming" (2007) 1:1 Rev Env'tl Econ & Pol'y 26.

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moment; (b) leadership lesson - a strong global Non-State Actor or a coalition of Non-State Actors is all that is required to spearhead such a regime, an actor that mirrors the global diamond industry; and (c) the implementation lesson - the implementation of the KPCS came swiftly in a self-regulatory fashion that involves the industry commitment together with that of the State authorities. The fifth part concludes the paper.

### 2. CLIMATE ACTION IN CANADA: AN EXAMPLE OF UNFCCC-BASED REGIME

Canada has a federal system of government in which the legislative powers over the environment are shared among the federal parliament at Ottawa and legislatures in its ten provinces and three territories. This means that climate action regulation in Canada stems from two levels of government. More than two decades ago, Canada's federal government had initiated the idea of using an environmental assessment under the *Canadian Environmental Impact Assessment Act, 2012*<sup>20</sup> (CEAA) to assess whether major projects are likely to cause significant adverse environmental effects due to greenhouse gas (GHG) emissions.<sup>21</sup> That was done even though the CEAA did not prescribe anything relating to Climate Change as an assessment criterion.<sup>22</sup> The CEAA was replaced in 2019 with the *Impact Assessment Act* (IAA),<sup>23</sup> which establishes a new process for considering the environmental, health, social and economic effects of projects subject to a federal impact assessment.<sup>24</sup> Among the factors that are considered under the IAA in the assessment process of any project is "the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its commitments in respect of Climate Change such as the *Paris Agreement*, Canada's 2030 target and the goal of Canada achieving net-zero emissions by 2050".<sup>25</sup> So far, under the environmental impact assessment law, not many assessments have been recorded statistically of projects based on GHG emissions standards.<sup>26</sup> However, the Climate Change commitment provision in section 63(e) of the IAA has been criticized as being a bare mandatory provision devoid of any meaningful elaboration by way

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<sup>20</sup> First passed in 1992 as the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

<sup>21</sup> See, Shi-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54 McGill L J 463 at 501.

<sup>22</sup> Robert B. Gibson, "Assessment Law is still too vague to achieve lasting green goals" (11 October 2019), online: *Policy Options: Politiques* <<https://policyoptions.irpp.org/magazines/october-2019/assessment-law-is-still-too-vague-to-achieve-lasting-green-goals/>>.

<sup>23</sup> S.C. 2019, c. 28, s. 1.

<sup>24</sup> Government of Canada, "Strategic Assessment of Climate Change Revised, October 2020" (accessed 27 April 2021), online: *Government of Canada* <<https://www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html>>.

<sup>25</sup> *Ibid* under the "Executive Summary".

<sup>26</sup> See, Hsu & Elliot, *supra* note 21 at 466-469 (The CEAA greenhouse gas-based assessment information is as of 2009).

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of practical guidance.<sup>27</sup> Arguably, the inclusion of climate standards in environmental assessments is a step in the right direction, but whether it will achieve a desirable objective at the end of the day remains to be seen.

Concerning a formal response to the international Climate Change action, Canada ratified the Kyoto Protocol in 2002, and for political reasons, no meaningful effort to implement the Protocol in Canada happened until 2007 when the *Kyoto Protocol Implementation Act* (KPIA) was enacted.<sup>28</sup> The legislative purpose of the KPIA, which came into force in June 2007 was “to ensure that Canada takes adequate and timely action to meet its obligations under the Kyoto Protocol and help address the problem of global climate change”.<sup>29</sup> Canada’s obligations under the Kyoto Protocol were to reduce Canada’s GHG emission level by an average of 6% below its 1990 emission levels during the protocol’s time frame of 2008 to 2012, the first commitment period.<sup>30</sup> Thus, beginning from 2007 and up to 2013, the KPIA required the government of Canada to produce an annual Climate Change plan.<sup>31</sup> KPIA required that the plan must include a variety of remedial measures (for example, regulatory, market-based, and fiscal measures) and that the government must account for and report on the GHS emissions reductions expected or already achieved through each measure.<sup>32</sup> However, based on the annual Climate Change plans, Environment Canada surprisingly signalled that the government would not achieve its Kyoto target.<sup>33</sup> The approach that Environment Canada used for determining the expected reductions from the measures was to state them relative to a future scenario in which the measures do not exist, known as business-as-usual emission projections.<sup>34</sup> This contrasts sharply with the KPIA and the Kyoto Protocol that required reporting against historical emission levels.<sup>35</sup> In 2010, Canada repudiated the Kyoto Protocol. Peter Kent, Canada’s Minister of the Environment then, stressed that for Canada “[t]o meet the targets under Kyoto for 2012 would be the equivalent of ... the transfer of \$14bn (£8.7bn) from Canadian taxpayers to other countries – the equivalent of \$1,600 from every Canadian family – with no impact on emissions or the environment.”<sup>36</sup> Ultimately, the KPIA was repealed under an omnibus *Bill and Budget Act*,

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<sup>27</sup> Gibson, *supra* note 22.

<sup>28</sup> Office of the Auditor General of Canada, “2009 Spring Report of the Commissioner of the Environment: Chapter 2 – *Kyoto Protocol Implementation Act*” (accessed 29 April 2021) online: *Office of the Auditor General of Canada* <[https://www.oag-bvg.gc.ca/internet/english/parl\\_cesd\\_200905\\_02\\_e\\_32512.html](https://www.oag-bvg.gc.ca/internet/english/parl_cesd_200905_02_e_32512.html)>.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Adam Vaughan, “What does Canada’s withdrawal from Kyoto protocol mean?”, *The Guardian* (13 December 2011), online: <<https://www.theguardian.com/environment/2011/dec/13/canada-withdrawal-kyoto-protocol>>.

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called the *Jobs, Growth and Long-term Prosperity Act* (informally referred to as "Bill C-38"), which was passed in June 2012.<sup>37</sup>

On another front, Canada, under Stephen Harper's administration in 2009, signed the Copenhagen Accord, which is a non-binding agreement, unlike the Kyoto Protocol.<sup>38</sup> In the Copenhagen Accord, Canada agreed to reduce its GHG emissions by 17 percent from its 2005 levels by 2020.<sup>39</sup> A few years after signing the Copenhagen Accord, Environment Canada issued a report in 2014, stating that Canada would not meet its target and that its GHG emissions might actually increase by 2020.<sup>40</sup>

Currently, the Federal Government's efforts at curtailing the GHG emissions in Canada are based on initiatives taken under the *Greenhouse Gas Pollution Pricing Act*<sup>41</sup> (GGPPA), which immediately came into force upon receiving royal assent in June 2018. The GGPPA establishes a set of minimum national standards for GHG pricing to meet Canada's emission reduction targets under the Paris Agreement. The GGPPA essentially introduces a carbon tax across Canada with the implication that provinces and territories that do not have their own carbon tax or a cap-and-trade system that meets a federal standard will have the federal carbon tax applied to them.<sup>42</sup> The federal tax started as \$20 per tonne and is to rise by \$10 annually until it is \$50 per tonne in 2022.<sup>43</sup> As of March 2021, the federal carbon tax applies in Alberta, Manitoba, New Brunswick, Ontario, Saskatchewan, Nunavut and Yukon.<sup>44</sup> The GGPPA has two main parts. Part 1, which is administered by the Canada Revenue Agency, applies a charge to 21 types of fuel and combustible waste (Fuel Charge), while part 2 is administered by Environment and Climate Change Canada, and introduces an output-based pricing system (OBPS) for large industrial emitters.<sup>45</sup>

The province of British Columbia (BC) provides an example of an alternative provincial regime that conforms to the federal standard. The

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<sup>37</sup> Dominique Amyot-Bilodeau & Michel Gagné, "Omnibus Bill C-38 – A Major Reform of Federal Environmental Laws" (16 September 2012), online: *McCarthy Tétrault* <<https://www.mccarthy.ca/en/insights/articles/omnibus-bill-c-38-major-reform-federal-environmental-laws>>.

<sup>38</sup> Vanessa Hrvatin, "A brief history of Canada's climate change agreements" (30 May 2016), online: *Canadian Geography* <<https://www.canadiangeographic.ca/article/brief-history-canadas-climate-change-agreements>>.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> S.C. 2016, c. 12, s. 186.

<sup>42</sup> Government of Canada, "Carbon pollution pricing systems across Canada" (accessed 20 July 2021), online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work.html>>.

<sup>43</sup> Government of Canada, "Additional information on the federal carbon pollution pricing benchmark" (accessed 20 July 2021), online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/carbon-pollution-pricing-federal-benchmark-information.html>>.

<sup>44</sup> Osler, "Canadian Government Carbon and Greenhouse Gas Legislation" (March 2021), online: *Osler* <<https://www.osler.com/PDFs/Resource/en-ca/Canadian-Government-Carbon-and-Greenhouse-Gas-Legi.pdf>>.

<sup>45</sup> *Ibid.*



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province was ahead of Canada's federal government in introducing formal climate action legislation. In 2008, the province passed the *Carbon Tax Act*,<sup>46</sup> which places a tax on GHG beginning at \$10 per tonne starting in 2008, a price that would increase up to \$50 per tonne by 2022.<sup>47</sup> The carbon tax is hoped to help provide an incentive for sustainable choices that produce fewer emissions.<sup>48</sup> According to the government of BC, revenue generated above \$30 per tonne of GHG level would be used to protect affordability, maintain industry competitiveness, and encourage new clean initiatives.<sup>49</sup> As of February 2021, BC has the highest carbon tax in Canada at \$40 per tonne.<sup>50</sup> A year before enacting the *Carbon Tax Act*, BC passed the *Climate Change Accountability Act*,<sup>51</sup> establishing a Climate Change accountability framework, which includes an independent advisory committee and detailed annual reporting on actions taken to reduce emissions and manage Climate Change risks.<sup>52</sup> The province, thus, legislated the targets for reducing GHG emissions to 40% below 2007 levels by 2030, to 60% below by 2040, and 80% below by 2050.<sup>53</sup> The Province has also introduced an interim target of 16% below by 2025 and planned on setting sectoral targets by March 2021.<sup>54</sup>

The above narrative paints a picture of Canada's climate action initiatives, similar to what is being deployed in other industrialized countries, especially those in the G7, where carbon tax and cap-and-trade systems represent the centerpiece of the portfolio of policies for Climate Change action.<sup>55</sup> The efficacy of the Canadian initiatives is, however, questioned. The position as of 2009 was that Canada's GHG emissions continued to rise dramatically instead of falling.<sup>56</sup> A recent government of Canada report states that "[b]etween 1990 and 2019, emissions increased by 21.4% or 129 Mt CO<sub>2</sub> eq. Canada's emissions growth over this period was driven primarily by increased emissions from oil and gas extraction as well

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<sup>46</sup> S.B.C. 2008, c. 40.

<sup>47</sup> British Columbia, "Climate Action Legislation" (accessed 1 May 2021), online: *British Columbia* <[https://www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/legislation#:~:text=Carbon%20Tax%20Act%20\(2008\),choices%20that%20produce%20fewer%20emissions](https://www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/legislation#:~:text=Carbon%20Tax%20Act%20(2008),choices%20that%20produce%20fewer%20emissions)> [British Columbia].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Global News, "Is Canada's carbon tax working? Experts, advocacy groups weigh in" (18 February 2021), online: *Global News* <<https://globalnews.ca/news/7646946/canada-carbon-tax-experts/>> [Global News].

<sup>51</sup> S.B.C. 2007, c. 42 (formerly titled *Greenhouse Gas Reduction Targets Act*).

<sup>52</sup> British Columbia, *supra* note 47.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> See David A. Weisbach, "Carbon Taxation in the EU: Expanding the EU Carbon Price" (2012) 24:2 J Envtl Law 183 (discussing a possible introduction of carbon tax amid the EU's carbon pricing system); Miroslav Hájek et al., "Analysis of Carbon Tax Efficiency in Energy Industries of Selected EU Countries" (2019) 134 Energy Pol'y 110955 (discussing the efficiency of the carbon tax in energy industries in Sweden, Finland, Denmark, Ireland and Slovenia).

<sup>56</sup> Hsu & Elliot, *supra* note 21 at 463.

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as transport”.<sup>57</sup> Moreover, the Canadian Taxpayers Federation in another news report confirms that the carbon tax system in Canada is not working.<sup>58</sup> As Kris Sims aptly put it, “[t]he carbon tax isn’t working, the emissions are going up, the only thing this is is a cash grab”.<sup>59</sup> This underscores the argument that the UNFCCC-based regime has not lived up to expectations in containing the GHG emissions, thus warranting the suggestion for an alternative regime that co-opts a soft law system in which Non-State Actors are meaningfully involved. What makes the Canadian experience a near-fiasco, as in other countries where a carbon tax and or a cap-and-trade regime exists, is that nothing tangible can be pointed to as the use made of the revenue realized from the carbon tax in terms of infrastructure to support clean energy.<sup>60</sup> Essentially, the current system is a case of business as usual. However, fairly recently, Canada’s Federal Government announced in December 2020, plans to expedite climate action.<sup>61</sup> The plan which is titled “*A Healthy Environment and a Healthy Economy*” involves an investment of \$15 billion in climate action through 64 specific measures.<sup>62</sup> Three particularly essential elements of the plan are enhanced carbon pricing measures, investment in low-carbon and energy-efficient infrastructure, and investment in low and zero-emission vehicles (ZEVs).<sup>63</sup> The announcement of the plan is a step in the right direction, but implementation is the key.

Considering Canada’s experience, it is logical to conclude that the current UNFCCC-based regime hinging only on States’ political authority has not been effective. It creates no connection with civil society except to the extent that the civil society is at the receiving end of the incremental carbon tax regimes that enrich the government treasury. At the very best, States are kept busy with making Climate Change action a revenue strategy.<sup>64</sup> Against this backdrop, an alternative regulatory approach involving the Non-State

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<sup>57</sup> Government of Canada, “Greenhouse Gas Emissions” (accessed 1 May 2021), online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/greenhouse-gas-emissions.html>>.

<sup>58</sup> Global News, *supra* note 50.

<sup>59</sup> *Ibid.* Kris Sims is the British Columbia Director of the Canadian Taxpayers Federation.

<sup>60</sup> See Jeremy Carl & David Fedor, “Tracking Global Carbon Revenues: A Survey of Carbon Taxes Versus Cap-and-Trade in the Real World” (2016) 96 *Energy Pol’y* 50 (demonstrating that globally, only 27% of revenue generated each year from carbon revenue (from both the carbon tax and cap-and-trade systems) is used to subsidize green spending in energy efficiency or renewable energy; 26% go toward state general funds; and 36 % are returned to corporate or individual taxpayers through paired tax cuts or direct rebates).

<sup>61</sup> Bennett Jones, “Canada Proposes New Plan to Invest \$15 Billion in Climate Action, Raise Carbon Price to \$170/Tonne” (15 December 2020), online: *JDSUPRA* <<https://www.jdsupra.com/legalnews/canada-proposes-new-plan-to-invest-15-88238/>>.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> See Tracy Snoddon & Trevor Tombe, “Analysis of Carbon Tax Treatment in Canada’s Equalization Program” 2019) 45:3 *Canadian Pub Pol’y* 377 at 381-382 (discussing Canada’s carbon pricing as an increasing source of government revenue, but opine that carbon-pricing policies are market-based approach to incentivizing cost-effective reductions in GHG emissions).

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Actor should be explored, one arising from similar regulatory imperativeness that produced the KPCS.

### 3. THE KIMBERLEY PROCESS: A MODEL SOFT LAW REGIME

The KPCS is a soft law regime, a child of necessity, born out of an alliance among the global diamond industry, international NGOs, key diamond producing and trading countries and the United Nations, to break the linkage between diamond mines and civil wars then ravaging Sub-Saharan African countries - Angola, Democratic Republic of Congo ("DRC"), and Sierra-Leone. The KPCS introduced a certification scheme, which authenticates diamonds from legitimate government-controlled sources, and provides for those diamonds access to international markets. Its hallmark is the adoption of a soft law mechanism to create an international law with a treaty-like binding effect. The unique nature of the KPCS-led model of governance recognizes some important but emerging principles. First, the private sector - the NGOs, industry and market-based stakeholders - is recognized as useful agents in the making and enforcement of international law. Second, a soft law initiative of the private sector can be a useful tool for establishing regulatory control that is almost like a hard law mechanism. Third, soft law normative prescriptions are easy to create and easy to implement. They can be adopted fast and require no bureaucratic ratification that normally accompanies and often stifles a traditional hard law model.

Apart from creating legal innovation, the KPCS has been critical in enhancing the capacity of weak governments in the African countries to exercise greater control over mining and trade in rough diamonds.<sup>65</sup> The success of KPCS as a ground-breaking model of governance has been acknowledged by scholars who now advocate for a replication of the same kind of regime in other industries. Rudy Salo<sup>66</sup> and Alexandra Harrington<sup>67</sup> have advocated for a similar certification system in the timber and gemstone industries respectively. Elsewhere a case was made for a global oil certification regime in the same vein as was done under the KPCS.<sup>68</sup> It was a case to use a certification system to trail the movement of crude oil from Nigeria's Niger Delta to legitimate destinations to solve oil theft from Nigeria. This paper does not argue for using a similar certification regime for

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<sup>65</sup> Elizabeth J A Rodgers, "Conflict Diamonds: Certification and Corruption: A Case Study of Sierra Leone" (2006) 13:3 J Financial Crime 267 at 271.

<sup>66</sup> Rudy S. Salo, "When the Logs Roll Over: The Need for an International Convention Criminalizing Involvement in the Global Illegal Timber Trade" (2003-2004) 16 Geo Intl Envtl L Rev 127.

<sup>67</sup> Alexandra R. Harrington, "Faceting the Future: The Need for and Proposal of the Adoption of a Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market" (2009) 18 Transnat'l L & Contemp Probs 353.

<sup>68</sup> Martin-Joe Ejikeme Ezeudu, *Transnational Trade Regulation as a Model for Peace and Transparency: The Case of the Niger Delta and an Oil Certification Regime* (Doctoral Dissertation, York University, 2012).

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the Climate Change action, although a policy model along that line is a possibility; it is more focused on the regulatory imperativeness that created the KPCS and how it is required to craft a better climate action regime, which like the KPCS would involve Non-State Actors.

### 3.1 Emergence of the KPCS and Africa's Civil Wars Connection

The extraction of rough diamonds in Africa has demonstrated one of the most devastating relationships between the exploitation of natural resources and regional conflicts.<sup>69</sup> Being a primary commodity and one of the most concentrated forms of wealth susceptible to easy smuggling,<sup>70</sup> the diamonds received the attraction of insurgents and have facilitated some of Africa's most prolonged wars.<sup>71</sup> Today, the history of conflict diamonds cannot be understood without accounting for the events in Angola, Sierra Leone and DRC, three countries that suffered brutal wars because of their rich mineral deposits. While the checkered nature of these conflicts is documented in the literature,<sup>72</sup> what is worthy of note is that in Angola's case, the war was clearly fueled by two key mineral deposits in the country – the oil, which funded the government forces and diamonds, which funded the opposition forces.<sup>73</sup> It was estimated that between 1992 and 1998 alone, the opposition forces received nearly \$4 billion in conflict diamonds revenue.<sup>74</sup> With respect to DRC, the rebels successfully seized control over many of the diamond-rich regions of the DRC.<sup>75</sup> A UN panel of experts that

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<sup>69</sup> Elisa Gilgen, "The Case of Conflict Diamonds: An Analysis of Regime Theories and Regime Interaction" (NCCR Trade Regulation, Working Paper No. 2007/01, January 2007) at 12 (on file with the author).

<sup>70</sup> Ingrid J. Tamm, "Diamonds in Peace and War: Serving the Conflict-Diamond Connection" (WPF Report 30: World Peace Foundation, WPF Program on Intrastate Conflict, CARR Centre for Human Rights Policy, Cambridge, Massachusetts, 2002) at 5, online: *Harvard Kennedy School: Belfer Centre for Science and International Affairs* <<https://www.belfercenter.org/publication/diamonds-peace-and-war-severing-conflict-diamond-connection>>.

<sup>71</sup> See Christian Dietrich, "Hard Currency: The Criminalized Diamond Economy of Democratic Republic of the Congo and its Neighbours" (The Diamonds and Human Security Project, Occasional Paper #4, 2002) at 24, online: *reliefweb* <<https://reliefweb.int/report/angola/hard-currency-criminalized-diamond-economy-democratic-republic-congo-and-its>> [Dietrich, "Hard Currency"].

<sup>72</sup> Seth A. Malamut, "A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo" (2005-2006) 29 *Suffolk Transnat'l L Rev* 25 at 29-34.

<sup>73</sup> Tracey Michelle Price, "The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate" (2003) 12 *Minn J Global Trade* 1 at 9.

<sup>74</sup> Margo Kaplan, "Carats and Sticks: Pursuing War and Peace through the Diamond Trade" (2003) 35 *N.Y.U.J. Int'l L. & Pol.* 559 at 574. See also, J. Andrew Grant & Ian Taylor "Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems" (2004) 93 *The Round Table* 385 at 387.

<sup>75</sup> For details about the wars in DRC, see also, the following notable works: Thomas Turner, *The Congo Wars: Conflict, Myth & Reality* (London: Zed Books, 2007); Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (Cambridge: Cambridge University Press, 2009); Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009); Gérard Prunier,

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investigated the conflict made a finding<sup>76</sup> that “there is a clear link between the continuation of the conflict and the exploitation of natural resources. It would not be wrong to say that one drives the other”.<sup>77</sup> By Christian Dietrich’s account, as much as \$50 to \$60 million worth of diamonds were extracted in the rebels controlled eastern and northern DRC and smuggled yearly out of the country in the course of the war.<sup>78</sup>

Despite the Angola and DRC wars, which were earlier in time and bigger in scale than the war in Sierra Leone, it was Sierra Leone’s decade-long war that finally brought “conflict diamonds” to the international limelight.<sup>79</sup> The human rights violations committed by rebel forces - the Revolutionary United Front (RUF) - within its controlled regions, for the most part, drew the international community’s attention to the war over control of diamond fields. RUF forcibly conscripted an estimated 12,000 children to fight as rebel soldiers and engaged in wanton abductions, rapes, and murder. Many of its victims had one or more of their limbs hacked off with a machete.<sup>80</sup> According to a report by Ian Smillie and his colleagues, about 75,000 lives were lost in the war, with over half of the country’s then 4.5 million population displaced as refugees.<sup>81</sup> Sierra Leone’s official diamond export virtually disappeared due to the rebel’s control of the diamond fields and piracy.<sup>82</sup> RUF traded rough diamonds for arms and food during the war, generating figures ranging from \$25 to \$125 million in annual diamond sales. Ostensibly, that presented an incentive for the rebels to ignore any meaningful peace talks.<sup>83</sup>

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*From Genocide to Continental War: The ‘Congolese’ Conflict and the Crisis of Contemporary Africa* (London: Hurst & Company, 2009).

<sup>76</sup> Malamut, *supra* note 72 at 32.

<sup>77</sup> *Addendum to the Report by the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/1072 (2001) at para. 147. See also, Kaplan, *supra* note 74 at 578.

<sup>78</sup> Christian Dietrich, “Diamonds in the Central African Republic: Trading, Valuing and Laundering” (The Diamonds and Human Security Project, Partnership Africa Canada, January, 2003) at 5, online: reliefweb <<https://reliefweb.int/report/central-african-republic/diamonds-central-african-republic-trading-valuing-and-laundering>> [Dietrich, “Diamonds in the CAR”].

<sup>79</sup> Price, *supra* note 73 at 12.

<sup>80</sup> *Ibid.* See also, Kaplan, *supra* note 74 at 571, and Thomas W. Dunfee & Timothy L. Fort, “Corporate Hypergoals, Sustainable Peace, and the Adapted Firm” (2003) 36 Vand J Transnat’l L 563 at 614.

<sup>81</sup> Ian Smillie, Lansana Gberie & Ralph Hazleton, “The Heart of the Matter: Sierra Leone, Diamonds & Human Security” (Partnership Africa Canada, January 2000) at 1, online: <<https://cryptome.org/kimberly/kimberly-016.pdf>>. See also, Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World’s Most Precious Stones* (Boulder, CO: Westview Press, 2002) at 213.

<sup>82</sup> Price, *supra* note 73 at 15.

<sup>83</sup> Malamut, *supra* note 72 at 31.

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### 3.2 Imperative Corporation of the Diamond Industry Motivated by Adverse Campaigns

Despite the UN Security Council's sanctions, the scourge of conflict diamonds was not eradicated nor was the situation ameliorated. Under Resolution 864 of 1998, the Security Council imposed a mandatory embargo on the sale or supply of weapons or petroleum products to rebel forces in Angola.<sup>84</sup> Similar sanctions were also imposed on Sierra Leone in 1997, targeted against the RUF.<sup>85</sup> Resolution 1306 was adopted in July 2000, by which the Security Council imposed a worldwide ban on the importation of rough diamonds originating from Sierra Leone.<sup>86</sup> It further requested the government of Sierra Leone to ensure, as a matter of urgency, that an effective Certificate of Origin regime for trade in diamonds was in operation in Sierra Leone.<sup>87</sup> The resolution was particularly far-reaching in its scope, in that it additionally urged the international community to assist the government of Sierra Leone to establish a well-regulated diamond industry. But it failed to provide sanctions against the refusal by any government or group to provide such assistance.<sup>88</sup> Finally, Resolution 1343 adopted in 2001, imposed sanctions against Charles Taylor's government in Liberia, in connection with his involvement with Sierra Leone's rebel group.<sup>89</sup>

Overall, however, the sanctions failed to effectively limit the access of conflict diamonds to the legitimate market. The rebels in Angola, for instance, were reported to be able to exchange diamonds for cash and arms, notwithstanding the sanctions. It was reported that in 2000, \$1 million worth of diamonds were smuggled from Angola daily, constituting \$350 to \$420 million annually in sales.<sup>90</sup> Even the global diamond industry admitted that it was buying conflict diamonds from rebel groups, as revealed by De Beers' CEO, who remarked that:

One of the essential jobs that we De Beers [sic] carry out worldwide is to ensure that diamonds coming onto the markets do not threaten the overall price structure and therefore although we have no direct relationship with Unita, there is no doubt that we buy many of those

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<sup>84</sup> U.N. SCOR, 46th Sess., 3277th Mtg., U.N. Doc. S/RES/864 (1993) at paras. 19-23.

<sup>85</sup> U.N. SCOR, 52nd Sess., 3822nd Mtg., U.N. Doc. S/RES/1132 (1997) at para. 5.

<sup>86</sup> U.N. SCOR, 55th Sess., 4168th Mtg., U.N. Doc. S/RES/1306 (2000) at paras. 1 & 6 [Resolution 1306].

<sup>87</sup> *Ibid* at para. 2.

<sup>88</sup> Laura Forest, "Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control over the Country's Diamond Resources" (2000-2001) 11 *Ind Int'l & Comp L Rev* 633 at 645.

<sup>89</sup> U.N. SCOR, 56th Sess., 4287th Mtg., U.N. Doc. S/RES/1343 (2001) at para. 6.

<sup>90</sup> Price, *supra* note 73 at 27; Karen E. Woody, "Diamonds on the Souls of her Shoes: The Kimberly Process and the Morality Exception to WTO Restrictions" (2006-2007) 22 *Conn J Intl L* 335 at 339. See also, *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA*, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/203 (2000) at para. 77; *Supplementary Report of the Monitoring Mechanism on Sanctions Against UNITA*, U.N. SCOR 56th Sess., U.N. Doc. S/2001/966 (2001) at para. 141.

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diamonds that emanate from Unita-held areas in Angola...<sup>91</sup>

Thus, the diamond industry had no imperative for change. It benefitted from the prevailing situation, just like governments and corporate entities are benefitting from the current carbon pricing regime because it is a win-win for both sides as explained in the next section. It follows, therefore, as Tracey Price rightly argues, that the cooperation of the international diamond industry towards a global certification initiative was spurred by negative publicity against the diamond trade.<sup>92</sup> Global Witness, a London-based NGO, was the first organization to bring to the international spotlight, the bloody link between rough diamonds and the wars in Africa, by its publication of *A Rough Trade: The role of Companies and Governments in the Angolan Conflict* in 1998.<sup>93</sup> This publication thus gave rise to several campaigns against the diamond industry. In October 1999, Medico International of Germany, Intermon of Spain, the Netherlands Institute for Southern Africa, and Novib of the Netherlands, all reputable human rights groups, collaborated with Global Witness to launch a major campaign titled the "Fatal Transaction".<sup>94</sup> The campaign's focus according to Koyame, was on the right of consumers to know whether diamonds they purchased came from a source that financed the acquisition of weapons for rebel armies, thus contributing to countless deaths throughout Africa.<sup>95</sup>

The Partnership Africa Canada, a Canadian NGO, in January 2000, also increased the weight to the negative publicity by releasing another incisive report - *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*.<sup>96</sup> Therefore, motivated by the fear that the kind of consumer boycotts and negative campaigns which had killed the fur trade might destroy their multi-billion diamond trade if nothing were done, the international diamond industry moved to work with diamond-producing countries and embraced the certification initiative.<sup>97</sup> In February 2000, De Beers announced that it would no longer buy diamonds from conflict-infested mines and that the industry would fully support a certification scheme.<sup>98</sup> In May of the same year, diamond-producing countries of Africa met in Kimberley, South

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<sup>91</sup> Global Witness, "Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds" (A Briefing Document by Global Witness, June 2000), online: Global Witness <<https://reliefweb.int/sites/reliefweb.int/files/resources/83488766797D3C36C125690D0035BF37-conflictdiamonds.htm>> [Global Witness, "Conflict Diamonds"]. See also, Woody, *supra* note 89 at 343, n. 61.

<sup>92</sup> Price, *supra* note 73 at 32.

<sup>93</sup> Global Witness, "A Rough Trade: The Role of Companies and Governments in the Angolan Conflict" (Global Witness, 1 December 1998) at 6, online: Global Witness <[http://www.globalwitness.org/sites/default/files/pdfs/A\\_Rough\\_Trade.pdf](http://www.globalwitness.org/sites/default/files/pdfs/A_Rough_Trade.pdf)> [Global Witness, "A Rough Trade"]. See also, Price, *supra* note 73 at 32.

<sup>94</sup> Mungbalemwe Koyame, "United Nations Resolutions and the Struggle to Curb the Illicit Trade in Conflict Diamonds in Sub-Saharan Africa" (2005) 1 Afr J Leg Stud 80 at 95.

<sup>95</sup> *Ibid* at 96.

<sup>96</sup> Smillie, Gberie & Hazleton, *supra* note 80.

<sup>97</sup> Price, *supra* note 73 at 32.

<sup>98</sup> *Ibid*.

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Africa, with the intent to devise a remedy to conflict diamonds. This was indeed the beginning of the so-called “Kimberley Process”, named after the venue of its inaugural meeting.<sup>99</sup> Further, at the 29th World Diamond Congress in July 2000, the International Diamond Manufacturers’ Association and the World Federation of Diamond Bourses issued a joint resolution by which they declared their commitment to a “zero tolerance” stance on conflict diamonds, and further established the World Diamond Council to represent the interests of every aspect of the diamond industry in the certification project.<sup>100</sup>

In December 2000, the KPCS initiative received the support of the UN General Assembly. The General Assembly unanimously adopted Resolution 55/56 sponsored by 48 members and welcomed the initiative by African diamond-producing countries to launch an inclusive consultation process of governments, industry and civil society, to deal with conflict diamonds and urged all member states to support it.<sup>101</sup>

### 3.3 The Regulatory Nature of the Kimberley Process

Assessed in its nature as a written agreement, the KPCS is couched in the language of a conventional treaty. Nevertheless, it detracts from using the traditional treaty terminology. Words such as “shall”, “agree”, “undertake”, “right”, “obligation”, and “enter into force” are nowhere to be found in the agreement.<sup>102</sup> Rather, the agreement uses less imperative expressions such as “recommend”, “encouraged”, and “should ensure”.<sup>103</sup> It contains no provision relating to ratification to come into force.<sup>104</sup> In addition to these features, it is worth mentioning that among the participants that negotiated the KPCS were NGOs and the diamond industry representatives who conventionally have no legislative authority.<sup>105</sup> Essentially, KPCS does not conceal its soft law nature, enhanced by the fact that it is a voluntary as opposed to an obligatory initiative.

State parties to the KPCS agreement referred to as participants, undertake to enact appropriate local legislation to implement and enforce the certification scheme and to maintain dissuasive and proportional

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<sup>99</sup> Gilgen, *supra* note 69 at 13.

<sup>100</sup> Ann C. Wallis, “Data Mining: Lessons from the Kimberley Process for the United Nations’ Development of Human Rights Norms for Transnational Corporations” (2005) 4 Nw J Intl Hum Rts 388 at 393.

<sup>101</sup> U.N. GAOR, 55th Sess., 79th Plen. Mtg., U.N. Doc. A/RES/55/56 (2001) at para. 2. See also, Price, *supra* note 73 at 34; Wallis, *supra* note 99 at 393; and Julie L. Fishman, “Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem” (2004-2005) 13 U Miami Bus L Rev 217 at 224.

<sup>102</sup> Frans Schram, “The Legal Aspects of the Kimberley Process” (International Peace Information Service, Antwerp, Belgium, January 2007) at 7, online: *Business & Human Rights Resource Centre* <<http://archive.niza.nl/docs/200701171036348313.pdf>>.

<sup>103</sup> *Ibid.*

<sup>104</sup> Daniel L Feldman, “Conflict Diamonds, International Trade Regulation, and the Nature of Law” (2003) 24:4 U Pa J Intl L 835 at 836.

<sup>105</sup> Ezeudu, *supra* note 17 at 117.



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penalties for infringement.<sup>106</sup> Although the encouragement of the participants to pass local laws to enforce the agreement at the home front is expressed to be based on “meeting internationally agreed minimum standards”,<sup>107</sup> in reality, the minimum standards are not minimum standards at all but are instead pretty high standards. All participant countries must pass new legislation to enforce the KPCS at home.<sup>108</sup> While some scholars may argue that the KPCS may be appropriately referred to as a hybrid document as opposed to a pure soft law instrument, given that all participant countries must pass new laws to enforce it at home, however, such a nomenclature preference does not affect the main thesis of this paper.

The KPCS regime operates based on the admission and exclusion of members. The agreement provides that each participant should “ensure that no shipment of rough diamonds is imported from or exported to a non-participant”.<sup>109</sup> This provision is one of the key elements of the regime that ensures its effectiveness and puts it on a pedestal even higher than many conventional treaties. Its obvious implication is that a country must first subscribe to the regime in order to participate legally in the global diamond trade.<sup>110</sup> This element is further reinforced by monitoring, which the KPCS monitoring committee conducts, and it is designed to ensure that participants are complying with its requirement.<sup>111</sup> Expulsion from the KPCS regime is often a dire consequence that accompanies any discovery of non-compliance following a monitoring review by a KPCS monitoring team. It shows that being already a member or participant is not sacrosanct. To continue the enjoyment of membership, a participant must continue to comply with the provisions of the agreement. There is however no definite provision in the agreement relating to the expulsion of a participant from the scheme. Rather, the agreement provides that dialogue should be resorted to through the Chair if concerns are raised regarding compliance or implementation of the certification scheme by a participant.<sup>112</sup> However, in practice, the regime began taking extra steps to expel defaulting participants from its membership.<sup>113</sup>

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<sup>106</sup> Kimberley Process, “2013 KPCS Core Document Amended”, KPCS Document, s. IV, para (d), online: *Kimberley Process* <<https://www.kimberleyprocess.com/en/kpcs-core-document-version-2016-0>> [*KPCS Document*].

<sup>107</sup> *Ibid* at preamble, para 10.

<sup>108</sup> Ezeudu, *supra* note 17 at 120, n 70.

<sup>109</sup> *KPCS Document*, *supra* note 105 at s. III, para (c).

<sup>110</sup> Ezeudu, *supra* note 17 at 123.

<sup>111</sup> It is pertinent to note that the civil society, diamond industry and NGOs who participated in the meetings and negotiations that led to the creation of the certification scheme, were reduced to mere observer status in the agreement. Nonetheless, they are still obliged to participate in plenary meetings and ad hoc working groups particularly the peer review visits. *See the KPCS Document*, *supra* note 105 at s.1, & s. VI, paras. 1, 10, 13(b), 15.

<sup>112</sup> *KPCS Document*, *supra* note 105 at s. VI, para 16.

<sup>113</sup> Ian Smillie, “The Kimberley Process Certification Scheme for Rough Diamonds” (Partnership Africa Canada, Comparative Case Study 1, October 2005) at 4, online: *The Overseas Development Institute (ODI)* <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4470.pdf>>.

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Certification of diamonds under the KPCS requires miners, mining companies, or rough diamond buyers operating in diamond-producing countries who are KPCS participants, to export diamonds sealed in a tamper-resistant container accompanied by a valid KPCS certificate issued by a government authority.<sup>114</sup> At the importing country, the importer of the rough diamonds must provide Customs with a valid and authentic certificate issued and validated by the exporting government. The shipment is then subjected to a physical inspection to ensure that the contents match the description on the certificate.<sup>115</sup>

Everyone familiar with the making and operation of international law would realize that there is no better way of achieving an expeditious solution to an international problem than through the soft law option, especially one that involves the Non-State Actors in its governance scheme. Such an option allows for more political leeway and rapidity and offers a regulatory malleability that accommodates competing priorities and provides a framework for future adaptation.<sup>116</sup> Of course, that does not imply that there are no negative aspects of using soft law. First, a soft law regime may sometimes struggle with acceptance or legitimacy issues, especially when its creation process is not grassroots-orientated or lacks transparency or is without extensive consultation with key stakeholders. Second, as argued by Chinkin regarding the Code of Conduct for Transnational Corporations, the negotiation of a soft law instrument may sometimes be complex and lengthy as in the case of a treaty.<sup>117</sup> Third, where the initiation and implementation of a soft law regime depend on the strength and influence of a single strong Non-State Actor, then the collapse or demise of that entity portends the end of the regime. However, in the context of this paper, the benefits of a soft law regulatory approach outweigh its disadvantages.

To some extent, the KPCS shares similarities with the Montreal Protocol on Substances that Deplete the Ozone Layer, signed in September 1987 ("Montreal Protocol"), which has been described as the most significant international environmental agreement in history.<sup>118</sup> Just as a situation of imperativeness spurred the establishment of the KPCS, the negotiation and signing of the Montreal Protocol stemmed from an increased sense of urgency that atmospheric ozone depletion was a real danger to mankind and required global action.<sup>119</sup> Again, just as the KPCS restricted trade in diamonds with non-compliant countries, the Montreal Protocol also

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<sup>114</sup> Ezeudu, *supra* note 17 at 125.

<sup>115</sup> *Ibid.*

<sup>116</sup> Schram, *supra* note 101 at 9.

<sup>117</sup> C M Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38(4) ICLQ 850 at 860. See also, Maynard, "A Code of Conduct for Transnational Corporations" (1983) 4 The Company Lawyer 103.

<sup>118</sup> Laura Thoms, "A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design" (2003) 41:3 Colum J Transnat'l L 795 at 797.

<sup>119</sup> *Ibid* at 801.

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restricted trade in chlorofluorocarbons with non-parties to its agreement.<sup>120</sup> Furthermore, the KPCS recorded success in contributing to the ending of the conflict diamond problem, and similarly, the Montreal Protocol also recorded success in reducing by eighty-five percent, the production of those gases that damage the ozone layer most.<sup>121</sup> However, the two regimes differ because while the KPCS is a soft law regime, the Montreal Protocol is a hard law treaty. In any event, the Montreal Protocol supports the thesis of this paper to the extent that it demonstrates that a situation of urgency or imperativeness could instigate worldwide action for a regime change.

### 4. KIMBERLEY PROCESS LESSONS FOR CLIMATE CHANGE ACTION

Essentially, the lessons from the KPCS example for the current climate crisis are threefold – the imperative aspect, the leadership aspect, and the implementation aspect. All three aspects have a common denominator - they all affected the economic interests of key players whose cooperation proved critical for the establishment of the KPCS.

#### 4.1 The Lesson in Imperativeness

No effective solution was crafted for the conflict diamonds until a situation of imperativeness was created, spurred by the NGOs' campaign against the global diamond industry. Individuals, as well as corporations, are often motivated to act or change a course of behaviour once their interests -pecuniary or otherwise, are threatened. The reaction of the global diamond industry to the adverse campaign sponsored against the industry by a coalition of NGOs created a new reality. As the negative publicity reached a crescendo, it triggered naming and shaming, resulting in a massive consumer boycott of diamonds. Referring to De Beers, the leader of the global diamond cartel, Tony Karon captured the situation in an important *Time* column that "[t]he gem giant, facing twin threats of dwindling market share and a boycott fuelled by human rights concerns, takes a new tack."<sup>122</sup>

The naming and shaming coupled with the consumer boycott, share a common semblance with the extant hard-law-based carbon taxing and cap-and-trade system, to the extent that they are all market-based governance approaches. But they have clear differences. The carbon tax, to entities required to reduce their emission, is treated like an ordinary expense, which can be absorbed in profit and loss accounting and is often passed onto the consumers. It has no meaningful economic bite on the regulated entities. Similarly, the cap-and-trade system is treated as a manufacturing inventory that can be traded off when excess is acquired, or more purchased when

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<sup>120</sup> *Ibid* at 803.

<sup>121</sup> *Ibid* at 805.

<sup>122</sup> Tony Karon, "Why De Beers Wants You 'Blood Diamond'-Savvy: The gem giant, facing twin threats of dwindling market share and a boycott fuelled by human rights concerns, takes a new tack", *Time* (13 July 2000), online: <<http://content.time.com/time/magazine/article/0,9171,49841,00.html>>.

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deficient quantity is in stock. Like the carbon tax, it can ultimately be absorbed in profit and loss accounting, and thus lacks meaningful economic bite. In contrast, a soft-law-based Non-State Actors' naming and shaming system with a boycott, creates an absolute loss of consumer patronage, meaning that targeted entities encounter dwindling revenue and profit. It comes with a meaningful economic bite, which is just enough to compel positive action. "Business as usual" is an apt expression for the current carbon tax and the cap-and-trade system. A regime change is imperative.

Essentially, until there is an adversely impactful campaign against the high emitters of GHGs, a campaign that portends serious economic consequences, an effort to contain global warming may not yield the desired result. The work must start with activist NGOs, just as in the case of conflict diamonds. There is a handful of organizations or groups that can escalate their work to a level of an adverse campaign. For instance, Climate Action Network Canada – *Réseau Action Climat Canada* (CAN-Rac Canada) has been championing Climate Change activism in Canada. It is Canada's representative of Climate Action Network International. This coalition of over 100 organizations across Canada has not only the potential but also stands in a position where it can galvanize the manner of activism required to spur a meaningful policy change.<sup>123</sup> In the spring of 2019, CAN-Rac Canada became a signatory and coordinating committee member of the Pact for a New Green Deal, which is a coalition of environmental NGOs and other social justice groups, who advocate among others for a clean energy economy.<sup>124</sup> The presence of the Climate Actions Network in several countries, including the US, makes it even better disposed to do a globally coordinated adverse campaign. 350.org is another international NGO, that is also championing the cause of Climate Change. It devotes its work largely to the ending of fossil fuel and advocates for conversion to renewable energy.<sup>125</sup> It can also drive negative publicity against the high carbon emitters. Indeed, the fall 2019 students' global rally on climate action is an indication that only a little nudging may be required to get the campaign to an adverse publicity status.<sup>126</sup>

One question that must be answered however is which emitters should be targeted in the negative publicity? Again, would the adverse campaign be directed also to countries with a high emission rate per capita? While these critical questions are raised to lay the groundwork for further research, it may be argued for the time being that the market-based nature of the soft

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<sup>123</sup> Climate Action Network Canada - Réseau action climat, "About CAN-Rac" (accessed 30 July 2020) online: *Climate Action Network Canada* <<https://climateactionnetwork.ca/about-can-rac/>>.

<sup>124</sup> Climate Action Network Canada - Réseau action climat, "A Green New Deal for Canada" (accessed 30 July 2020) online: *Climate Action Network Canada* <<https://climateactionnetwork.ca/a-green-new-deal-for-canada/>>.

<sup>125</sup> 350.org, "Stop Fossil Fuels: Build 100% Renewables" (accessed 14 June 2021) online: *350.org* <<https://350.org/>>.

<sup>126</sup> Eric Stober, "Youth rally around the world in global climate strike" *Global News* (27 September 2019), online: <<https://globalnews.ca/news/5962704/global-climate-strike-overview/>>.

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law system in which Non-State Actors are involved, suggests that an appropriate approach may be to target corporate-entity high emitters in different industries, especially those corporations dealing in fossil fuel. The reason is that high carbon emissions that contribute to global warming are attributed to the use of fossil fuels. Thus, with naming and shaming comes consumer boycott that may lead to low revenue. The consumer boycott would in turn affect governments because a low revenue for corporations means a low or no tax. Automakers may also be the focus of negative publicity. Hybrid cars with high efficiency, in terms of remarkably low fuel consumption, ought to have been the norm at the turn of the current decade, but as it appears, such cars are still produced as high-end cars for only buyers who could pay more.

### 4.2 Role in Leadership: The Instrumentality of the Diamond Industry

The establishment of the KPCS is a clear illustration that a Non-State Actor (the global diamond industry, in that case) could spearhead an effective global regime, both from the standpoint of implementation and enforcement. The NGOs' activism led to the exposure of the scourge of blood diamonds to the world, but the diamond industry, once impacted, took steps to regulate the diamond market. Thus, a meaningful leadership role did not emerge from the KPCS negotiation until the global diamond industry committed to ending the blood diamonds. That is another crucial lesson to take away from the KPCS. Concerning the Climate Change action, institutional investors to a reasonable extent, stand in a position to take the leadership role in climate action as the diamond industry did for the KPCS. Without discounting the power of private investors in driving sustainable investment, which has been acknowledged,<sup>127</sup> there is a strong indication that institutional investors can perform the leadership role based on popular policy analyses. Such a leadership role in the form of market pressure can take three forms, namely, institutional divestment from non-conforming corporations, lobbying for policy change towards a stronger market-related regulation, and coordinated public reporting for informed private investor/consumer actions.

For instance, Ken Silverstein, a senior column contributor at Forbes, discloses in a compelling column titled "*Institutional Investors Have More Power Than Governments To Shape Climate Future*" that while institutional investors have been using their financial influence to urge corporations to commit to a green economy, they are now focusing on demanding that the Congress should come up with policy change that would mandate the US Securities and Exchange Commission to ensure there is stronger

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<sup>127</sup> David Uzsoi, *Sustainable Investing: Shaping the Future of Finance* (Winnipeg, MB: International Institute for Sustainable Development, February 2020) 8, online: <<https://www.iisd.org/system/files/publications/sustainable-investing.pdf>>.

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transparency and consistency in corporate reporting risk.<sup>128</sup> The institutional investors take the position that businesses should be compelled to disclose their environmental, social and governance data to investors who require such information to make informed investment decisions.<sup>129</sup> As Silverstein writes, The Principles for Responsible Investment, a group of institutional investors who manage around \$86 trillion assets, has emphasized that climate issues are the number one risk in their portfolios and they need to act now to avoid disruption.<sup>130</sup> With the globalization of policy trends, it is believed that the US example once successfully executed, may be copied in other G7 countries with a potential domino effect around the world.

The suitability of the institutional investors for the leadership role is informed by their economic strength and influence like the global diamond industry, and they are in a position to facilitate more easily a global coalition and strategy required for a widespread regime change. At the moment, an existing entity that could seamlessly assume this position is the Climate Action 100+, which is coordinated by five partner organizations that include the Asia Investor Group on Climate Change (AIGCC), Ceres, Investor Group on Climate Change (IGCC), Institutional Investors Group on Climate Change (IIGCC), and the Principles for Responsible Investment (PRI).<sup>131</sup>

With respect to operational leadership, the oil and gas industry appears to be well-positioned to design a template for the working of a Climate Change-specific regime – a peculiar system of certification. MiQ, which is an independent, not-for-profit partnership between Rocky Mountain Institute and SystemIQ, has developed a certification system to encourage methane abatement through a differentiated market for natural gas buyers and sellers.<sup>132</sup> The oil and gas industry acknowledges that methane leaked into the atmosphere is a much more powerful climate pollutant than carbon dioxide.<sup>133</sup> Year by year, the industry emits over 84

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<sup>128</sup> Ken Silverstein, “Institutional Investors Have More Power Than Governments to Shape Climate Future” (26 July 2019) online: *Forbes* <<https://www.forbes.com/sites/kensilverstein/2019/07/26/institutional-investors-have-more-power-than-governments-to-shape-climate-future/?sh=54e9676530d1>>.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Michael Edesess, “The Misguided Role of Institutional Investors in Climate Change” (30 November 2020), online: *Advisor Perspectives* <<https://www.advisorperspectives.com/articles/2020/11/30/the-misguided-role-of-institutional-investors-in-climate-change>>.

<sup>132</sup> Alex Chin, “Rocky Mountain Institute (RMI) and SYSTEMIQ launch MiQ to tackle methane emissions from the oil and gas sector” (2 December 2020), online: *RMI: Energy Transformed* <<https://rmi.org/press-release/rocky-mountain-institute-rmi-and-systemiq-launch-miq-to-tackle-methane-emissions-from-the-oil-and-gas-sector/>>.

<sup>133</sup> *Ibid.* See also Isabelle Gerretsen, “IPCC report prompts calls to tackle methane emissions at Cop26” (11 August 2021), online: *Climate Home News* <<https://www.climatechangenews.com/2021/08/11/ipcc-report-prompts-calls-tackle-methane-emissions-cop26/>> (stressing that methane has a warming impact 84 times that of CO<sub>2</sub> over a 20-year period).

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million tons of methane, which is equivalent to the total emissions from road transport vehicles around the world.<sup>134</sup> The MiQ Certification System will urgently and effectively reduce methane emissions from the production of natural gas, reports Alex Chin, an RMI's media contact.<sup>135</sup> According to Chin, "[t]he market-based certification will allow for a differentiation of the gas markets based on methane emissions performance and, therefore, generate different price levels that create an economic incentive for companies that are lagging behind to invest in methane abatement".<sup>136</sup> As gas buyers are increasingly seeking guarantees about the origin of LNG imports, the MiQ certification will help buyers to verify the methane emission performance of gas entering the LNG streams, pre-liquefaction.<sup>137</sup> As Georges Tijbosch, a Senior Adviser of MiQ explains, certifying gas based on methane performance "will allow suppliers to make purchasing decisions based on the environmental impact of gas, creating a financial incentive for producers to invest in the technology, procedures and policies that reduce their methane emissions".<sup>138</sup> This indeed reinforces the position of this paper that a meaningful climate action regime must have an economic incentive to compel compliance. At the same time, it demonstrates that a non-State-actor-led climate action regime can be easily crafted if it attracts enough coordinated campaigns for it.

#### 4.3 The Implementation Lesson

The implementation of the KPCS does not toe the line of a conventional treaty. In the first instance, it is a voluntary initiative as opposed to an obligatory one. Being a market-based scheme, the participants eager not to halt the influx of their diamond revenue did not hesitate to implement the regime within their national territories. The spontaneity of the implementation was unique because, unlike a conventional treaty, there was no lag time for ratification. Again, the threat of being out of the legal diamond trading circle was the main impetus that drove the implementation of the regime. Essentially, the way the regime was set up, coupled with the involvement of the largely non-State actor diamond industry body, made it to be a self-regulatory regime because it co-opts and triggers off every part of the diamond trading chain to become a continuously and perpetually vigilant self-regulatory system. The implementation of KPCS indeed demonstrates the achievement of easy consensus (industry-government cooperation) in providing a global public good, because the common economic interests of all parties were at stake.<sup>139</sup> It is important to note that

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<sup>134</sup> Chin, *supra* note 131.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> See J Andrew Grant, "Consensus Dynamics and Global Governance Frameworks: Insights from the Kimberley Process on Conflict Diamonds?" (2013) 19:3 Canadian Foreign Policy Journal

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the implementation is also widespread because non-diamond producing countries are compelled to implement the agreement within their national boundaries because of that important consequence of non-participation in the legitimate diamond trading circle for non-implementation.<sup>140</sup>

An additional element of the implementation that must be emphasized is the efforts made by the participants to impose severe sanctions for breach of the regime at the home front by elevating the status of their respective KPCS local laws to that of criminal law. In most, if not all the participant countries, it is a criminal offence to deal in rough diamonds without an appropriate government certificate. The criminal element of the KPCS law is thus a spectacular phenomenon worthy of note – a creation of normative synergy between industry's cooperative regulation and state's brute authority. Thus, without such a compelling force of law, it might have been difficult to implement the non-binding agreement within the national boundaries.

Essentially, any effort to achieve a meaningful remedial alternative to the Climate Change crisis, which takes the soft law approach should inevitably, induce parties to act on their own volition without compulsion; and create a disincentive for failing to comply and implement. The disincentive must have a purposeful economic element. So long as the current carbon taxing and cap-and-trade continue without serious economic deprivation on the part of both national governments and polluting entities, nothing will change in the fight against Climate Change.

## 5. CONCLUSION

If States and key stakeholders must work together to safeguard the future of mankind as Hugo Boyko advocates for,<sup>141</sup> then a meaningful soft law option may be explored for a Climate Change action. In the current age of neo-liberalism when economic interests tend to drive most considerations, whether, by individuals, governments, or corporations, the carbon taxing, and cap-and-trade being devoid of economic constraints will not champion the cause of climate action. Both systems, which are market-based initiatives are currently profit-driven. With them, it is a case of business as usual – a monetization of the right to pollute. The current UNFCCC-based regime lacks meaningful legal and economic bite despite its hard law nature. While most, if not all parties, to the treaty have not demonstrably met their emissions reduction levels, no sanctions have been imposed based on the

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323, online: <<http://dx.doi.org/10.1080/11926422.2013.844909>> (discussing the nature of the consensus that enabled the KPCS agreement).

<sup>140</sup> Regarding some of the participant countries who include non-diamond producers, see *Interlaken Declaration on the Kimberley Process Certification Scheme for Rough Diamonds*, 5 November 2002, online: <<https://www.diamonds.net/Docs/MoralClarity/KP-InterlakenDeclaration-KPCS-1102.pdf>>.

<sup>141</sup> Hugo Boyko, "Introduction" in Hugo Boyko, 2nd ed, *Science and the Future of Mankind* (The Hague: Dr. W. Junk Publishers, 1964) 7.



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treaty. Thus, like most international treaties based on State authority, the Paris Agreement would continue to be a political instrument that provides a sense of hope, but may continue to flounder on its promise. A soft law-based alternative regime system must be tried out, and this can be propelled by creating meaningful constraints to the economic benefits that accrue to both the regulator and the regulated under the current regime.

As in the case of the KPCS, there are a number of catalysts indicating that the global socio-political climate is already being prepared for the implementation of a market-based soft law regime for climate action. First, growing Climate Change activism is pushing for better regulation of GHG emissions. This involves both organized NGO bodies and dispersed groups like student bodies. Such activism has the tendency to trigger a consumer domino effect towards boycotts. The potential implication of such consumer activism is the loss of economic interests such as revenue on the part of targeted polluting entities and by extension the government. Second, institutional investors are in a position to match the activism with leadership for better GHG emission regulation. They have the economic strength not only to steer key actors to the path of GHG reduction but equally can compel obedience to any crafted regime. The institutional investor leadership will traverse between the regulated entities and the civil society, thus providing a grassroots governance style like the KPCS.

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### AUTHOR' DECLARATIONS AND ESSENTIAL ETHICAL COMPLIANCES

#### *Author' Contributions (in accordance with ICMJE criteria for authorship)*

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#### *Research involving human bodies (Helsinki Declaration)*

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