

INTERNATIONAL LAW ASSOCIATION
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LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE

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THE LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE

FIRST REPORT¹

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¹ Prepared by the Rapporteur, Lavanya Rajamani, Professor, Centre for Policy Research, India, in consultation with the Chair, Shinya Murase, based on the paper by the Japan Branch of the ILA Committee on Legal Principles Relating to Climate Change, and comments offered by Committee members Daniel Bodansky, Alan Boyle, Jutta Brunnee, William Burns, Christian Calliess, Philippe Cullet, Duncan French, Eric Canal-Forgues, Anita Halvorsen, Harald Hohmann, Sandrine Maljean-Dubois, Hari Osofsky, Jacqueline Peel, Tianbo Qin, Anita Rønne, Werner Scholtz, Hennie Strydom and Xinjun Zhang.

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I. Introduction

1. The Establishment and Mandate of the ILA Committee on the Legal Principles Relating to Climate Change

The ILA Committee on the Legal Principles Relating to Climate Change (hereinafter “the Committee”) was established by the ILA Executive Council in November 2008 in response to a proposal by the Japan Branch in September 2008.

The international climate change regime comprises principally of the United Nations Framework Convention on Climate Change of 1992 and the Kyoto Protocol of 1997. Although these instruments are important first steps towards addressing climate change and its impacts, they are widely regarded as inadequate and inadequately implemented. The international community is engaged in intense negotiations, both within the context of these instruments, and in other plurilateral and multilateral fora, to design an agreement that builds on, complements and may even replace part of the existing climate change regime.

The establishment of a new Committee on the “Legal Principles relating to Climate Change” is appropriate and timely in this context. If the Committee adopts a set of Principles or a Statement, these have, given the fluid nature of the international climate negotiations, the potential to shape and influence the evolution of the climate change regime, as well as to provide guidance on the implementation of any new instrument that might emerge from these negotiations.

The work of this Committee will seek to complement rather than replicate the work of other ILA Committees, notably that of the Committee on Sustainable Development. While the mandate of the Committee on Sustainable Development is broad, the mandate of this Committee is limited to the legal issues that arise in seeking to address climate change and its impacts. Although this Committee is likely to touch upon legal concepts and principles considered by other Committees, its principal focus and lens will be climate change.

The Japan Branch of the Committee² submitted a paper in July 2009, which provided a basis for discussion among the members of the Committee. The First Report to be submitted to the ILA Hague Conference, August 2010, is based on the Japan Branch paper as well as the rich array of structural and substantive comments that members of the Committee offered in response to the Japan Branch paper.

2. The Goal of the ILA Committee on the Legal Principles Relating to Climate Change

In line with the normal practice of ILA Committees, the ultimate goal of the Committee’s work should be to have its work on the “Legal Principles relating to Climate Change” adopted in the form of draft articles and attached commentaries. The Third [Final] Report of the Committee scheduled to be submitted to the ILA Conference at Kyoto in 2014 will take this form.

The Second Report of the International Committee to be submitted to the 2012 Sofia Conference will be a substantive report addressing selected legal issues relating to the existing climate change regime.

This First report scheduled to be submitted to the 2010 Hague Conference is intended to set the stage for a preliminary consideration of the problem, namely, the methodology and the scope of the Committee’s work.

II. The International Climate Change Regime: An Overview

The international climate change regime is comprised of the United Nations Framework Convention on Climate Change, 1992³ and its Kyoto Protocol, 1997.⁴ These instruments are in force,⁵ have concrete content and are

² Members of the Japan Branch Committee are as follows: Akiho Shibata, Yukari Takamura, Osamu Yoshida, Yoshinori Abe, Junichi Eto, Takeo Horiguchi, Kenji Kamigawara, Tsuyoshi Kawase, Mari Koyano, Kazuhiro Nakatani, Tomoakio Nishimura, Yumi Nishimura, Shinya Murase, Masataka Okano, Takako Onitsuka, Mari Takeuchi, and Jun Tsuruta.

³ United Nations Framework Convention on Climate Change, May 29, 1992, A/AC.237/18 (Part II)/Add. 1, *reprinted in* (1992) 31 I.L.M. 849 [hereinafter FCCC], available at, <http://unfccc.int/essential_background/convention/background/items/2853.php> (visited May 31, 2010).

⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, FCCC/CP/1997/L.7/add.1, *reprinted in* (1998) 37 I.L.M. 22 [hereinafter the Kyoto Protocol], available at, <http://unfccc.int/kyoto_protocol/items/2830.php> (visited May 31, 2010).

⁵ 189 countries and the EC are Party to the Kyoto Protocol, and 193 countries and the EC are Party to the FCCC, available at, <<http://unfccc.int/playground/items/5524.php>> (Status of Ratification of the Kyoto Protocol), and

binding upon the Parties. Resources are in place to facilitate the negotiation process⁶ and ensure emissions reductions,⁷ as well as to supervise and enforce compliance with the obligations imposed by these treaties.⁸

The balance of commitments under the FCCC and its Kyoto Protocol is based on the principle of common but differentiated responsibilities and respective capabilities (CBDRRC).⁹ The core content of the CBDRRC principle as well as the nature of the obligation it entails is deeply contested, and this will be considered in detail below. Notwithstanding the contestations over this principle, at its core the CBDRRC principle permits, and indeed requires, differential treatment between countries in the fashioning of treaty obligations. Accordingly, the FCCC and its Kyoto Protocol contain differing obligations for different countries or groups of countries. The FCCC lists 36 developed countries in Annex I, and relegates developing countries to the catch-all category of non-Annex I countries.

The FCCC requires all countries, developing and developed, to develop in a sustainable manner¹⁰ and address the adverse effects of climate change through adaptation. Of developed countries, however, the FCCC further requires that they address climate change through specific mitigation commitments.¹¹ While FCCC Article 4(1) relating *inter alia* to national inventories of anthropogenic emissions by sources and removals by sinks,¹² programmes containing measures to mitigate climate change,¹³ and scientific and technological co-operation,¹⁴ is applicable to *all* Parties, Article 4(2) containing specific commitments is limited to Annex I Parties.¹⁵ Developed countries are committed by virtue of this article to aiming to return individually or jointly to their 1990 levels of anthropogenic emissions of Greenhouse Gases (GHGs).¹⁶

The FCCC lays down guiding principles to help Parties find an acceptable formula to address the problem, and the formula is contained in the Kyoto Protocol.¹⁷ The Kyoto Protocol is a product of the Berlin Mandate Process. Adopted by the first COP, the Berlin Mandate proposed strengthening the commitments of Annex I Parties through the adoption of a Protocol or another legal instrument.¹⁸ The mandate further specified that the process “shall” be guided by *inter alia*, Article 3(1) (CBDRRC principle).¹⁹ It required the process to aim at setting quantified emissions limitation and reduction objectives within specified time frames for Annex I countries but

<http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php> (Status of Ratification of the Convention) (visited May 31, 2010).

⁶ The FCCC and the Kyoto Protocol are serviced by a Secretariat based in Bonn, staffed with several hundred international civil servants, online, <<http://unfccc.int/secretariat/items/1629.php>> (visited May 31, 2010).

⁷ Through Joint Implementation, the Clean Development Mechanism and Emissions Trading, Kyoto Protocol, *supra* note 4, arts. 6, 12 and 17.

⁸ At the seventh FCCC COP, Parties adopted the Marrakech Accords which laid down operating rules for the mechanisms and, accounting procedures for emissions reduction credits. They established a compliance system and set out the consequences for non-compliance. *See* Report of the Conference of the Parties on its Seventh Session, held at Marrakesh from 29 October to 10 November 2001, Addendum, Part two: Action taken by the Conference of the Parties, Volume I FCCC/CP/2001/13/Add.1 (2002); *See also* Volume II FCCC/CP/2001/13/Add.2 (2002); Volume III FCCC/CP/2001/13/Add.3 (2002); and Volume IV FCCC/CP/2001/13/Add.4 (2002).

⁹ FCCC, *supra* note 3, art. 3.; the climate change regime is widely considered to be the “clearest attempt to transform, activate and operationalize common but differentiated responsibility from a legal concept into a policy instrument.” *See* Remarks by Christopher Joyner, in Christopher C. Joyner, Transcript of Panel Discussion on “Common but Differentiated Responsibility”, 96 AM. SOC’Y INT’L L. PROC. 358 (2002); Committee member Bodansky expressed a preference, given the language of FCCC art. 3, for the phrase “respective capabilities” to be included in every usage of the phrase “common but differentiated responsibility”.

¹⁰ In addition to the requirement to develop in a sustainable manner. *See* Gabcikovo – Nagymaros (Hung./Slovk.), 1997 I.C.J. 15, 24 [hereinafter Gabcikovo – Nagymaros]; climate-specific mandates exist in the FCCC *supra* note 3, including in the Preamble, and arts. 3 (4) and 4(1).

¹¹ FCCC, *supra* note 3, art. 4(1).

¹² FCCC, *supra* note 3, art. 4(1) (a).

¹³ FCCC, *supra* note 3, art. 4(1) (b).

¹⁴ FCCC, *supra* note 3, art. 4(2) (f).

¹⁵ FCCC, *supra* note 3, art. 4(2) (a) and (b).

¹⁶ FCCC, *supra* note 3, art. Article 4(2) (b).

¹⁷ *See* LAWRENCE SUSSKIND, ENVIRONMENTAL DIPLOMACY 34 (1994).

¹⁸ Decision 1/CP.1, The Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, sub-paragraph (a) and (b), of the Convention, including proposals related to a Protocol and decisions on follow-up, contained in Report of the Conference of Parties on its first session held at Berlin from 28 March to 7 April 1995, Addendum, Part two: Action taken by the Conference of the Parties at its first session, FCCC/CP/1995/7/Add.1 (1995) at 4 [hereinafter the Berlin Mandate].

¹⁹ *Id.*

not introduce any new commitments for non-Annex I Parties.²⁰ The Berlin Mandate reaffirmed the CDDRRC principle and in keeping with the FCCC division of responsibilities between developed and developing countries, focused on mitigation activities and thereby primarily on commitments of developed countries. An *Ad Hoc* Working Group was set up to advance the ambition of the Berlin Mandate and as a result of its deliberations the draft negotiating text of the Kyoto Protocol emerged and was adopted at Kyoto in December 1997.²¹ The Kyoto Protocol requires certain developed country Parties listed in Annex I to the FCCC to reduce their overall emissions of a basket of greenhouse gases by at least 5% below 1990 levels in the commitment period of 2008-2012.²² It provides Parties with three mechanisms- Joint Implementation,²³ the Clean Development Mechanism,²⁴ and Emissions Trading²⁵ -to provide flexibility in meeting their targets. In the years following Kyoto, Parties negotiated to arrive at operating rules for the mechanisms and, accounting procedures for emissions reduction credits. They established a compliance system and set out the consequences for non-compliance. And, they created frameworks for capacity building and technology transfer to developing countries and in some cases economies in transition.²⁶

The Kyoto Protocol came into force on 16 February 2005, and at the first Meeting of Parties to the Kyoto Protocol and the eleventh Conference of Parties, in December 2005, discussions commenced on how the climate change regime might be structured after 2012. Two separate processes were initiated: an *Ad Hoc* open-ended Working Group to consider further commitments for developed countries beyond 2012 under the Kyoto Protocol (AWG-KP)²⁷ and a “[D]ialogue on long-term cooperative action” under the FCCC.²⁸ The Dialogue, which stressed development and poverty eradication as well as the role of technology, covered actions by *all* parties but was neither binding nor authorized to open negotiations leading to new commitments.²⁹ The Dialogue nevertheless led to the Bali Action Plan on 15 December 2007.³⁰ The Bali Action Plan launched a process to advance the climate change regime at the fifteenth COP (COP-15) in 2009 at Copenhagen.³¹ COP-15 attracted 125 heads of State and government, the largest such gathering in the history of the United Nations, and nearly 40,000 participants. No collective challenge facing humanity has ever before attracted such attention, participation and political capital, yet the international community could not resolve its differences and arrive at a legally binding agreement to advance the climate change regime. The Copenhagen conference resulted in decisions to continue negotiations under the FCCC³² and Kyoto Protocol,³³ in addition to the controversial

²⁰ *Id.*

²¹ Decision 1/CP.3, Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change in Report of the Conference of Parties on its Third Session at Kyoto held from 1 to 11 December, 1997, Addendum, Part two: Action taken by the Conference of the Parties at its third session, FCCC/CP/1997/7/Add.1 (1998) at 4.

²² Kyoto Protocol, *supra* note 4, art. 3(1).

²³ Kyoto Protocol, *supra* note 4, art. 6.

²⁴ Kyoto Protocol, *supra* note 4, art. 12.

²⁵ Kyoto Protocol, *supra* note 4, art. 17.

²⁶ *See*, Report of the Conference of the Parties on its Seventh Session, Addendum, Part two, Action taken by the Conference of the Parties, Volume I FCCC/CP/2001/13/Add.1 (2002); *See also* Volume II FCCC/CP/2001/13/Add.2 (2002); Volume III FCCC/CP/2001/13/Add.3 (2002); and Volume IV FCCC/CP/2001/13/Add.4 (2002).

²⁷ Decision 1/CMP.1, Consideration of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention under Article 3, Paragraph 9 of the Kyoto Protocol in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session held at Montreal from 28 November to 10 December 2005, Addendum, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session, FCCC/KP/CMP/2005/8/Add.1 (2006).

²⁸ Decision 1/CP.11, Dialogue on Long-Term Cooperative Action to Address Climate Change by Enhancing the Implementation of the Convention in Report of the Conference of Parties on its eleventh session held at Montreal from 28 November to 10 December 2005, Addendum, Part Two: Action taken by the Conference of the Parties at its eleventh session, FCCC/CP/2005/Add.1 (2006).

²⁹ *Id.*

³⁰ Decision 1/CP.13, Bali Action Plan in Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session, FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter The Bali Action Plan].

³¹ *Id.*

³² Decision 1/CP.15, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, in Report of the Conference of Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session, FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) at 3.

³³ Decision 1/CMP.5, Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its fifth session, held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the

Copenhagen Accord,³⁴ a political agreement of uncertain legal status, reached among a subset of the Parties to the FCCC and Kyoto Protocol. The significance of the Accord in the climate negotiations is subject to considerable debate in the wake of the COP's decision to "take[s] note" of rather than adopt the Copenhagen Accord. Considerable challenges line the road ahead. And, the international community is currently engaged in seeking to address these through the FCCC and parallel international negotiating processes. The methodology and scope of the Committee's work must of necessity be determined by the needs of the international legal regime.

III. Proposed Methodology of Work

In order to reach a meaningful, rigorous and evidence-based outcome the Committee's work must be guided by certain methodological impulses. First, while climate often inspires impassioned policy debates, the ILA Committee as an academic body composed of legal experts should focus on the examination and formulation of the relevant "legal principles" rather than the development of policy proposals. Further, although interdisciplinary approaches are important, and have their place, the Committee should play to its strengths and focus on jurisprudential rather than inter-disciplinary analysis.

Second, it is critical to distinguish arguments based on *lex lata* (law as it is) from those based on *lex ferenda* (law as it ought to be). In the field of international environmental law in general and of climate change law in particular, *lex ferenda* proposals and preferences are smuggled into the process of "interpretation" of *lex lata*, which should be avoided. Although the Committee will likely make *lex ferenda* proposals at the end of its work, these should be designed only after a careful assessment of the function of *lex lata*.

Third, it is important that the legal principles on climate change are considered within the framework of general international law. This implies that the work of the Committee should resist the tendency toward "fragmentation" in international legal studies caused by dominant "single-issue" approaches. Further, the legal principles on climate change should, as far as possible, be considered in relation to doctrines and jurisprudence of general international law. It also implies that the work of the Committee should extend to applying principles of general international law to various aspects of climate change. For instance, the Committee would consider customary norms such as the no harm rule, and the way in which the law of State responsibility applies to the harm caused by climate change.

Based on these considerations, the Committee should adopt a cautious approach to elaborating "legal principles" on climate change. First it should seek to clarify the meaning and function of the existing legal principles in their interpretation and application *de lege lata*. Next, should the existing law be found lacking, it could offer a re-interpretation of the existing principles or legal concepts. Finally, it may, after careful analysis of the possibilities and boundaries of existing principles, make *de lege ferenda* proposals on the progressive development of new legal principles.

IV. Approaches to Defining the Scope of the Committee's Work

Members of the Committee have identified two possible approaches to defining the scope of the Committee's work, one being the Socratic method, the other a thematic approach.

Some Committee members prefer to adopt the Socratic method to address a limited set of questions, in responding to which the Committee would engage with the full gamut of climate change law, but in a directed fashion that builds on and extends existing legal scholarship in the area. Questions identified by Committee members who favour this approach are as follows:³⁵

- Is there an existing or emerging duty for industrialized countries – within and independent of treaties - to reduce GHG (and possibly other) emissions, and if so to what extent? In responding to this the precautionary principle/approach, the polluter pays principle, notions of sustainable use, and inter-generational equity could be discussed.

Parties serving as the meeting of the Parties to the Kyoto Protocol at its fifth session, FCCC/KP/CMP/2009/21/Add.1 (Mar. 30, 2010) at 3.

³⁴ Decision 2/CP.15 Copenhagen Accord in Report of the Conference of Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) at 4 [hereinafter The Copenhagen Accord].

³⁵ Drawn from comments by Committee members Hohmann and Boyle.

- Is there an existing or emerging duty for major developing countries – within and independent of treaties – to reduce GHG (and possibly other) emissions, and if so to what extent? In responding to this the precautionary principle/approach, the polluter pays principle, notions of sustainable use, and inter-generational equity on one hand and on common but differentiated responsibilities and equity (including *inégalité compensatrice*) on the other hand, could be discussed. Definitions and categorization of “major developing countries” would also need to be discussed.
- Do these duties, should they exist, extend to low lying developing countries (LLDCs) and most affected countries as well? If yes, under what conditions? Are such reduction duties dependent on transfers of technology and provision of financial assistance? If yes, are industrialized countries major developing countries under a legal duty to transfer technology or provide funds for the benefit of LLDCs and most affected nations? If yes, under what terms/conditions? If not, why not?
- In addition to mitigation duties, are there any cooperation duties between States? For instance in relation to adaptation or climate disaster relief and assistance?
- If these duties exist, what legal consequences flow from their non-performance? Can LLDCs and most affected nations – or entities on their behalf - claim liability for damages? What mechanisms exist and can be viably developed for enforcement? Which dispute settlement fora are available for this purpose? Can the most efficient forum be chosen (e. g. arguably the WTO dispute settlement fora), even if only some, not all, of these countries are WTO Members?³⁶
- How does the climate change regime interact with other regimes of international law such as trade law?
- How do efforts by transnational coalitions of sub-national actors interact with the climate change regime?
- How does the climate change regime interact substantively and procedurally with, among others, the United Nations Convention on the Law of the Sea, 1982,³⁷ the Convention of Biological Diversity, 1992, the Convention on the Conservation of Migratory Species of Wild Animals, 1979³⁸ and with human rights law?
- What role should environmental impact assessment play in the climate change context and how can it be developed to help address climate change?

Other Committee members appeared to prefer a thematic rather than a Socratic approach, albeit with differences among them on the precise themes to be covered. In the thematic approach proposed by the Japan Branch, the Committee would first review key principles and legal concepts relevant to climate change with a view to analysing their current legal status, functions, possibilities and limits within the existing climate change regime and to set the stage for their possible incorporation, with necessary elaboration and/or modification, into the “Legal Principles.” Second, the Committee would examine the relationship of the climate change regime with general international law and other fields of international law with a view to evaluating the current (and future) climate change regime and its operation within a broader context, in particular within the framework of general international law. As a result of such an examination, the Committee may be better able to extrapolate and construct general legal principles applicable to the issue of climate change. Finally, once the post-2012 legal framework has been negotiated, the Committee would analyse the relationship of a post-2012 legal framework with the current regime and with general international law. It is advisable to wait until the contours of the post-2012 legal framework have been put in place, as the international climate negotiations are plagued by considerable uncertainty at this juncture; uncertainty that the Copenhagen Accord, 2009, given its tortured birthing process and questionable legal status, did little to diminish and much to enhance. Under the circumstances, speculative enquiries relating to the nature of the possible outcome and the shape of the post-2012 regime may prove irrelevant shortly after an outcome is reached, and will contribute little to the literature in the long-term.

This initial scoping paper proceeds on the basis of the thematic rather than Socratic method. This is not intended to prejudge the approach the Committee eventually chooses to adopt in defining its work, but merely to explore the principles and legal concepts that are likely to be engaged in both methods.

³⁶ There is divergence among Committee members on whether the WTO, however efficient, is an appropriate or legitimate forum. Comment from Committee member Burns.

³⁷ Comment by Committee member Boyle.

³⁸ *Id.*

1. Role of Principles in International Environmental Law and the Climate Change Regime

There is a divergence of views among international legal scholars on the definition of “principles,” the existence of particular principles, their nature and status, the functions they perform, and their analytic utility. Indeed, it has been said that the state of scholarly opinion on principles, rules, norms and duties in environmental law reflects “utter confusion” in determining the “status, role and effects of these principles, rules, etc.”³⁹ Some Committee members were of the view that as a starting point the Committee should engage – albeit without resurrecting tired and well documented debates - in a substantive discussion on the term “principle” and its nature and functions in international environmental law, and in the climate change regime in particular. One Committee member, however, was of the view that such a substantive discussion was unnecessary, especially in the context of FCCC Article 3. He noted that in a practical way, legal principles or “operative legal principles” as he characterizes them, can be understood as “ways and means” to achieve the objective of the treaty.⁴⁰ Another Committee member suggested prefacing the discussion of principles with a discussion on the characteristics of law.⁴¹

(i) Definition and Functions

Although, the term “principle” appears to signify a high level of legal authority, principles are of various kinds, from the merely aspirational to the legally binding. At its most basic “when we say that a particular principle is a principle of law we mean that the principle is one which officials must take into account if it is relevant as a consideration.”⁴² While a principle may sway decision-makers in a particular direction it does not necessitate a predetermined action. In this sense it is open-ended.⁴³ Depending on a series of factors a principle of law could be given more or less weight under particular circumstances.

The notion of “principle” arguably denotes the character or “texture” of a norm, rather than its formal legal status.⁴⁴ Like legal rules, principles have legal significance. Unlike binding rules, they do not require particular outcomes or “entail responsibility for breach if not complied with.”⁴⁵ But they do provide reasons or considerations that decision-makers must take into account. Principles can “set limits, or provide guidance, or determine how conflicts between other rules and principles will be resolved.”⁴⁶ To have this effect, principles need not have the status of customary international law, nor do they need to be incorporated into treaties to be relevant to their interpretation or application. This point was made by the International Court of Justice (ICJ) in the *Gabcikovo-Nagymaros* case, where it observed that “... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration and such standards given proper weight...”⁴⁷

When a treaty does articulate particular principles, as the FCCC does in its preamble and in Article 3, they provide “authoritative guidance” for its interpretation, application or implementation.⁴⁸ They entail “at least an element of good faith commitment, an expectation that they will be adhered to if possible.”⁴⁹ Arguably, principles that are enshrined in the body of a treaty operate differently from both preambles and commitments: “unlike preamble paragraphs, [such] principles embody legal standards, but the standards they contain are more general than commitments and do not specify particular actions.”⁵⁰ The upshot is that, “[a]t the very least, Article 3 is relevant to interpretation and implementation of the Convention as well as creating expectations

³⁹ Cf. Ulrich Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles, and Rules*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 425 (Daniel Bodansky et al eds., 2007); drawn from comments by Committee member Strydom.

⁴⁰ Comments by Committee member Canal-Forgues.

⁴¹ Comments from Committee member Hohmann. He defines “law” as covering all written or oral rules which (1) are able to influence the behaviour of persons/states and (2) which reflect formal law in such a way that a court can base its decision on it. See HARALD HOHMANN, PRECAUTIONARY LEGAL DUTIES AND THE PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 177 (1994).

⁴² See, Ronald Dworkin, *Taking Rights Seriously* 24-7 (1977).

⁴³ See, Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 Y. J. INT’L L. 451, 501-2 (1993).

⁴⁴ Following paragraphs drawn from comments provided by Committee member Brunnée.

⁴⁵ A. E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L. QTRLY. 901, 908 (1999).

⁴⁶ *Id* at 907.

⁴⁷ *Gabcikovo – Nagymaros*, *supra* note 10, ¶ 140 (discussing the concept of sustainable development).

⁴⁸ PATRICIA BIRNIE, ALAN BOYLE AND CATHERINE REDGWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* 34 (3rd ed., 2009).

⁴⁹ *Id*.

⁵⁰ See, *supra* note 43 at 501.

concerning matters which must be taken into account in good faith in the negotiation of further instruments.”⁵¹ This result flows in part from the Vienna Convention on the Law of Treaties (VCLT), which confirms the duty to perform a treaty in good faith (Article 26) and requires that treaties be interpreted in good faith (Article 31(1)).⁵² It is worth noting however that albeit titled “principles” some consider FCCC Article 3 to contain an assortment of duties, objectives, conditions and measures.⁵³

In a framework treaty such as the FCCC, principles provide parameters both for the interpretation of the treaty and for further negotiations by the parties on new commitments.⁵⁴ This view is confirmed in FCCC Article 2, which states that it is the “ultimate objective” of the “Convention and any related legal instrument” to achieve, “in accordance with the relevant provisions of the Convention”, the stabilization of greenhouse gas concentrations in the atmosphere at a level that prevents dangerous climate change.⁵⁵ This view is also reflected in, as well as further reinforced by, the repeated references to FCCC principles in the decisions and instruments adopted to develop the climate change regime. The Berlin Mandate specified that the negotiation of what became the Kyoto Protocol was to be guided by “[t]he provisions of the Convention, including Article 3, in particular the principles in Article 3.1.”⁵⁶ The preamble to the Kyoto Protocol itself states that the parties were “guided by Article 3 of the Convention.”⁵⁷ Kyoto Article 10 reaffirms and builds on all parties’ existing commitments under FCCC Article 4(1), “taking into account their common but differentiated responsibilities.” Finally, the 2007 Bali Action Plan that has framed the negotiations for a post-2012 climate change regime, requires that any “shared vision” for approaches to long-term cooperative action proceed “on the basis of equity and in accordance with the provisions and principles of the Convention, in particular the principle of common but differentiated responsibilities and respective capabilities, taking into account social and economic conditions and other relevant factors.”⁵⁸

(ii) Issues for the Committee to Consider

- Nature of principles of international environmental law and the relationship of principles to other concepts such as “obligations,” “rules,” “standards,” and “breach.” Do they imply the existence of obligations? Can a state “breach” a principle?⁵⁹
- Role of principles in the international environmental process. To what degree do they guide the behaviour of States? Are they important primarily in the context of dispute settlement? Do they in some cases provide a rule of decision or do they serve a primarily interpretive function? Or is their primary function to help guide the subsequent development of international environmental law through either treaty-making or customary international law?⁶⁰
- Nature, role, functions, and limits of principles in the climate change regime.

2. Review of Principles and Key Legal Concepts in the Climate Change Regime

FCCC Article 3, entitled “principles,” lists several principles and/or key legal concepts that are intended to guide Parties “in their actions to achieve the objective of the Convention and to implement its provisions.” These principles and key legal concepts, characterized as “guiding principles” by commentators offer a logical starting point for the deliberation of the Committee.

Before reviewing these principles and/or key legal concepts, it is worth highlighting a few observations that were offered by Committee members in relation to the selection and treatment of principles and key legal concepts in the Report. One Committee member noted that albeit entitled “Principles” Article 3 in fact arguably contains an

⁵¹ See, *supra* note 45 at 908.

⁵² Drawn from comments by Committee member Brunnée.

⁵³ Comment by Committee member Strydom.

⁵⁴ Lluís Paradell-Trius, *Principles of International Environmental Law: an Overview*, 9 REV. EUR. COM. INT’L ENV’T L L 93, 96 (2000).

⁵⁵ Emphases added.

⁵⁶ The Berlin Mandate, *supra* note 18.

⁵⁷ Kyoto Protocol, *supra* note 4, Preambular paragraph 4. This paragraph was put forward by the Chair of the negotiations, building on proposals by the EU, the G-77 and China, AOSIS, Iran, and the Russian Federation (some of which had wanted to have a “principles” article included in the protocol). See, Joanna Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History*, FCCC/TP/2000/2 (Nov. 25, 2002) ¶¶ 36-39, 463-467.

⁵⁸ See, *supra* note 30.

⁵⁹ Drawn from comments by Committee member Bodansky.

⁶⁰ *Id.*

assortment of “duties, objectives, conditions and measures.”⁶¹ The work of the Committee could in part be devoted to determining the precise character of and nomenclature to be assigned to particular provisions.

A few Committee members have indicated that as the principle of CBDRRRC is an application of the principle of equity, they would favour integrating the discussion on these two principles.⁶² Although the principles of CBDRRRC and equity are treated separately for the purposes of this initial report, the discussion can be integrated at a later stage should the Committee so decide. A few Committee members have also noted that nothing can usefully be said about principles such as sustainable development and precaution, since there is an ILA report on the former, and the latter has been extensively analyzed in the scholarly literature.⁶³ These principles as they relate to the climate change regime have been considered in brief in this version of the report, but they can be deleted in a later version, should the Committee concur in this assessment.

(i) Common but Differentiated Responsibilities and Respective Capabilities

The first and arguably foremost principle in the climate change regime is the principle of common but differentiated responsibilities and respective capabilities (CBDRRRC).⁶⁴ There were differing views among Committee members on the emphasis the Committee should place on this principle in its work. Some Committee members are of the view that this principle is central to the interpretation, implementation, and further development of the climate change regime and as such the Committee should attempt to ascertain which aspects of the principle are generally agreed, which aspects remain contested, and in what respects its meaning may be shifting.⁶⁵ In so doing some suggest that the north-south dynamics – the chasm between developing and developed States - that shapes the divergences in interpretation and application of this principle must be borne in mind.⁶⁶ One Committee member, however, suggests that after Copenhagen, the principle of common but differentiated responsibilities is arguably “not viable”.⁶⁷ Another notes that the emphasis should be placed primarily on the “common responsibilities” part of the principle, which in his view is “core and realistic” while the “but differentiated responsibilities” part is more limited in scope as well as controversial.⁶⁸

(a) Definition and Core Content

Although the CBDRRRC principle is referred to in numerous international documents,⁶⁹ it is only in two of these that it is defined and explained – the Rio Declaration and the FCCC. Rio Principle 7 by its terms is clear in assigning a leadership role to industrial countries based on their enhanced contribution to environmental degradation. Rio Principle 7 reads,

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the *different contributions* to global environmental degradation, States have

⁶¹ Drawn from Comments by Committee member Strydom. He argues, for instance, that the accommodation of present and future generations in accordance with common but differentiated responsibilities and capabilities confuses outcomes (inter-generational equity) and conditions/factors (common but differentiated responsibilities and capabilities) with principles. He notes that it is fanciful to think that actions/decisions taken in the present can, in reality, also account for the needs and interests of future generations as if these interests and needs are already known in the present. A more nuanced reading of this element, he argues, which takes its meaning from the objective of ensuring sustainable development, would be to see it as the outcome or consequence of a process characterized by rational planning, the rational management of resources and the elimination of unsustainable patterns of production and consumption through the integration of social, economic and environmental factors. Put differently, if states, through such a process, reach the point of development that is sustainable, they will at the same time have created the conditions for future generations to survive and sustain themselves. It is simply a matter of cause and effect. For this reason will sustainable development (see also Article 3(4)) itself be the outcome of a process rather than a principle.

⁶² Comments by Committee members Bodansky, Maljean-Dubois and Burns.

⁶³ Comments by Committee members Boyle and Brunnée.

⁶⁴ FCCC, *supra* note 3, art. 3(1).

⁶⁵ Comments by Committee member Brunnée.

⁶⁶ Comments by Committee members Scholtz, Zhang and Maljean-Dubois.

⁶⁷ Comments by Committee member Boyle.

⁶⁸ Comments by Committee member Canal-Forgues.

⁶⁹ See, examples in PATRICIA BIRNIE et al., *supra* note 48 at 132-135; Also in its 2001 report in the *Shrimp-Turtle* case, the WTO panel urged Malaysia and the United States to cooperate on concluding an agreement on sea turtles, “taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment.” United States — Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Art. 21.5 by Malaysia, Report of the Panel, WT/DS58/RW, 15 June 2001 (drawn from Comments by Committee member Brunnée).

common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the *pressures their societies place on the global environment* and of the *technologies and financial resources they command*.⁷⁰

The terms of FCCC Article 3 are, however, less clear. FCCC Article 3 reads, The parties should protect the climate system for the benefit of present and future generations of human kind on the basis of equity and *in accordance with their common but differentiated responsibilities and respective capabilities*. Accordingly, the developed country parties should take the lead in combating climate change and the adverse effects thereof.⁷¹

FCCC Article 3, unlike Rio Principle 7, contains no reference to the enhanced contributions of industrial countries to global environmental degradation, and it places both common but differentiated responsibilities and respective capabilities on the same plane.

The CBDRRRC principle brings together several strands of thought. First, it establishes unequivocally the common responsibility of States for the protection of the global environment. Next, it takes into account the contributions of States to environmental degradation as well as their respective capacities in determining their levels of responsibility under the regime. In doing so it recognizes broad distinctions between States, whether on the basis of economic development or consumption levels.

The use of the word “responsibilities” in the CBDRRRC principle does not indicate the legal consequences that flow from an internationally wrongful act. Instead, “responsibilities” in the CBDRRRC principle can be understood to signify: a “duty” (“*devoir*” in French) which may be construed as a moral or a legal requirement; a legally binding “obligation;” or a principle to guide the articulation of specific rules in a given regime. As one Committee member notes, the meaning of “responsibilities” in CBDRRRC needs to be further illustrated and explored.⁷²

(b) Normative Status / Legal Significance

The CBDRRRC principle has come to play a pivotal role in international environmental law as it relates to global concerns.⁷³ Indeed, the adoption of the Rio Declaration by the UN General Assembly and the fact that the FCCC has been ratified by all States, point to the universal acceptance of the principle.⁷⁴

Yet, the core content of the CBDRRRC principle, as well as the nature of the obligation it entails, is deeply contested. Both at the negotiations, and in the scholarly literature, there are at least two incompatible views on its content. One, that the CBDRRRC principle “is based on the differences that exist with regard to the level of economic development.”⁷⁵ Alternatively, the CBDRRRC principle is based on “differing contributions to global environmental degradation and not in different levels of development.”⁷⁶ There is, in addition, a fundamental disagreement as to the nature of the obligation it entails. While some argue that it is obligatory others contend that it can be nothing but discretionary. The disagreements over this principle’s content and the nature of the obligation it entails have spawned debates over the legal status of this principle. The clear weight of opinion, given these divergences, is that CBDRRRC has not acquired the status of customary international law.⁷⁷

This is not to suggest, however, that it does not have considerable legal gravitas. The CBDRRRC principle is

⁷⁰ Rio Declaration on Environment and Development, *in* Report of The United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, *reprinted in* 31 I.L.M. 874 [hereinafter Rio Declaration, 1992].

⁷¹ FCCC, *supra* note 3, art. 3 (emphasis added).

⁷² Comment by Committee member Zhang.

⁷³ See International Law Association, Report of the Seventieth Conference, New Delhi, 2002, at 394 (Committee on Legal Aspects of Sustainable Development): “the principle of common but differentiated responsibilities has a firm status in ... international environmental law.” Citing Principle 7 of the Rio Declaration, 1992, the report goes on to call climate change “an obvious example” for the application of the principle.

⁷⁴ PATRICIA BIRNIE ET AL., *supra* note 48 at 132 (drawn from Comments by Committee member Brunnée).

⁷⁵ See, BETTINA KELLERSMANN, DIE GEMEINSAME, ABER DIFFERENZIERTE VERANTWORTLICHKEIT VON INDUSTRIESTAATEN UND ENTWICKLUNGSLÄNDERN FÜR DEN SCHUTZ DER GLOBALEN UMWELT 335 (English Summary) (2000)

⁷⁶ International Law Association, International Committee on Legal Aspects of Sustainable Development, Report of the Sixty-Sixth Conference 116 (1995).

⁷⁷ See, e.g. Lavanya Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 REV. EUR. COM. INT’L ENV’T L. 120, 124 (2000); See also PATRICIA BIRNIE ET AL., *supra* note 48 at 135.

referred to in the Rio Declaration, the FCCC,⁷⁸ numerous FCCC COP decisions,⁷⁹ and the Johannesburg Plan of Implementation, 2002.⁸⁰ In addition differential treatment which is the application of CBDRRC is evident in its varying forms in most international environmental agreements, and differential treatment with respect to implementation and assistance are integral to the Vienna Convention, Montreal Protocol, Convention on Biological Diversity, FCCC and Convention to Combat Desertification, five environmental treaties with near-universal participation. It could be argued that the CBDRRC principle, repeatedly endorsed in international fora and seen in practice in five treaties with over 95% participation, is the bedrock of the burden sharing arrangements crafted in the new generation of environmental treaties.

In the climate change regime, despite the legal wrangling, CBDRRC is the overarching principle guiding the future development of the regime. It is found in two operational, rather than preambular paragraphs of the FCCC, a binding treaty with near universal participation and reiterated in the preamble of the Kyoto Protocol. It is also frequently referred to in FCCC COP decisions and Ministerial Declarations. Even though this principle does not assume the character of a legal obligation in itself, it is a fundamental part of the conceptual apparatus of the climate change regime such that it forms the basis for the interpretation of existing obligations and the elaboration of future international legal obligations within the regime in question.⁸¹ Indeed, it is arguable that any future legal regime must be consistent with the CBDRRC principle in order to meet the requirements of the Convention, as well as the duties to perform and interpret a treaty in good faith.⁸²

(c) Application of CBDRRC in the Climate Change Regime

The central question, therefore, is what are the elements of the principle for the purposes of the FCCC and how might these be applied. The answer to this question depends primarily on the articulation of the CBDRRC principle in the FCCC, as well as on the subsequent practice of the parties as reflected in the Berlin Mandate, the Kyoto Protocol, and the Bali Action Plan, as well as in statements made by individual parties. To the extent that ambiguities remain, recourse may also be found in articulations of the principle outside of the FCCC, as well as its implementation in other multilateral environmental agreements (MEAs).⁸³

A closer look at the FCCC, related sources, and relevant practice suggests that some elements of CBDRRC are generally agreed upon, while others are subject to debate.⁸⁴ Arguably, there is consensus that the protection of the climate system is a *common responsibility* of all parties to the FCCC, developed and developing.⁸⁵ This common responsibility could be said to flow from the common concern occasioned by climate change and its adverse effects.⁸⁶ Based on the wording in the Convention, the common responsibility of all parties is to cooperate in developing the climate change regime (preamble), and to work to achieve the objective of the Convention by taking steps to protect the climate system for present and future generations (FCCC Article 3 (1)).

There is also agreement that the parties' *resultant responsibilities are differentiated* (FCCC preamble, Article 3 (1) and Article 4).⁸⁷ Notably, there is consensus that the responsibilities of *developed and developing countries*

⁷⁸ FCCC, *supra* note 3, art. 3.

⁷⁹ See, e.g. The Berlin Mandate, *supra* note 18; and more recently, The Bali Action Plan, *supra* note 30.

⁸⁰ See, e.g. World Summit on Sustainable Development, Plan of Implementation, 4 September 2002 <http://www.un.org/jsummit/html/documents/summit_docs/2309_planfinal.htm> (visited May 31, 2010). There are six references to CBDR in the Plan including in the Introduction (¶ 2) and in the context of changing unsustainable patterns of consumption and production (paragraph 13), climate change (¶ 36), air pollution (¶ 37) and means of implementation (¶ 75).

⁸¹ Lavanya Rajamani, *Differential Treatment in International Environmental Law*, ch. 5 (2006).

⁸² Comment by Committee member Brunnée.

⁸³ See Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 31(3)(c), 1155 U.N.T.S. 331; See also the observations of the International Court of Justice in *Gabcikovo-Nagymaros*, *supra* note 10; and WTO, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (¶ 120), in which the Appellate Body excluded the application of the precautionary principle on account of a more specific articulation of the precautionary approach in the SPS Agreement (drawn from comments by Committee member Brunnée)

⁸⁴ The following paragraphs are drawn from comments by Committee member Brunnée.

⁸⁵ See, e.g. Views regarding the work programme of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, AWGLCA, 1st Sess., FCCC/AWGLCA/2008/MISC.1 (Mar. 3, 2008); See e.g. submission of Singapore therein at p. 66, "Paper No. 19: Singapore – Work Programme for the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention" (stating that "All countries, both developed and developing, have a part to play to address climate change...").

⁸⁶ See, FCCC, *supra* note 3, Preambular paragraph 1; See also Rio Declaration, 1992, princ. 7; PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 287 (2nd ed., 2003); Rajamani, *supra* note 77, at 121.

⁸⁷ See e.g. Tuula Honkonen, *The Principle of Common But Differentiated Responsibility in Post- 2012 Climate Negotiations*, 18 REV. EUR. COM. INT'L ENV'T L. 257, 259 (2009).

under the climate change regime are subject to differentiation. This approach is consonant with Principle 7 of the Rio Declaration and with the practice under other MEAs. It is also reflected in the distinction between developed and developing country commitments set out in FCCC Article 4, as well as in the Berlin Mandate, Kyoto Protocol, and Bali Action Plan. The Copenhagen Accord, dubious as its legal status might be, represents an “on the ground emerging commitment,”⁸⁸ and it recognizes the distinction between “targets” and actions for developed and developing countries respectively.⁸⁹ It also seems to be beyond question that industrialized countries should lead in climate action.⁹⁰

Much less common ground exists with the respect to the *criteria for differentiation*. There appears to be agreement that capacity differentials, especially between developing and industrialized States, are relevant in this context.⁹¹ Stark disagreements remain on whether or not historical and per capita emissions are appropriate criteria for differentiation. Another highly contested concept is the temporal element, i.e. when should major emitters have “known” that their emissions were causing harm, and is this relevant to determining current and future responsibility and obligations?⁹² Similarly, it remains controversial whether and how commitments of developed countries to provide financial and technical assistance to developing countries relate to CDBRRC. For developing countries, this commitment follows from developed countries’ responsibilities under the CDBRRC principle, and is reinforced by the linkages between commitments set out in FCCC Article 4(7). In turn, developed countries have consistently resisted an explicit connection between CDBRRC and assistance duties.

Little common ground exists also with respect to the *need and criteria for graduating from differentiation*. Differentiation exists where relevant differences exist. It follows logically that when the relevant differences vanish, differentiation should cease, or at least that the lack of differences should be taken into account in fashioning future obligations under the regime. Since differential treatment is a reflection of differences, if differential treatment persists after the differences have ceased to exist, differentiation perpetuates rather than addresses inequality. This suggests that differential treatment should be subject to review and therefore time-bound.⁹³ However, there is considerable resistance to this idea in the negotiations.

Some read the developments in the last two years of negotiations pursuant to the Bali Action Plan, as well as the Copenhagen Accord, as demonstrating a steadily growing support for the proposition that there should be differentiation amongst developing countries as well. Clearly, this point remains highly contentious and staunchly resisted by some key States.⁹⁴ Yet, a growing number of developed and developing countries do suggest that differences amongst developing countries are relevant. The Copenhagen Accord, arguably, reflects such movement on differentiation.⁹⁵ Within the group of “non-Annex I parties,” the Accord singles out least developed countries and developing nations that are especially vulnerable to climate change. Notably, whereas non-Annex I states “will implement” mitigation actions, least developed and small island developing countries “may undertake actions voluntarily and on the basis of support.”⁹⁶ The Accord also identifies “the most

⁸⁸ Comment by Committee member Burns.

⁸⁹ The Copenhagen Accord, *supra* note 34, ¶¶ 4, 5.

⁹⁰ See Fulfilment of the Bali Action Plan and components of the agreed outcome – Note by the Chair, AWGLCA, 5th Sess., FCCC/AWGLCA/2009/4 (Part II) (Mar. 18, 2009), ¶ 30.

⁹¹ Committee member Strydom notes that CDBRRC provides the factors/circumstances which must be taken into account in determining the rationale for the differential treatment offered to developed and developing states with regard to their respective contributions towards achieving the “ultimate” objective of the FCCC. The justification must be based on factors and/or circumstances that are rationally connected to the achievement of the objective specified in Article 2. He suggests for this purpose, and to minimize ambiguity, that a future treaty arrangement will have to spell out, in a form that will allow for a change in circumstances, the factors and/or circumstances that must be taken into account.

⁹² Comment by Committee member Burns.

⁹³ See *supra* note 81; see also Comments by Committee member Halvorssen.

⁹⁴ See, e.g. Paper No. 5: China – China’s Views on Enabling the Full, Effective and Sustained Implementation of the Convention through Long-Term Cooperative Action Now, Up To and Beyond 2012, *in* Ideas and proposals on the Elements contained in paragraph 1 of the Bali Action Plan. Submissions from Parties., AWGLCA, 4th Sess., FCCC/AWGLCA/2008/MISC.5 (27 October 2008), at 34 (arguing that the “principle of “common but differentiated responsibilities” between developed and developing countries is the keystone of the Convention Any further sub-categorization of developing countries runs against the Convention...”).

⁹⁵ Paragraph drawn from Comments by Committee member Brunnée; See also Daniel Bodansky, *The Copenhagen Conference: A Post-Mortem*, 104(2) AM. J. INT’L L. (forthcoming 2010) for a similar view.

⁹⁶ The Copenhagen Accord, *supra* note 34, ¶ 5.

vulnerable developing countries, such as the least developed countries, small island developing States and Africa” as priority recipients of adaptation funding.⁹⁷

It is worth noting, however, that the provisions of the Accord “do not have any legal standing within the UNFCCC process.”⁹⁸ Some differentiation between developing countries is recognized in the FCCC itself, and, even if further distinctions amongst non-Annex I countries were intended to be operationalized in the Accord, the conditions accompanying Parties’ targets or actions in the Appendix to the Copenhagen Accord – with developing countries seeking to make their actions “voluntary” and conditioned on provision of support – have unravelled any such advances achieved in the Accord.⁹⁹

(d) Issues for the Committee to Consider

- Rationale underlying the principle of CDRRC: To what extent does “equity” inform the rationale for CDRRC, and what consequences, if any, flow from the relationship between equity and CDRRC?
- Core elements of the CDRRC principle in the FCCC regime: What does the use of the term responsibility in CDRRC imply? What is it that lies in the realm of “common” responsibility and what is it that lies in the realm of “differentiated” responsibility?
- CDRRC and Differential Treatment: What does the CDRRC principle permit/require? If differentiation, between who, to what extent and for how long?
 - Does it require/permit differential treatment in the central obligations of a treaty?
 - Does it require/permit differentiation between and within the current categories of Parties under the climate treaties?
 - If it does require/permit such differentiation, what criteria (if it provides any guidance at all) does the CDRRC principle countenance for differentiation?
 - If it does require/permits differentiation of different kinds between different groups of Parties for how long does it do so? How, if at all, should different categories of Parties be defined and categorized (for instance, developing countries, for which no clear accepted definition exists)? What criteria should guide graduation from one category of Parties to another? What sort of mechanism, if any, should be created to implement such graduation?
 - How does its application vary in the mitigation versus adaptation contexts?
- Divergent interpretations and applications of the CDRRC principle: What are the underlying premises guiding different interpretations and applications? What ends do different interpretations and applications serve?
- Value and Significance of the CDRRC principle: What value can be ascribed to the CDRRC principle given the divergent interpretation/applications it lends itself to?
 - Does it have functional/operational significance?
 - Does it have rhetorical power?
 - Does it have instrumental value?
 - Does it have all? Or none? Or some other significance or influence?
- Evolution of the CDRRC principle: How, if at all, has the CDRRC principle evolved? And, what use might the principle be put to in the structuring of the future climate change regime? What role does the CDRRC principle play in the ongoing negotiations for a future climate change regime?
 - Is it merely an instrumental device in the hands of different Parties?
 - Does it have the ability to dictate or augur certain outcomes?
 - If it does not, is it merely a device that Parties use to stamp particular preferred ends with the aura of legitimacy and/or equity?
 - If yes, how, if at all necessary, can the CDRRC principle be reclaimed?
- Limits to the CDRRC principle: What, if any, are the limits to the CDRRC principle? And, how might they be applied? Which of the substantive areas in which differentiation has been advocated is most in keeping with the CDRRC principle and which among them strains its limits?

⁹⁷ *Id.*

⁹⁸ Notification to Parties, Clarification relating to the Notification of 18 January 2010, 25 January 2010.

⁹⁹ See Lavanya Rajamani, *The Making and Unmaking of the Copenhagen Accord*, INT’L & COMP. L. QTRL’Y (forthcoming July 2010).

- The legal character of the obligations undertaken by different countries or groups of countries?
 - The content and/or stringency of the commitments or actions?
 - The time frames within which different countries are expected to undertake certain commitments?
 - The provision of financial and technological assistance?
 - All? Others?
- Legal Status: Does the CDDRRC principle and the use that it has been put to in the climate change regime provide clarity on the core content of the principle? Does it help flesh out the principle? If yes, does this clarity and detail have an impact on the legal status of the principle?
 - To what extent should developments of the concept of CDDRRC in other fields of international law be referred to in formulating the rules for climate change?
 - What is the relationship between the concept of CDDRRC and other principles and concepts in international environmental law such as intra-generational equity, polluter-pays principle and sustainable development?

(ii) Equity

The CDDRRC principle is complemented in the FCCC by the notion of “equity.” Although the notion of equity has considerable provenance in general international law¹⁰⁰ it is unclear to what extent the notions of equity so developed apply, except in the most general way, in the climate change regime. It is clear however that equity and fairness concerns are central to the global environmental debate. And, that albeit not articulated in these terms, common but differentiated responsibilities may be sourced, however conditionally and tenuously, to several equitable notions including notions such as “equality for equals,” “inter-generational equity,” and “intra-generational equity.” Some Committee members are of the view that the discussion on equity should be integrated with the discussion on the CDDRRC principle,¹⁰¹ a view bolstered by the structure and language of FCCC Article 3 (1) that places equity alongside CDDRRC.

(a) Core Content, Nature, Dimensions and Functions

There are three types of equity recognized in the scholarly literature and in ICJ jurisprudence: equity *infra legem* (equity within the law), equity *praeter legem* (equity outside the law, but as a gap-filler) and equity *contra legem* (equity contrary to the law).¹⁰²

There are two meanings ascribed to equity in international environmental law - the equitable utilisation of natural resources, and equitable cost-sharing in managing environmental concerns, in particular in dealing with damage or risk.¹⁰³ An example of the former lies in the field of non-navigational uses of international

¹⁰⁰ The notion of equity has considerable provenance in general international law in particular within the context of delimitation of maritime boundaries of continental shelves and exclusive economic zones between States, and, within the context of common resources shared by two or more States, like international rivers and lakes as well as transboundary ground waters. See, for example, the 1997 UN Convention for the Use of Non-navigational International Watercourses (UN Watercourses Convention); the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and Lakes (UNECE Helsinki Convention), and other conventions, such as the 1994 Convention on Cooperation for the Protection and Sustainable Use of the Danube River Basin.

There is a wealth of jurisprudence in this area, for example, there are a series of ICJ cases and arbitral awards in the area of delimitation of maritime boundaries of continental shelves and exclusive economic zones. The ICJ in the Fisheries Jurisdiction cases applied the concept in the context of allocating fishery resources. The Lake Lanoux arbitration concerned the use of shared international watercourses.

¹⁰¹ Comments by Committee members Bodansky, Burns, Cullet and Maljean-Dubois. Committee member Hohmann is of the view that “equity” has no practical impact on the legal principles of climate change, and therefore should not be considered..

¹⁰² Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEAR BOOK OF INTERNATIONAL LAW 801-802 (1974-75); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 217 (Clarendon Press, 1994); Vaughan Lowe, *The Role of Equity in International Law*, 12 AUSTRALIAN Y.B. OF INT’ L L. 56 (1988-89) (reprinted in Martti Koskenniemi (ed.), SOURCES OF INTERNATIONAL LAW 405 (2000); Prosper Weil, “*L’équité dans la jurisprudence de la Cour internationale de justice*”, in Vaughan Lowe and Malgosia Fitzmaurice (eds.), FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 129-144 (1996).

¹⁰³ Dinah Shelton, *Equity*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 39, at 653-658. The I.C.J. also recognized these three types of equity (Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554 (Dec. 22)).

watercourses, where it is considered a fundamental legal principle.¹⁰⁴ Another example lies in the Convention on Biological Diversity which lists “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources” as one of its objectives.¹⁰⁵ Equitable cost-sharing in managing environmental concerns appears in the climate change regime’s CDDRRC principle. The ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities incorporates both meanings: the articles require the parties concerned to “seek solutions based on an equitable balance of interests” taking into account “all relevant factors and circumstances” (Article 9), including certain factors indicated by Article 10, in handling risks of transboundary harm.¹⁰⁶

There are two dimensions to equity - procedural and substantive, both of which are relevant to international environmental law.¹⁰⁷ In its procedural dimension, equity requires all relevant factors and circumstances to be taken into account in achieving a desired equitable result. It provides the rationale for procedural requirements such as notification, information and consultations between parties relating to matters of conflicting interest where there are no applicable rules or where existing applicable rules are not sufficiently clear. Equity *praeter legem* is of particular relevance here. What is a desired equitable result is, however, determined on a case-by-case basis. Therefore, there is usually a lack of predictability in the application of equity as a gap-filler. Moreover, the outcome as a result of the application is not necessarily favourable for environmental protection. In order to make it so, tools such as environmental impact assessments can be deployed.¹⁰⁸ Such tools have been utilized in recent treaties including the UN Watercourses Convention and the UNECE Helsinki Convention. The substantive dimension of equity is less evolved than the procedural. There is little consensus on the substantive content of equity in international law. It is generally understood that the substance of equity depends on the particular context in which it is sought to be applied.

In the recent past, two new conceptions of equity have been advocated in the field of international environmental law - “inter-generational equity” and “intra-generational equity.”¹⁰⁹ These notions are different in character from the notion of equity thus far discussed in the following ways. First, these notions contain substantive content and direction - in that their application in particular situations directs and frames outcomes. Second, their conceptual framework tests the boundaries of existing international law in several respects, as for instance with respect to time-frame, sovereign equality among States, *etc.*, without sufficient theoretical explanation. Third, their legal implications are not clear. In particular, it is unclear how these concepts are to be applied in particular contexts and what the legal consequences of such an application would be.¹¹⁰

Where there are no applicable rules or where existing applicable rules are not sufficiently clear, equity performs the following functions. First, equity allows a judge or decision-maker to consider the relevant extra-legal factors and circumstances thereby leading to a just and fair outcome acceptable to the parties.¹¹¹ Second, equity permits the use of procedural devices that allow environmental factors to be taken into account thereby leading to environmentally beneficial outcomes.¹¹² Finally, equity prompts the elaboration of a specific rule applicable to the subject matter where there is a wealth of precedents. This function is strengthened where a court is involved in the application of equity. Thus, equity *praeter legem* has considerable significance in international environmental law.

In contrast to the functions that traditional conceptions of equity perform, the new conceptions of equity - “inter-generational equity” and “intra-generational equity” - may be pressed into service in the process of rule-making or to justify the adoption of certain measures, rather than in the context of resolving disputes. These notions are studied in further detail in the context of the climate change regime.

¹⁰⁴ See, Lake Lanoux Arbitration (Fr. v. Spain) 12 R.I.A.A. 281 (1957); see also Convention on the Law of the Non-navigational Uses of International Watercourses, 1997, arts. 5 and 6.

¹⁰⁵ Convention on Biological Diversity, 1992, art. 1.

¹⁰⁶ Some writers, however, argue that this does not reflect customary rules. e.g. PATRICIA BIRNIE ET AL., *supra* note 48 at 202; Alan Boyle, *Codification of International Environmental Law and the ILC: Injurious Consequences Revisited*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENT AND FUTURE CHALLENGES 79-84 (Alan Boyle and David Freestone eds., 2001).

¹⁰⁷ Dinah Shelton, *supra* note 103, at 640.

¹⁰⁸ PATRICIA BIRNIE ET AL., *supra* note 48, at 202.

¹⁰⁹ See EDITH B. WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989).

¹¹⁰ See PATRICIA BIRNIE ET AL., *supra* note 48, at 119-123.

¹¹¹ Lowe, *The Role of Equity in International Law*, *supra* note 102, at 418-422.

¹¹² OWEN McIntyre, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW 361-362 (2007).

(b) Normative Status/Legal Significance

The normative status and legal significance of the notion of equity depends on which of the notions and dimensions of equity – traditional or new – is under consideration. There are, however, some concerns that resonate through all these notions and dimensions. First, there is no common understanding or definition of equity as a legal concept. While the procedural dimension of equity has been fleshed out to some extent, the core content and functions of the substantive dimension of equity, and of the new notions of equity which are substantive in character, remain fuzzy. Second, given the conceptual fuzziness in the notion of equity, there is little predictability in the manner of its application or the outcome thereof. This weakness equity shares with other principles discussed in this paper including CDBRRRC, precaution and sustainable development.¹¹³ The notion of equity, therefore, given the conceptual fuzziness in its content and unpredictability in its application, has considerable normative value but is arguably of limited legal significance. It may be used to sway opinion in one direction rather than another, but its ability either to catalyze particular outcomes or to direct and compel State behaviour is limited.

(c) Application of Equity in the Climate Change Regime

FCCC Article 3 (1) identifies equity as one of the bases, in addition to CDBRRRC, for sharing the burden of protecting the climate system. The negotiating history to this provision reveals that States had differing views on whether the concept includes only “intragenerational” equity or “intergenerational” equity.¹¹⁴ The provision by itself does not define the notion of equity, either generally or in its application in the climate change context. The language (“accordingly”) however suggests that an application of the notion of equity would demand that developed countries take the lead in combating climate change and the adverse effects thereof.

The notion of equity is frequently invoked by Parties to the FCCC in their submissions, and it features in several COP decisions, as for instance in the Berlin Mandate that launched the process that led to the Kyoto Protocol.¹¹⁵ It is also referred to in the Copenhagen Accord, 2009, where those who associate with the Accord, agree “on the basis of equity and in the context of sustainable development” to enhance long-term cooperative action to combat climate change.¹¹⁶ In the FCCC process although equity is frequently invoked as the appropriate basis for burden sharing,¹¹⁷ its constituent elements and the mechanics of application are rarely articulated.

There are several ways in which the multi-dimensional notion of equity may be engaged in the climate change regime. First, in its substantive dimension, it could offer a basis for burden sharing and differential treatment. And, second, in its procedural dimension, it could offer a lens through which to analyze the process of regime-building, in particular, as an illustration, the ongoing phase of negotiations launched in Bali, 2007.¹¹⁸

Equity as a Basis for Burden Sharing

Equity, linked inextricably to the CDBRRRC principle, could offer a substantive basis for burden sharing in the climate change regime. A better understanding of the various facets of equity that could potentially be engaged in the climate change regime will lead to a better appreciation of the nature and limits of differential treatment in the climate change regime - an enduring site of conflict between countries.

Intra-generational and inter-generational concerns are explicitly articulated in FCCC Article 3(1) (“Parties should protect the climate system for the benefit of present and future generations of humankind”). These are linked to “equity” in so far as they are referred to in the same sentence as equity in FCCC Article 3(1), and they flow from the notion of sustainable development in FCCC Article 3(4). Both inter and intra generational equity can be traced to the principle of sustainable development defined as, “development that meets the needs of the present without compromising on the ability of future generations to meet their own needs.”¹¹⁹ This widely accepted principle by

¹¹³ Comment by Committee member Bodansky.

¹¹⁴ Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session at Geneva held from 9 to 20 December 1991, A/AC.237/15 (Jan. 29, 1992) at 27.

¹¹⁵ See, The Berlin Mandate, *supra* note 18.

¹¹⁶ The Copenhagen Accord, *supra* note 34, ¶ 1.

¹¹⁷ Juliane Kokott, *Equity in International Law, in FAIR WEATHER? EQUITY CONCERNS IN CLIMATE CHANGE* 186-188 (F. L. Toth ed., 1999); Dinah Shelton, *supra* note 100, at 653-658.

¹¹⁸ Developed based on a suggestion by Committee member Maljean-Dubois. Committee member Zhang also suggested the need to focus on “procedural rules in the making of the regime,” albeit not explicitly in the context of equity.

¹¹⁹ World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment And Development* 8 (1987).

its terms refers to inter-generational equity, a concern for social equity between generations. The Brundtland Commission emphasized that inter-generational equity is logically extendible to equity within each generation, viz. to intra-generational equity.¹²⁰ Intra-generational equity and inter-generational equity complement each other, yet also limit each other.¹²¹ They complement each other since intra-generational equity is a prelude to inter-generational equity. Yet there is a tension between them for limits are placed, in the interests of leaving sufficient resources for the future, on how present generations may utilize resources. Although it is clear that inter and intra-generational equity, as encompassed within the sustainable development principle, and referenced in FCCC Article 3(1), is a legitimate aim of the climate change regime, it is less clear what means are necessary to achieve it.

A related facet of equity that could provide an additional substantive basis for burden-sharing in the climate change regime is the notion of “restoring equality”. This notion derives from Ulpian’s dicta, “[j]ustice is the constant and unwavering determination to give unto each his due.”¹²² This end is achieved by making every person bear the consequences of his/her wrong, or negligence, by allowing everyone to exercise his/her rights, by restoring to everyone losses which have been unjustly suffered and by making everyone return that which has been unjustly acquired.¹²³ Henry Shue argues that when a party has in the past taken unfair advantage of others by imposing costs upon them without their consent, those who have been unilaterally put at a disadvantage are entitled to demand that in the future the offending party should/must shoulder burdens that are unequal at least to the extent of the unfair advantage previously taken, in order to restore equality.¹²⁴ This is particularly relevant in the climate change context. Developed countries have benefited disproportionately from the industrialization process that led to the accumulation of GHGs in the atmosphere yet since the damage is universal the impacts are borne by everyone. Indeed the impacts will be felt overwhelmingly by developing countries and in particular small island countries. Justice here would demand that those who have benefited the most from the process that led to the creation of the problem bear an unequal burden for addressing the problem. The climate change regime, as structured, with heavier burdens for developed countries, may well embody this notion of equity. Franck argued that the Montreal Protocol, seen as a precursor to the FCCC regime, is also an example of “international law working to substitute a regime of fairness for the injustices of the past.”¹²⁵

However, even if the notion of “restoring equality” is one that breathes life into the reference to equity and to CDBRRRC in the climate change regime, it is unclear how this is to be applied. A technique frequently used to address historical injustice, where it exists and can be established, is “affirmative action.” Affirmative action is a means to address historic causal-related injustice – in this case developing countries, the argument goes, have not had the same socio-economic benefits as developed countries that over-exploited the global environment, yet they are expected to share the burden of controls on economic development that may have an adverse effect on the environment.¹²⁶ Affirmative action however can only stem from the existence and acceptance of responsibility for a historic causal-related injustice and a corresponding faith that affirmative action will redress it. The negotiating history of the FCCC and the CDBRRRC principle in particular indicates that developed countries steered clear of accepting any overarching responsibility for climate change. Indeed the differences in language between Rio Principle 7 and FCCC Article (3) stands testament to this. Moreover affirmative action is a highly disputed method of redressing historical injustices and few countries accept it unconditionally even in their domestic systems.

Another facet of equity of relevance in the climate change regime is the notion of “equality for equals.” Over the centuries philosophers including Aristotle¹²⁷ and Nietzsche¹²⁸ have argued in differing contexts that justice requires those similarly situated to be treated similarly and those dissimilarly situated to be treated dissimilarly to the extent of the dissimilarity. The jurisprudence of the ICJ on equity, in particular those facets of it that reflect

¹²⁰ See generally, John Ntambirweki, *The Developing Countries In The Evolution Of an International Environmental Law*, 14 HASTINGS INT’L AND COMP. L. REV. 905, 924 (1995).

¹²¹ See, Nina M. Ejima, *Sustainable Development and the Search for a Better Environment, A Better World: A Work In Progress*, 18 UCLA J. ENV’T L. & POL’Y 99, 117 (2000).

¹²² *Justicia Est Constans Et Perpetua Voluntas Jus Suum Cuique Tribuendi*. See DIG. 1.10, ULPAN, RULES, BOOK 1.

¹²³ See, Ruth Lapidot et al, *Is there a Role for Equity in International Law*, 81 AM. SOC’Y INT’L L. PROC. 126, 145 (1987) (quoting Bin Cheng).

¹²⁴ See, Henry Shue, *Global Environment and International Inequality*, 75(3) INT’L AFF. 531, 536 (1999).

¹²⁵ Thomas Franck, *Fairness in International Law and Institutions* 386 (1995).

¹²⁶ Gunther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INTL. ENV’T L. L. 29 (1990).

¹²⁷ See, ARISTOTLE, *THE NICOMACHAEN ETHICS* (David Ross trans., revised by J.L. Ackrill and J.O. Urmson, 1991).

¹²⁸ See, FREIDRIC H NIETZSCHE, *TWILIGHT OF THE IDOLS* 102 (R. J. Holligdale trans., 1968) (1889).

“proportionality”, substantiates this point.¹²⁹ Proportionality as an expression of equality “in relation and in proportion”¹³⁰ refers to the fact that equal cases have to be treated equally and that unequal cases have to be treated differently in proportion to the relevant inequalities.¹³¹ Judge Tanaka in his dissenting opinion in the *South West Africa Case* notes that, “to treat unequal matters differently according to their inequality is not only permitted but required.”¹³² If the “equality for equals and inequality for unequals” notion were applied in the climate change regime, justice would require that the considerable differences between countries – the characteristics of developing countries, the inequalities in the international community, divergences in levels of economic development and unequal capacities to tackle a given problem - be taken into account in fashioning commitments under environmental treaty regimes. The interests of justice would require States to shape the nature and extent of commitments to the relevant factual matrix in particular environmental treaties.

Equity as a Tool to Analyze the Regime-building process

The FCCC, in common with several new generation multilateral environmental agreements adopts the approach of “permanent diplomacy”¹³³ – the FCCC requires Parties to meet annually to review the implementation of the treaty and recommend measures for further implementation, in the process adopting COP decisions that add to the corpus of climate change law. The process of FCCC regime building and the practices developed thereto have recently come under attack. As the issue of climate change has acquired considerable salience there is popular pressure to reach an agreement. But, the FCCC process – a multilateral one that functions on the basis of consensus¹³⁴ - is slow, unwieldy and cumbersome. This led to the emergence of two distinct trends. First, the proliferation of fora in which climate change is discussed among a subset of Parties to the FCCC, and second, the development of practices in the FCCC negotiations which are undemocratic, and therefore perceived as illegitimate,¹³⁵ but which may realize timely results. These emergent practices have led to tremendous discord in the climate change regime, and analyzing the negotiation process through the lens of equity, in its procedural dimension, might be a fruitful line of enquiry.

A few words in explanation. The last two and a half years have witnessed a flurry of diplomatic activity on climate change. In addition to the sixteen weeks of scheduled inter-governmental negotiations under the auspices of the FCCC, meetings, many at a Ministerial level, were convened by the G-8,¹³⁶ the Major Economies Forum,¹³⁷ the UN Secretary General,¹³⁸ and Denmark,¹³⁹ the host of COP-15. These were intended to feed into COP-15 at Copenhagen, 2009. As deliberations remained deadlocked, however, well into the second week of COP-15 when heads of State and government began to arrive, the Danish Prime Minister, Lars Løkke Rasmussen, in a bid to salvage the floundering conference, organized a high-level negotiation, parallel with the official negotiations, to agree on the elements of a political deal. Earlier attempts by the Danish presidency to obtain COP authorization, explicit or implicit, to convene a select “Friends of the Chair” group¹⁴⁰ to negotiate a

¹²⁹ Equivalence refers to an impartial search for a balance between interests and proportionality refers to the notion that equal cases are to be treated equally and unequal cases unequally to the extent of their relevant inequalities *See* Paul Reuter Reuter, *Quelques Reflexions sur l'equite en Droit International*, 15 REVUE BELGE DE DROIT INT'L 165 (1980-81).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *South West Africa (Ethiopia v. South Africa, Liberia v. South Africa) (Second Phase)*, 1966 I.C.J. 6, 306 (July 18) (Dissenting Opinion of Judge Tanaka).

¹³³ Catherine Redgwell, *Multilateral Environmental Treaty-Making*, in *MULTILATERAL TREATY-MAKING* 104-105 (V. Gowlland-Debbas ed., 2000).

¹³⁴ Parties have yet to agree on Rule 42 (Voting), of the draft Rules of Procedure, which have been applied, with the exception of Rule 42, since 1996. In the absence of agreement, decisions are taken by consensus. *See*, Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies in FCCC/CP/1996/2.

¹³⁵ Agenda 21, Chapter 39, paragraph (1) (c) stresses the importance of participation in and contribution of all countries, including developing countries, in treaty making in the sustainable development field. *See* Agenda 21, UN Conference on Environment and Development, A/CONF.151/26 (1992).

¹³⁶ For references to climate change in the outcome of the last G-8 meeting, *see* Chair's Summary, G-8 Summit, L'Aquila, 10 July 2009 <http://www.g8italia2009.it/static/G8_Allegato/Chair_Summary,1.pdf> (visited May 31, 2010).

¹³⁷ Further details available at <<http://www.state.gov/g/oes/climate/mem/>> (visited May 31, 2010).

¹³⁸ *See*, for details of the first informal thematic debate on climate change at the General Assembly, <<http://www.un.org/ga/president/61/follow-up/thematic-climate.shtml>> (visited May 31, 2010).

¹³⁹ Further details available at,

<http://www.kemin.dk/the_greenland_dialogue_-_a_ministerial_gathering_on_climate_change_climate_change_discussions_ministers.htm> (visited May 31, 2010).

¹⁴⁰ For an insight into the practice of convening “Friends of the Chair” groups, *see* Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to the Rules, Institutions and Procedures* 455-7 (2004).

deal, had been scuttled by some developing States that sought political and ideological, rather than regional and coalition-based representation as is customary.¹⁴¹ The high-level negotiations, given the many twists and turns they reportedly took,¹⁴² did not link back to the official negotiations. The COP, therefore, had neither authorized the formation of a group to negotiate the Accord, nor was it kept abreast of the negotiations as they evolved. Such information as was available to the unrepresented Parties and observers alike was provided by the media, rather than through official channels.¹⁴³ As these events followed ten days of procedural irregularities and ill-fated initiatives by the Danish presidency,¹⁴⁴ when the Copenhagen Accord was presented to the COP for adoption late on 18 December, 2009, it was rejected by, among others, members of the Bolivarian Alliance for the Americas (ALBA) - Bolivia, Cuba, Ecuador, Nicaragua, Venezuela¹⁴⁵ - Sudan and Tuvalu. They did so both because of the procedural irregularities in the negotiation of this Accord as well as the substantive inadequacies they perceived in it.

The legal status and future of the Copenhagen Accord in the FCCC process, having thus been rendered doubtful, subsequent negotiations are being conducted in the shadow of, rather than on the basis of, the Accord,¹⁴⁶ and with a renewed emphasis on procedural fairness. The conclusions of the AWG-LCA meeting in Bonn, April 2010, for instance, commit “to work in an inclusive and transparent manner that adheres to the principles of the United Nations.”¹⁴⁷ In the aftermath of Copenhagen, several questions have been raised relating to the practices followed in the negotiations (for instance, the practice of convening “Friends of the Chair” groupings), the limits of the discretion available to the COP host, and presiding officers in organizing the meetings; and the value and functions of different procedural rules, including in particular rules of decision-making. Certain rules, practices and procedures imbue the FCCC process with legitimacy, yet these very procedures may render the process cumbersome, and detract from the ability of the process to realize the objectives of the climate change regime. In other words, is it viable or reasonable to proceed with an inclusive consensus-based negotiating model given the experience and learning from COP-15? Are there better alternatives?¹⁴⁸ What other fora, and what techniques, might be more appropriate to the development of climate change law?

(d) Issues for the Committee to Consider

- Content, Status and Implications of Equity in the Climate Change Regime: What legal content, status and impact does the notion of equity, as formulated in FCCC Article 3(1), have in the climate change regime? How can it be applied with respect to both mitigation and adaptation? And, what implications does it have?
- What substantive content does the notion of equity have in the climate change regime? To what extent does equity act as a basis for burden-sharing in the climate change regime? If it does, what are the constituent elements discernible in this notion of equity? How can these be distilled and applied? And, how may such application direct and shape the discussions on burden-sharing in the ongoing negotiations, and the future legal regime?
- What procedural requirements might equity impose, if at all, on the climate change regime-building process? How might equity be used to interpret and assess rules and practices of procedure and process in the climate change regime?

¹⁴¹ The composition of “Friends of the Chair” groups while left to the discretion of the Chair, takes account of context and purpose, and derives legitimacy from its representative character. It typically has representatives from the five UN regions, across negotiating groups and tailored to the absolute number of Parties.

¹⁴² See, e.g. Sam Coates, Leaders try to rescue Copenhagen Climate talks as Obama Rebukes China, TIMES ONLINE, Dec. 18 2009.

¹⁴³ See for instance *Copenhagen Climate Summit enters Crucial Stage*, BBC NEWS, Dec. 18, 2009. BBC, among others, had uploaded early drafts of the Accord on its website before the Accord was shared with the Conference of Parties. See, <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/091218copenhagen_accord.pdf> (visited May 31, 2010).

¹⁴⁴ For instance, the introduction of a Danish draft of the Copenhagen agreed outcome, a text poorly aligned to the developments and sensitivities in the negotiations, and perceived as biased towards the US. See John Vidal, *Copenhagen Climate Summit in Disarray after 'Danish text' leak*, GUARDIAN, Dec. 8, 2009; the “Danish text” available at, <<http://www.guardian.co.uk/environment/2009/dec/08/copenhagen-climate-change>> (visited May 31, 2010).

¹⁴⁵ ALBA emerged as an “alternative to the neo liberal model” which has, they believe, deepened the structural asymmetries to favour the accumulation of wealth in privileged minorities, further details available at, <<http://www.alianzabolivariana.org/>> (visited May 31, 2010).

¹⁴⁶ See, *supra* note 99.

¹⁴⁷ Organization and methods of work in 2010, Draft conclusions proposed by the Chair, in FCCC/AWGLCA/2010/L.2 (Apr. 11, 2010).

¹⁴⁸ Comment by Committee member Boyle.

- Relevance and Role of Equity as Equitable Cost-sharing: To what extent, if at all, is equity, as equitable cost-sharing, relevant in the climate change regime? If it is relevant, to what extent can it be applied, and what implications and consequences does its application have?
- Relevance and Role of Equity *Praeter Legem*: To what extent, if at all, does equity *praeter legem* have a role in the climate change regime? When and in what context may it come into play in the climate change regime?
- Equity and Related Notions: What, if anything, is the relationship between equity and related notions such as “sustainable utilisation”, “sustainable development” and “common but differentiated responsibilities and respective capabilities”?
- Is equity pertinent to liability issues? If so, how, and what consequence flow from this?¹⁴⁹

(iii) Precaution¹⁵⁰

Although efforts to reduce scientific uncertainties related to climate change are to be welcomed, further scientific research may uncover new uncertainties, as well as gaps and weaknesses in past research, leading to increased levels of uncertainty, and decreased levels of commitment. The state of climate science at this juncture is a case in point. The negotiation history of the FCCC indicates,¹⁵¹ however, that broad consensus existed at the time the FCCC was negotiated that the threat of climate change needed to be addressed in advance of conclusive scientific evidence. Based on this broad consensus, FCCC Article 3(3) stipulates precaution as one of the "principles" by which Parties shall be guided in their actions to achieve the objective of the Convention and to implement its provisions.

(a) Core Content and Definition

There are several definitions of the concept of precaution (some argue as many as nineteen different ones) and many of these are incompatible with each other. At the unexceptionable end of the spectrum precaution is nothing more than a reflection of the age old adage “better safe than sorry”¹⁵² - it would suggest that “a lack of decisive evidence of harm should not be a ground for refusing to regulate.” The Rio Declaration, 1992, the FCCC, 1992 and other MEAs contain this version. Most scholars consider the weak version unobjectionable – it is the equivalent of buckling one’s seat belt or buying smoke detectors. At the more controversial end of the spectrum an application of precaution could require that a “margin of safety be built into all decision-making”¹⁵³ - it would suggest that “regulation is required whenever there is a possible risk to health, safety or the environment, even if the supporting evidence is speculative and even if the economic costs of regulation are high.”¹⁵⁴ This reading of precaution may well result in shifting the burden of proof to those who create potential risks - innovators, entrepreneurs, developers and such like - to establish that a particular activity is risk-free before it is allowed to proceed. Such an interpretation and application could stifle innovation and creativity, hamper scientific and technological advancements and arguably result in regulatory paralysis.¹⁵⁵

Cameron and Abouchar identify three core elements that run through different formulations of precaution in

¹⁴⁹ Comment from Committee member Burns.

¹⁵⁰ Although the debate on whether precaution is a “principle” or “approach” is an old one, and is linked to the legal status of precautionary principle/approach, the importance of this debate should not be overestimated (See, PATRICIA BIRNIE ET AL., *supra* note 48 at 155). Committee member Calliess underscores this, and argues that regardless of whether it is deemed to be a principle or an approach, precaution suffers from a lack of concrete content and vagueness. He suggests that in the context of the FCCC, however, that it would be more appropriate to use the term principle as it occurs in FCCC Article 3 titled principles. Committee member Strydom however notes that it is unfortunate and confusing to deal with precaution as a principle, for a precautionary measure is a *modality* by means of which a state seeks to prevent harm from happening. This paper, uses the term “precaution” with a view to avoiding in-depth discussion on terminology and legal status at this stage of work. The Committee may decide how to address these issues within its work.

¹⁵¹ Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Fourth Session, A/AC.237/15 (Jan. 29, 1992), at 9, ¶50.

¹⁵² As Committee member Strydom notes the underlying principle is what our parents and grandparents taught us: prevention is better than cure.

¹⁵³ Bjorn Lomborg, *The Skeptical Environmentalist* 348 (2001).

¹⁵⁴ CASS R. SUNSTEIN, *BEYOND THE PRECAUTIONARY PRINCIPLE* (The Law School, Univ. of Chicago, John M. Olin Law and Economics Working Paper No. 149, 2003).

¹⁵⁵ Lucas Bergkamp, *Understanding the Precautionary Principle* (pt. 2), 2 *ENVTL LIABILITY* 67-81 (2002).

international instruments: first, regulatory inaction threatens non-negligible harm; second, there is a lack of scientific certainty on the cause and effect relationship; and third, under these circumstances, regulatory inaction is unjustified.¹⁵⁶ FCCC Article 3 (3) incorporates these three elements, but does not provide guidance on two important aspects. First, the “trigger” that engages precaution - that is the level and/or kind of harm that needs to be proven at a particular level of rigour and quantity of evidence. One Committee member suggests that the “trigger” must be based on risk assessment (“objective” – all sources of scientific evidence) and risk evaluation (“subjective” – political balancing and weighting of established facts, mechanisms and uncertainties as well as the concerns of individuals and society).¹⁵⁷ Second, FCCC Article 3(3) does not provide guidance on the burden of proof - when, if at all, should the burden of proof be shifted? One Committee members suggests that the shifting of the burden of proof is to be understood as a refutable presumption of danger, which functions as an incentive for those causing the risk to carry out impacts research with the aim of refuting the presumption of danger.¹⁵⁸

(b) Normative Status/ Legal Significance

Precaution has gained considerable ground in international environmental law over the years, but its precise legal status is yet to be determined. Although it has found its way into numerous treaties – the Straddling Fish Stocks Agreement,¹⁵⁹ the Convention on Biodiversity,¹⁶⁰ the FCCC,¹⁶¹ and most notably the Cartagena Protocol¹⁶² where it acquires true operational content - by and large international courts have remained cautious about pronouncing on its legal status.¹⁶³

One Committee member argues that there is sufficient evidence of State practice – references in international instruments,¹⁶⁴ decisions of national¹⁶⁵ and international courts,¹⁶⁶ national legislation¹⁶⁷ and opinions of legal advisors - to indicate that certain aspects of the precautionary principle have evolved over the years into a principle of “customary international environmental law.”¹⁶⁸ Another Committee member suggests a different way of approaching the issue of legal status. He argues that as the rationale for taking precautionary measures is grounded in the principle of due diligence,¹⁶⁹ due diligence should be regarded as the “primary rule of law” and precaution as the measure to be taken to give effect to the obligation of due diligence. The test would then rather be whether the due diligence measure has any rational connection with the obligation and/or with the climate

¹⁵⁶ James Cameron and Juli Abouchar, *The Status of the Precautionary Principle in International Law*, in *THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION* 45 (David Freestone and Ellen Hey, eds., 1996), ; *See also*, PATRICIA BIRNIE ET AL., *supra* note 48.

Committee member Hohmann offers an alternative interpretation of the precautionary principle which includes nine concrete duties (*see supra* note 41 at 189). In his view the definition by Cameron and Abouchar is limited.

¹⁵⁷ Comment by Committee member Calliess.

¹⁵⁸ *Id.*

¹⁵⁹ Agreement for the Implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995), art. 6.

¹⁶⁰ Convention on Biological Diversity (1992), pmbl.

¹⁶¹ FCCC, *supra* note 3, art. 3.

¹⁶² Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), pmbl. and arts. 15 and 16 dealing with risk assessment and management.

¹⁶³ The ITLOS refers to ‘prudence and caution’ in the Mox and Southern Bluefin Tuna cases, without an explicit reference to the principle or its status. In the Beef Hormones Case the WTO Appellate Body opined that the precautionary principle was not yet a principle of customary international law, and in the EC Biotech Case, the Appellate Body side stepped the issue. *See* discussion and references in PATRICIA BIRNIE ET AL., *supra* note 48 at 152-164.

¹⁶⁴ Citing Arie Trouwborst, *Prevention, Precaution, Logic and Law*, 2 ERASMUS LAW REVIEW 105-106 (2009), (noting that the precautionary principle has been incorporated in or under more than sixty multilateral instruments).

¹⁶⁵ Referring to decisions of national courts including those of the Indian and Pakistani Supreme Courts.

¹⁶⁶ Referring to the Southern Blue-fin Tuna and aspects of the Beef Hormone case, both of which base their reasoning on precaution.

¹⁶⁷ Referring *inter alia* to the Article 20(a), Grundgesetz (Germany), and Article 191 of the EU’s Lisbon Treaty.

¹⁶⁸ Comments by Committee member Calliess.

¹⁶⁹ Instructive in this regard is the commentary on Article 3 of the ILC’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001). There the following is stated: “Article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedus*, which is reflected in Principle 21 of the Stockholm Declaration ...”. And further: “The obligation of the State of origin to take preventive or minimizing measures is one of due diligence... . . . the degree of care in question is that expected of a good Government” (¶¶ 7, 17) (drawn from Comments by Committee member Strydom).

change objective.¹⁷⁰ This may also have relevance for sustainable development. The relationship between due diligence, precaution and sustainable development can be restated as the relationship between the most appropriate response to a specific set of circumstances; the means chosen (precaution); and the outcome (sustainable development).¹⁷¹ This view, however, is disputed by another Committee member who argues that due diligence is too limited and limiting a concept to provide a full understanding of the precautionary principle.¹⁷² Instead, he offers an expansive view of the precautionary principle in which sustainable development is an integral aspect of the precautionary principle.¹⁷³

The extent to which, if at all, precaution has an impact on the norm-creating process depends on context and circumstance. In some cases, it may function to institutionalise “caution and prudence” in emerging rules, in others not. Precaution may also function as an interpretive device to import some “prudence and caution” into the assessment of existing rules by the courts and tribunals faced with situation of scientific uncertainty.¹⁷⁴ For instance, Judge Treves’ separate opinion in the ITLOS Southern Bluefin Tuna case suggests that the concept of precaution should not only guide the future conduct of States but also the assessment by the courts and tribunals, in this specific case, of the urgency of the provisional measures.¹⁷⁵

(c) Application of Precaution in the Climate Change Regime

Thus far precaution has had an important albeit understated and underlying role to play in the climate change regime. The climate change regime came into existence premised on a version of precaution. And, precaution as embodied in FCCC Article 3(3) “guides” discourse among Parties by supporting the arguments of Parties desiring more stringent actions. Precaution is frequently invoked by Parties, in particular small island States, in the ongoing negotiations.¹⁷⁶ In the past, precaution has been raised by Parties in a bid to strengthen rules of implementation. For instance, the EU and developing countries invoked FCCC Article 3(3) in seeking to exclude additional activities of “Land Use, Land Use Change and Forestry” (LULUCF) under Kyoto Article 3 (4) for the first commitment period, as measurement of enhanced carbon stock involved considerable uncertainty and had the potential to undermine the environmental integrity of the regime. Such frequent invocation of precaution wields influence on norm-creating processes.

The concept of precaution, since by definition it is applied in the absence of full scientific certainty, has the potential to be applied in an arbitrary manner, which in turn could undermine legal stability and predictability.¹⁷⁷ An area that the Committee may choose to dwell on in its work is in the identification and elaboration of criteria for appropriate application of precaution within the climate change regime.

Criteria for appropriate application of precaution have been identified in other contexts,¹⁷⁸ and can be drawn on here. These include: best available science; objective risk assessment; proportionality; non-discrimination; consistency of the proposed measure with similar measures already taken; costs and benefits of action or lack thereof;¹⁷⁹ review in light of scientific developments;¹⁸⁰ transparency and accountability in the decision making

¹⁷⁰ Comments by Committee member Strydom.

¹⁷¹ *Id.* The relationship between precaution and sustainable development is also explored in Daniel Barstow Magraw and Lisa D. Hawke, *Sustainable Development*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 631-632, *supra* note 39.

¹⁷² Comments by Committee member Hohmann.

¹⁷³ *Id.*

¹⁷⁴ Lowe suggests the similar function of the concept of sustainable development. Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT *supra* note 103 at 19-37.

¹⁷⁵ Southern Bluefin Tuna (Joint cases 3 and 4) (N. Z. v. Japan; Aus. V. Japan), Provisional measures, Aug. 27, 1999, (Separate opinion of Judge Treves), available at <http://www.itlos.org/start2_en.html> (visited May 31, 2010).

¹⁷⁶ For instance, in submissions by Brazil, AOSIS, the Federated States of Micronesia and Venezuela. *See*, Ideas and Proposals on Paragraph 1 of the Bali Action Plan, in FCCC/AWGLCA/2008/16/Rev.1 (Jan. 15, 2009).

¹⁷⁷ Jaye Ellis, *The Implications of the Precautionary Principle on Procedure in International Law*, in THE MEASURE OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY 351-365 (Canadian Council on International Law, Kluwer Law International, 2004); *See also* Shinya Murase, “*Kiko Hendo ni kansuru Kagakuteki Chiken to Kokusai Rippo*,” [“The Scientific Knowledge relating to Climate Change and International Lawmaking”] in 572 KOKUSAI MONDAI [INTERNATIONAL AFFAIRS] 46-58 (2008).

¹⁷⁸ EC-Measures Concerning Meat & Meat Products (Hormones), Report of the Appellate Body: WT/DS26/AB/R & WT/DS48/AB/R, Jan. 16, 1998, ¶¶ 124 and 125; and on similar lines, European Commission, Communication from the Commission on the Precautionary Principle, COM(2000) 1, Feb. 2, 2000.

¹⁷⁹ FCCC Article 3 (3) is similar to Rio Principle 15 except for the reference to cost-effectiveness of measures. It is worth considering if the difference in language has any implications for its application.

process.¹⁸¹

(d) Issues for the Committee to Consider

- What are the “triggering conditions” for the engagement of precaution in the climate change regime? What consequences does the application of precaution have, including on the burden of proof, in the climate?
- What is the normative status/ legal significance of precaution in the climate change regime? What precise influence does it wield in norm creating processes?
- What are the criteria for proper application of precaution? How might these be identified and elaborated?
- How does precaution relate to other principles including sustainable development, equity and CBD/RRC in the climate change regime?

(iv) Sustainable Development

(a) Definition and Origins

The history of the international environmental dialogue has been a history of conflict between developing and industrial countries on burden sharing to tackle global environmental degradation. At Rio, 1992, in a replay of debates held at Stockholm, 1972, there was little consensus on the real environmental issues, the significance of the terms, “environment” and “development” and indeed the nature of the “environment-development” interaction. While developed countries sought progress on climate change, biodiversity, forest loss and fishery issues the developing countries pushed for market access, trade, technology transfer, development assistance and capacity building.¹⁸² While developed countries sought to place global environmental issues on the agenda, perceived as a consequence of affluence, developing countries sought to emphasize local issues, perceived as intimately linked to poverty. At Rio, a fragile consensus developed on an agenda of “sustainable development”¹⁸³ - “development that meets the needs of the present without compromising on the ability of future generations to meet their own needs.”¹⁸⁴

The notion of sustainable development is, however, an ambiguous one. While it presents the illusion of having something for everyone by seeking to keep its definitional scope as broad as possible, it has lost significantly not just in its subjective content and coherence but also in its ability to present a genuine compromise position between the needs and desires of the developing and industrial countries. In post-Rio environmental battles both developing and industrial countries employ the common language of sustainable development, which suggests a consensus in values, yet they differ in their approach, focus, method and aims. Sustainable development is widely accepted. Judge Weeramantry in his separate opinion in the *Gabcikovo-Nagymaros Case* opined that the principle is “[p]art of modern international law, by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.”¹⁸⁵ Indeed the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development notes that sustainable development is now “widely accepted as a global objective” and the concept has been “amply recognized in various international and national legal instruments.”¹⁸⁶ Sustainable development is frequently referenced in MEAs,¹⁸⁷ in national legal instruments, and in international and national judicial decisions. It is exhaustively

¹⁸⁰ The International Law Commission (ILC) states in its commentaries of the Articles on Prevention of Transboundary Harm from Hazardous Activities: “... the precautionary principle constitutes a very general rule of conduct of prudence. It implies the need for States to review their obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge.” GAOR A/Res/62/68 (2007), Annex: Prevention of transboundary harm from hazardous activities; *see also*, ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, ILC Report on the work of its fifty-third session, GAOR 56th Sess. Supp. No. 10 (A/56/10) at 366-436 (2001).

¹⁸¹ Such procedural criteria assume greater significance in situation where science cannot afford a convincing basis for decision-making. The above ILC articles with their commentaries further emphasize the importance of environmental impact assessment in light of the precautionary principle. *See*, Yukari Takamura, “*Kokusai Kankyoho niokeru Yobo Gensoku no Dotai to Kino*,” [“The Precautionary Principle in International Environmental Law: Its Current Status and Functions”] in 104 (3) *KOKUSAIHO GAIKO ZASSI* [THE JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY] 1-28, 27-28 (2005).

¹⁸² David Runnals, *What the North Must Do*, in *ASIAN DRAGONS AND GREEN TRADE* 169,170 (Simon S.C. Tay and Daniel Esty, eds., 1996). *See also*, RODNEY R. WHITE, *NORTH, SOUTH AND THE ENVIRONMENTAL CRISIS* 96 (1995).

¹⁸³ Agenda 21, Programme of Action for Sustainable Development, 1992, A/CONF.151/26/Rev. 1 (1992).

¹⁸⁴ OUR COMMON FUTURE, *supra* note 116.

¹⁸⁵ *Gabcikovo – Nagymaros*, *supra* note 10 at 24.

¹⁸⁶ *See*, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, New Delhi, 2002.

¹⁸⁷ *See, e.g.*, United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought

covered in scholarly literature, and the ILA has already devoted considerable attention to it. Some Committee Members are of the view, in these circumstances, that there is little of value that can be added in a further exploration of this theme.¹⁸⁸

(b) Normative Status/Legal Significance

In keeping the definitional scope of sustainable development broad and therefore open to diverse interpretations, States chose to drain the notion of concrete content and coherence. As such, the legal status of sustainable development is debated but unsettled. Scholarly views range from characterizing it as soft law to a mediating principle to custom. The ILA Committee on the International Law of Sustainable Development notes in its 2008 Conference Report, however, that the focus should not be on whether sustainable development has binding force or not, but rather on the extent to which it is influencing legal and political debate including the resolution of judicial disputes.¹⁸⁹

(c) Application of Sustainable Development in the Climate Change Regime

There are frequent references to sustainable development in the FCCC and Kyoto Protocol. FCCC Article 2 (Objective) notes that stabilization of GHGs in the atmosphere must be achieved within a time frame sufficient to “enable economic development to proceed in a sustainable manner.” Further FCCC Article 3(4) notes that Parties have a right to – and should promote – sustainable development and FCCC Article 3(5), that “[P]arties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.” These provisions underscore the need for development to proceed hand in hand with both economic and ecological sustainability.¹⁹⁰

The Kyoto Protocol also contains several references to sustainable development – including in Article 2 (1) on policies and measures,¹⁹¹ Article 10 on advancing the implementation of commitments under FCCC Article 4, and Article 12 on the clean development mechanism (CDM). This oft-referenced term “sustainable development,” however, is not defined anywhere. In the context of the project-based CDM, efforts to define the notion, as well as to develop sustainable development indicators, in the climate negotiations proved fruitless. And, the Marrakesh Accords, 2001, refrain from defining the term, choosing instead to characterize sustainable development as a host country “prerogative.”¹⁹²

Sustainable development is often referred to in COP decisions as well. The Bali Action Plan, which outlines the framework for the post-2012 agreement, refers repeatedly to sustainable development.¹⁹³ Of particular note is the reference in the controversial paragraph 1(b)(ii), which requires developing countries to take nationally appropriate mitigation actions “in the context of sustainable development...”¹⁹⁴ The disputed Copenhagen Accord, also highlights sustainable development. It prescribes that long term cooperative action, as well as mitigation actions by developing countries, should be “in the context of sustainable development.”¹⁹⁵ It notes that “a low-emission development strategy is indispensable to sustainable development.”¹⁹⁶

There are many ways in which the concept of sustainable development underpins and enriches the climate change regime. First and foremost, the concept of sustainable development, and in particular its pillars of social and economic development, on which developing countries tend to focus, recognizes a legitimate role for

and/or Desertification, Particularly in Africa (1994), pmb. and art. 19(1).

¹⁸⁸ Comment from Committee member Boyle, Burns (noting however that it may be germane to consideration of how to operationalize inter-generational equity concerns), and Hohmann (noting that sustainable development should be discussed as an integral aspect of the precautionary principle but not independently).

¹⁸⁹ ILA, Rio de Janeiro Conference, Report of the Committee on International Law of Sustainable Development 7 (2008), citing Daniel Barstow Magraw and Lisa D. Hawke, *supra* note 171 at 637-638.

¹⁹⁰ NICO SCHRIJVER, THE EVOLUTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: INCEPTION, MEANING AND STATUS 105 (2008).

¹⁹¹ DUNCAN FRENCH, INTERNATIONAL LAW AND POLICY OF SUSTAINABLE DEVELOPMENT 81 (2005).

¹⁹² Decision 17/C.P.7, Modalities and Procedures for a Clean Development Mechanism as defined in Article 12 of the Kyoto Protocol, FCCC/CP/2001/13/Add.2 (2001).

¹⁹³ *See*, Decision 1/CP.3 in FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) at 3.

¹⁹⁴ *Id.*

¹⁹⁵ The Copenhagen Accord, *supra* note 34, ¶¶ 1 and 3.

¹⁹⁶ The Copenhagen Accord, *supra* note 34, ¶ 2.

development related concerns.¹⁹⁷ In doing so, it also overlaps with equity. Whilst the FCCC does not endorse an explicit “right” to development, it recognizes the central role that development plays in the climate change regime. FCCC Article 2 (Objective) specifies that stabilization of GHGs in the atmosphere must be achieved within a time frame sufficient to “enable economic development to proceed in a sustainable manner.” The FCCC also recognizes that in the pursuit of social and economic development, emissions and energy consumption in developing countries will grow.¹⁹⁸ This, read in conjunction with the global stabilization goal in FCCC Article 2, suggests arguably that the climate change regime envisions a redistribution of the ecological space, or the ecosystem services of the atmosphere, with industrial countries reducing their emissions to make room for developing countries to grow.¹⁹⁹ It could be further argued that such redistribution stems from a recognition that developing countries, and by extension their citizens, are entitled to an appropriate proportion of the ecological space so as to achieve and sustain a certain quality of life. The discussions in the climate negotiations, and on the sidelines of it on survival versus luxury emissions,²⁰⁰ the contraction and convergence proposal (based on per capita CO₂ emission entitlements),²⁰¹ and the Greenhouse Development Rights framework (based on the right of all people to reach a dignified level of sustainable human development)²⁰² all draw on the equity-based right to development. Notably, the Copenhagen Accord, echoes FCCC Article 4(7) in noting that “social and economic development and poverty eradication are the first and overriding priorities of developing countries.”²⁰³

Second, the concept of sustainable development plays an important role in integrating environmental concerns into the larger framework of economic and social development. The ILA Committee on International Law of Sustainable Development is currently examining the role and effectiveness of institutional mechanisms in promoting domestic and international implementation of integrated approaches to sustainable development. In applying the concept of sustainable development, the climate change regime would need criteria to evaluate how to facilitate and promote balanced integration of the economic, social and environmental dimensions of sustainable development. The necessity for such criteria has been identified in the case of CDM projects, but since sustainable development is context, need and nation specific, the prerogative of determining whether a project assists in achieving sustainable development is left to the host country.²⁰⁴

Third, sustainable development incorporates a temporal dimension, both in its explicit reference to inter-generational equity, as well as its implicit reliance on the principle of common but differentiated responsibilities and the precautionary approach, among others²⁰⁵ in meeting the objective of sustainable development. CBD/RRC incorporates considerations relating to historical emissions, and the precautionary approach takes account of the future risk of threats of serious or irreversible damage. Sustainable development thus helps bring together the front end of mitigation with the back end of adaptation.

Fourth, the concept of sustainable development recognizes the necessity of partnership and participation. Rio Principle 27 stresses that “[s]tates and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development”. FCCC Article 4(7) which establishes a compact between developed and developing countries on climate change reads: “[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology ...”. The Montreal Protocol,²⁰⁶ the Convention on Biological Diversity,²⁰⁷ and the Stockholm

¹⁹⁷ The NIEO may also be reflected in the principle of sustainable development. See, Duncan French, *The Role of the State and International Organizations in Reconciling Sustainable Development and Globalization*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE 59 (Nico Schrijver and Friedl Weiss, eds., 2004).

¹⁹⁸ FCCC, *supra* note 3, pmb1. The Preamble also specifies that states have the sovereign right to exploit their resources pursuant to their environmental and developmental policies; standards and priorities in developing countries should reflect the developmental context to which they apply; and responses to climate change should be coordinated with social and economic development in order to avoid adverse impacts on development.

¹⁹⁹ An argument made at length in *supra* note 81.

²⁰⁰ See Mark J. Mwandosya, *Survival Emissions: A Perspective From The South On Global Climate Negotiations* 74 (1999).

²⁰¹ Global Commons Institute, *CONTRACTION AND CONVERGENCE: A GLOBAL SOLUTION FOR A GLOBAL PROBLEM* <<http://www.gci.org.uk/>> (visited May 31, 2010).

²⁰² Paul Baer et al, *The Greenhouse Development Rights Framework - The Right to Development in a Climate Constrained World* (2008) <<http://www.ecoequity.org/docs/TheGDRsFramework.pdf>> (visited May 31, 2010).

²⁰³ The Copenhagen Accord, *supra* note 34, ¶ 2.

²⁰⁴ Decision 3/CMP.1, Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006) at 15, ¶ 40.

²⁰⁵ See, ILA New Delhi Principles, *supra* note 73.

²⁰⁶ The Montreal Protocol on Substances that deplete the Ozone Layer (1987), art. 5(5).

Convention on Persistent Organic Pollutants²⁰⁸ contain similar provisions. Little debate preceded the acceptance of these provisions, and the secretariats of the various treaties in which these provisions are found have scant information about the provisions and are reticent about how they are to be interpreted.²⁰⁹ These provisions are nevertheless significant innovations in that, by conditioning developing countries' participation and implementation to industrial countries' commitments, they underpin and reinforce the compact between developing and industrial countries with respect to international environmental protection. The precise contours of this compact, however, are not entirely clear. Do developing countries have a responsibility to contain environmental degradation even if financial assistance and technology transfer are not forthcoming? Or is the provision of financial assistance and technology transfer a precondition to the implementation of their commitments?²¹⁰

Finally, in order to achieve sustainable development through and in tandem with climate protection in the evolving climate change regime, more effective, democratic and accountable international or multilateral institutions may be necessary. In the 2002 World Summit on Sustainable Development (WSSD) held at Johannesburg, the international community agreed that "the implementation (of the outcomes of the Summit) should involve all relevant actors through partnerships, especially between Governments of the North and South, on the one hand, and between Governments and major groups, on the other, to achieve the widely shared goals of sustainable development" and that "such partnerships are key to pursuing sustainable development in a globalizing world"²¹¹. In the climate change context, such groups include, among others, corporations, nongovernmental organizations, and sub-national actors.

(d) Issues for the Committee to Consider

- How can environmental and climate protection be best integrated into the framework of development? Is the concept of sustainable development, as formulated and applied in the FCCC, effective in balancing environmental protection with social and economic development? How can the legitimate needs and aspirations of developing countries to develop be accommodated in this schema? What lessons might we learn from other regimes?
- How does the concept of sustainable development relate to other principles and concepts relevant to the climate change regime, in particular CBDRRC, precaution, and the no-harm rule?
- How, if at all, can the compact between developed and developing countries to implement sustainable development, and climate protection, be fleshed out? What concrete and effective measures for partnership, cooperation and participation flow from the notion of sustainable development, and FCCC Article 4(7)? Who are the core governmental and nongovernmental actors and how should the conversation among them be structured?

(v) Good Faith

(a) Core Content & Significance

Unlike the principles and key concepts analysed above, the notion of good faith does not find explicit mention in the FCCC or the Kyoto Protocol except in the context of the dispute settlement procedure (FCCC Article 14(6)). However, arguably, "there need be no explicit mention of the principle of good faith in a treaty because unless that principle were specifically negated it is an implicit provision of all treaties."²¹²

The concept of good faith, through judicial pronouncements and State practice, has come to acquire concrete legal content and is considered in the scholarly literature as a legal principle.²¹³ Robert Kolb identifies the

²⁰⁷ Convention on Biological Diversity (1992), art. 20(4).

²⁰⁸ Stockholm Convention on Persistent Organic Pollutants (2001), art. 13(4).

²⁰⁹ M. A. Drumbl, *Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance*, 27 COLUM. J. ENV'T'L L. 363 (2002).

²¹⁰ See for a detailed analysis of Article 4 (7), Lavanya Rajamani, *The Nature, Promise and Limits of Differential Treatment in the Climate Change Regime*, 16 Y.B. INT'L ENV'T'L L. 81 (2007).

²¹¹ See, *supra* note 80, at 8.

²¹² Anthony D'Amato, *Good Faith*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Instalment 7, 108 (R. Bernhardt, ed., 1984).

²¹³ La Cour observera que le principe de la bonne foi est un principe bien établi du droit international, *Frontière terrestre et maritime entre le Cameroun et le Nigéria*, exceptions préliminaires, arrêt, C.I.J. Recueil 1998 (Cameroun c. Nigéria), 275, 296, ¶38; See generally, M. Lachs, *Some Thoughts on the Role of Good Faith in International Relations*, in DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 47-55 (R.J. Akkerman, et al., eds., 1977); ÉLIZABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* (1977); Michel Virally, *Review Essay: Good Faith in Public International Law*, 77 AM. J. INT'L L. (1983); J. F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* (1991); Gillian White, *The Principle of Good Faith*, in THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAY IN MEMORY OF MICHAEL AKEHURST 230-255 (Vaughan

following concrete manifestations of the concept of good faith:²¹⁴

- The pre-contractual obligations (VCLT Article 18)
- The prohibition to deprive a transaction of its objects and purpose
- The primacy of the spirit over the letter in the interpretation of legal texts
- The binding nature of normative unilateral acts of States
- The doctrine of normative acquiescence (estoppel by silence; *qui tacet consentire videtur si loqui potuisset ac debuisset*)
- Estoppel
- The responsibility for appearances created (*responsabilité pour apparence, Vertrauenshaftung*)
- The prohibition of abuse of rights including *détournement de pouvoir* and fraud to the law
- The doctrine of reasonable time, e.g., for denouncing a legal act
- The maxim that nobody can profit from its own wrong
- Perfidy in the law of warfare, and
- The doctrine of critical date in the law of territorial delimitation (no self-serving acts made after the critical date can be invoked to one's own benefit).

(b) Application of Good Faith in the Climate Change Regime

The concept of good faith may play a role in the negotiation of the future climate change regime – by imposing on States a duty to negotiate and consult in good faith – as well as in the implementation of the existing climate change regime. The obligation to negotiate or consult in good faith is recognised as concrete expression of the principle of good faith. In addition, as the International Court of Justice recognized in 1980 the principle imposes obligations “to co-operate in good faith to promote the objectives and purposes” of the regime in question.²¹⁵ Indeed, the principle of good faith has been recognised as an essential element in implementing international obligations by States for the maintenance of a regime.²¹⁶

The reference to good faith in the climate context signals, on the one hand, a far-reaching obligation on the part of regime-members that could potentially have greater weight than a standard obligation to comply with the provisions of a treaty. The members are required to maintain a certain factual situation or condition, requiring constant monitoring and supervision to ensure the prescribed standards are being met. On the other hand, it could also signal a certain flexibility in complying with the obligations under the treaty. The implementation of an obligation by a member must be analysed in a broader context of its constructive contribution to the promotion and maintenance of the *raison d'être* of the regime itself. The possible role that the principle of good faith could play in the implementation of the climate change regime is to demarcate this flexibility by taking into account both the subjective element of member's “good will” and the objective element of the regime's object and purpose. In this context, it is worth noting that the non-compliance procedure under the Montreal Protocol (unlike the Kyoto Protocol Compliance Procedure) explicitly stipulates a requirement for “*bona fide*” efforts by the Parties to comply with the obligations under the relevant treaties.²¹⁷

(c) Issues for the Committee to Consider

- What, if any, is the relevance and role of the principle of good faith in the climate change regime?
- What guidance, if any, can this principle offer in setting standards for State behaviour during the negotiation process?
- How might this principle influence States in the implementation of the climate change regime?

(vi) Further Concepts and Principles of Relevance to the Climate Change Regime

In addition to the principles and key legal concepts reviewed, Committee Members have in their comments also suggested a consideration of the following principles and concepts:²¹⁸

Lowe and Colin Warbrick, eds., 1994); ROBERT KOLB, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC : CONTRIBUTION À L'ÉTUDE DES PRINCIPES GÉNÉRAUX DE DROIT (2000).

²¹⁴ Robert Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 NETH. INT'L L. REV. 19-20 (2006).

²¹⁵ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 93 (¶ 43) and 96 (¶ 49) (Dec. 20).

²¹⁶ Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, RECUEIL DES COURS, TOME 253, 413-422 (1995).

²¹⁷ Decision IV/5 (1992), Annex on Non-compliance procedure under the Montreal Protocol (as amended by Decision X/10 (1998)), ¶ 4.

²¹⁸ The following paragraphs are drawn from comments and text provided by Committee member Halvorsen.

(a) The Polluter Pays principle

This principle is relevant in particular in the context of incentivizing major emitters to take enhanced action on climate change. This principle, stipulated in Rio Declaration Principle 16, and well established in EU and US law, focuses on the allocation of the cost of the pollution or environmental damage borne by public authorities and liability for damage.²¹⁹ If applied in the context of climate change, it would highlight the fact that GHG emissions represent a market failure, in that States have corporate and other entities within their territory that do not internalize their externalities, thus requiring them to take action to reduce their emissions.

(b) A State's sovereign right to exploit one's natural resources and the prohibition on causing transboundary harm²²⁰

This principle, in addition to being enshrined in Stockholm Declaration Principle 21 and Rio Declaration Principle 2 is captured in an FCCC preambular paragraph. According to this principle, States have sovereignty over their natural resources and a responsibility to refrain from causing environmental damage in States or areas beyond the limits of their jurisdiction. This principle is accepted as *de lege lata* by most international law scholars. The sovereign right to exploit one's own natural resources encompasses the rule to be free from outside interference over the use of natural resources.²²¹ This rule has been questioned in disputes over the extra-territorial application of environmental laws of one State to activities carried out in another State or areas beyond its jurisdiction.²²² Corporations operating in foreign countries could be subject to the environmental laws of their home State through the 'nationality' principle of jurisdiction.²²³ This is problematic, however, if such corporations are also subject to the host State jurisdiction leading to jurisdictional disputes.²²⁴ Yet if damage originating from corporate activity in the host State resulted in environmental damage in the home State or the global commons – for instance, the climate system, then the home State would have a stronger case.²²⁵ In such a case the 'objective' applications of the territoriality principle - the 'effects' principle could also be applied, giving the home State a stronger case for applying jurisdictional extraterritoriality, though this has not generally been accepted.

“Responsibility not to cause environmental damage” is the part of principle that imposes obligations. In particular, it places environmental limits on States' exercise of their right to exploit their natural resources. Birnie, Boyle and Redgwell state that the most important part of this principle is that States are to take suitable preventive measures, captured as due diligence, to protect the environment, in this case the climate system.²²⁶ If applied in the climate change regime, this principle would draw attention to the fact that States have not internalized their externalities, thus mandating a limit to their exploitation of natural resources. In this sense it could be linked to the polluter pays principle and sustainable development. Committee members may choose to consider inter alia, the parameters of the due diligence in fleshing out the scope of obligations of States in the context of the no-harm rule.

(c) According priority to the special situation and needs of developing countries

This principle is articulated in FCCC Article 3(2), and implemented throughout the climate change regime, as for instance in Article 4(8) and (9), addressing the situation of developing countries with specific needs, such as small island countries and countries with low-lying coastal areas, and least developed countries. This principle is closely linked to CDDRRC, and can be considered in conjunction with it.

3. The Relationship of the Climate Change Regime with General International Law and Other Fields of International Law.

(i) The Climate Change Regime within the Framework of the General International Legal Order

(a) Basic Tenets of the International Legal Order

²¹⁹ See PATRICIA BIRNIE ET AL., *supra* note 48.

²²⁰ Committee Member Rønne is of the view that these could be treated as two distinct principles.

²²¹ Philippe Sands, *Principles Of International Environmental Law* 237 (2003).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

The international climate change regime and its constitutive principles do not exist in isolation from well-founded concepts of general international law, such as the concepts of *pacta sunt servanda*, consent, territoriality, jurisdiction and sovereignty. For example, the concept of *l'État situé* (placing and treating States according to their specific circumstances)²²⁷ is not new in international law but it must be normatively constructed in light of the overarching principle of sovereign equality of States. The concept of common concern of mankind (first preambular paragraph of the FCCC) may militate in favour of institutionalisation and, potentially, collective decision-making,²²⁸ but its concretisation has to be examined in light of the consent-driven international legal order.

Furthermore, some concepts and principles of general international law may function in clarifying, filling the gap between, providing concrete contents to, or even coordinating and resolving the potential discrepancies among the norms already recognised as applicable in the climate change context. There is a wealth of work on these “interstitial”²²⁹ concepts and principles of international law that we can turn to. For example, the concepts of process legitimacy²³⁰ and accountability²³¹ may provide useful clues and suggestions in constructing principles of law-making and law-administration within the context of the climate change legal regime. The concepts of equity and fairness²³² as principles of substantive burden-sharing may provide interpretative guidance as to the concept of CDDRRC. The concepts of “risk” and “rationality (cost-effectiveness)”²³³ may be important components when we construct legal principles applicable to problem areas in which scientific uncertainties remain. Finally, some of the basic tenets of the international legal order may provide a reasonable foundation when the Committee proposes *lex ferenda* principles relating to climate change.

(b) Established Rules of General International Law

The Relevance of Established Rules for the Climate Legal Regime

In addition to the basic tenets of international legal order examined above, the Committee may benefit from an examination of the established rules of general international law, namely the law of State responsibility and liability, the law of treaties, the principles and rules relating to the dispute settlement, and the law of international organizations.

The legal relationship between the FCCC and the Kyoto Protocol and any future post-2012 legal regime is established, first and foremost, by applying the general international law of treaties. The coherence between and among the components of a regulatory regime²³⁴ can be ensured, and the potential discrepancies resolved, by applying the general rules on treaty interpretation and those on successive treaties, unless there are special, internal mechanisms to deal with them in the regime. The legal and operational significance of resolutions and decisions of the COP also depend upon the interpretation of the relevant provisions of the multilateral environmental agreements (MEAs) themselves and on the application of general rules on treaty interpretation.²³⁵ The so-called “legislative activities” of the MEA regimes²³⁶ should first be examined in light of the general law

²²⁷ Ryuichi Ida, *Kaihatsu no Kokusaiho ni okeru Hatten Tojokoku no Chii*, [Legal Status of Developing Countries in International Law of Development: Equality of States and Inequality of Development], 116 (1-6) HOGAKU RONSO [KYOTO LAW REVIEW] 615 (1985) (citing R.-J. Dupuy, *L'organisation internationale et l'expression de la volonté générale*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, TOME 61, 540-550 (1957)).

²²⁸ Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 39, at 550-573.

²²⁹ Vaughan Lowe, *The Politics of Law-Making: Are the Methods and Character of Norm Creation Changing?* in THE ROLE OF LAW IN INTERNATIONAL POLITICS 207-226 (Michael Byers, ed., 2000).

²³⁰ THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

²³¹ INTERNATIONAL LAW ASSOCIATION, ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS: FINAL REPORT, REPORT OF THE 71ST CONFERENCE 164-271 (2004).

²³² THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

²³³ See Jonathan B. Wiener, *Precaution*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 39, at 597-612.

²³⁴ Donald Feaver and Nicola Durrant, *A Regulatory Analysis of International Climate Change Regulations*, 30 (4) LAW AND POL'Y 394-422 (2008).

²³⁵ Lavanya Rajamani, *From Berlin to Bali and Beyond: Killing Kyoto Softly?* 57 INT'L COMP. L. Q. 914-917 (2008).

²³⁶ Jutta Brunnée, *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 (1) LEIDEN J. INT'L L., 1-52 (2002); and, Günther Handl, *International 'Law-making' by Conference of the Parties and Other Politically Mandated Bodies*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 127-143 (Rüdiger Wolfrum and Volker Röben, eds., 2005).

of treaties relating to “the means of expressing consent to be bound by a treaty” (VCLT Article 11).²³⁷ It has also been suggested that the law of treaties provides a “delimitation” function between treaty rights and mere interests given to Parties through the administrative apparatus of the regime, and that Article 60 (2) of the VCLT would apply only to the case of suspension of treaty rights as a consequence of Party’s non-compliance of a treaty.²³⁸ Recently, influential views have argued that the same legal phenomena would be explained more appropriately by applying the law of international organisations, especially the concept of internal legal relationship between an organisation and its members and that of derivative and even “implied” powers of international institutions.²³⁹

As regards the dispute settlement procedures, it has been argued that the traditional, bilateral dispute settlement procedures have barely been utilised for MEAs and, instead, the specially-crafted non compliance procedures have been established to deal with the non-compliance by States. This is the case for the Kyoto Protocol, which has established a unique and disputed non compliance procedure. Although there are several non compliance procedures under MEAs, most MEAs still contain traditional dispute settlement provisions, and the non compliance procedures function “without prejudice” to these provisions. The legal relationship between dispute settlement procedures and non compliance procedures,²⁴⁰ and, more specifically, the legal significance of the “without prejudice clause”²⁴¹ must be analysed within the framework of general international law.

The Law of State Responsibility and the Climate Change Regime

The Concept of Responsibility and Liability: In common parlance among international legal scholars, “responsibility” indicates the legal consequences that flow from an international wrongful act committed by a State, while “liability” indicates a duty to compensate for damage caused by a State’s lawful conduct. It is evident from these definitions that there can be no general rule of State liability in international law. Liability is introduced in particular treaties such as the Convention on International Liability for Damage Caused by Space Objects. In the light of the purpose of this section, it is necessary only to examine the relationship between the climate change regime and general rules of international responsibility.

Is the Climate Change Regime self-contained? The first question that arises in this context is the extent to which, if at all, the FCCC and Kyoto Protocol can be characterized as a “self-contained regime”? If a legal regime is a “self-contained regime,” it could exclude application of general rules of State responsibility. However, Parties have not articulated an intent to classify the FCCC as a self-contained regime. On the contrary, several Parties including Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu have made interpretative declarations to the effect that provisions in the FCCC cannot be interpreted as derogating from the principles of general international law²⁴².

Applicability of State Responsibility: The next question that arises is that in so far as the climate change regime is not a self-contained one, how do the rules of State responsibility under general international law apply? Under the general law of State responsibility, a State injured by a wrongful act – that is, a breach of an international obligation attributable to a State -- by another State may demand a cessation of the wrongful act as well as reparation for the damage inflicted. A dispute is thus settled by applying the law of State responsibility where an international wrongful act occurs, which causes injury to another State. Pursuing State responsibility

²³⁷ Akiho Shibata, *Teiyaku koku Kaigi ni okeru Kokusaihou Teiritsu Katudo*, [International Law-Making Activities in the Conference of the Parties (COP),] 25 SEKAIHOU NENPO [Y.B. OF WORLD L.], 43-67 (2006).

²³⁸ Akiho Shibata, *Kankyo Joyaku Fujunshu Tetuduki no Kiketsu to Jouyaku Ho*, [The Consequences of Non-Compliance Procedures under MEAs and the Law of Treaties Revisited,] 107(3) KOKUSAIHO GAIKO ZASSI [THE J. OF INT’L L. AND DIPL.]1-21 (2008).

²³⁹ Robin R. Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94(4) AM. J. INT’L L. 623-659 (2000) Volker Röben, *Institutional Developments under Modern International Environmental Agreements*, 14 MAX PLANCK Y.B. OF UNITED NATIONS L. 363-443 (2000).

²⁴⁰ M. A. Fitzmaurice and C. Redgwell, *Environmental Non-Compliance Procedures and International Law*, 31 NETHERLANDS Y. B. INT’L L. 43-52 (2000).

²⁴¹ Akiho Shibata, *Kankyo Joyaku Fujunshu Tetuzuki wa Funso Kaiketsu Seido wo Gaisazu’ no Jissaiteki Igi – Yugai Haikibutu-to no Ekkyoidou wo Kisei suru Basel Joyaku wo sozaini* [Without Prejudice to the Dispute Settlement Procedures’’: Its Practical Significance for MEA’s Non-Compliance Procedures], in KOKUSAI FUNSO NO TAYOUKA TO HOUTEKI SHORI [International Disputes Settlement: Its Diversity and Legal Nature] 65-89 (N. Shimada, et al eds., 2006).

²⁴² For example, the declaration by Fiji states as follows: “The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law.”

can be an effective tool to settle disputes, when the damage caused by the wrongful act is of such a kind that can be remedied *ex post* by reparation.

For the law of State responsibility to be engaged it is necessary first to identify the obligations imposed on States by the climate change regime, and next establish that these have been breached. Under general international law, States must ensure with due diligence that activities within their territories do not cause harm to others (see Principle 21 Stockholm Declaration and Principle 2 of the Rio Declaration). However, in the context of climate change, States that cause the harm cannot readily be identified, as climate change is the result of the concurrent and accumulative acts of many actors. Against this background, the climate change regime seeks to impose individual and collective obligations on Parties.

Binding legal obligations imposed by the FCCC and the Kyoto Protocol: The term “legally binding” is typically applied to legal instruments that render a particular State conduct non-optional as well as judicially enforceable.²⁴³ Treaties such as the FCCC and the Kyoto Protocol are binding in this sense. But, compliance, implementation and effectiveness of these instruments rests on a range of factors, some of which are independent of their status as legally binding instruments. One such factor is the normative content as well as precision of the provisions within these treaties. The FCCC has numerous provisions that are couched in discretionary and contextual language. For instance, the commitments of industrial countries relating to financial resources and technology transfer are peppered with phrases such as “as appropriate,” “if necessary,” “in so far as possible,” and “all practicable steps.”²⁴⁴ Although the discretion provided is with regard to the manner or timeframe of performance of a particular obligation, rather than as to performance or non-performance, it nevertheless renders the setting of a standard, a finding of breach or non-compliance, and the resulting visitation of consequences, a problem-ridden task.

The Kyoto Protocol, given its targets and time-tables approach, lends itself more readily to standard setting, and it has its own compliance system.²⁴⁵ However even the Protocol contains provisions and terms that defer to the judgment of Parties on what is or is not appropriate in the circumstances, which in turn renders the setting of standards and finding of breach or non-compliance problematic. For instance, the Kyoto Protocol requires developed country Parties to make “demonstrable progress” by 2005 in achieving their identified mitigation commitments.²⁴⁶ While non-compliance with mitigation commitments is subject to enforcement through the compliance system, non-compliance with the requirement to demonstrate progress, given the inherent subjectivity of the term, may not lend itself to such action.²⁴⁷ These examples suggest that although a Convention or a Protocol may, as it is a legally binding instrument, offer the comfort of presumed rigour, whether in practice its provisions create mandatory obligations, and lend themselves to findings of breach is less certain. Provisions, even within legally binding instruments, have differing levels of normativity and precision. And, for those with less precision, it is difficult to establish their breach. The more precise and concrete the obligations the more likely that States will be found in breach of them. Examples of such obligations are procedural ones such as the FCCC requirement to submit national communications,²⁴⁸ and substantive ones such as the Kyoto Protocol GHG mitigation targets for developed countries.²⁴⁹

Identifying the Injured State: Under general international law of State responsibility an injured State is entitled to invoke the responsibility of another State. However, in the context of climate change, an internationally wrongful act, even where it can be established as such, cannot be construed to have injured a particular State. In the circumstance it is worth examining whether Article 48 (Invocation of responsibility by a State other than an injured State) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts codifies existing international rules or it proposes a *lex ferenda*.

Limits of State Responsibility in Preventing Climate Change: There are two kinds of obligations – procedural and substantive - whose breach could generate responsibility of wrongdoing States in the context the climate change regime. If we assume in accordance with the ILC Articles that every State party is entitled to pursue the

²⁴³ See Brunnée, *supra* note 236, at 32, noting however that most norms that are enforceable in principle are not enforced in practice.

²⁴⁴ FCCC, *supra* note 3, art. 4(5).

²⁴⁵ See Decision 27/CMP.1, Procedures and mechanisms relating to compliance under the Kyoto Protocol, in FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006).

²⁴⁶ Kyoto Protocol, *supra* note 4, arts. 3(1) and 3(2).

²⁴⁷ Several Kyoto Protocol Parties were above their 1990 levels of emissions, some well above them, in 2007. Data available at <http://unfccc.int/ghg_data/ghg_data_unfccc/items/4146.php> (visited May 31, 2010).

²⁴⁸ FCCC, *supra* note 3, art. 12.

²⁴⁹ Kyoto Protocol, *supra* note 4, art. 3.

responsibility of a State having violated those obligations, the breach of procedural obligations can be remedied by ensuring that the wrong-doing State ceases the wrongful act, that is, by making the State perform its procedural obligations. However, responsibility for the breach of the Kyoto GHG mitigation obligation raises the following queries:

Since the breach can only be established at the end of the first commitment period, that is, after the obligations to reduce GHG emissions themselves have expired, what are the possible remedies or reparations that can be pursued?

The Kyoto GHG mitigation obligations are allocated to developed country parties with the aim of managing the *risks* of climate change, i.e. the breach of these obligations does not necessarily result in actual damage. Thus, the usual remedies under the law of State responsibility might not be suitable for the breach of such obligations. To put it differently, the legal regime for tackling climate change is built on the premise that States should focus on reducing the risks of catastrophic climate change, which in turn would prevent climate change. Against this backdrop, can the system of State responsibility which focuses on remedial aspects of international wrongful acts adequately respond to this aim?

(ii) The Climate Change Regime and Other Fields of International Law

Measures to tackle climate change, whether taken multilaterally or unilaterally, are often relevant to, at times even in conflict with, other fields of international law. In principle, it would be desirable to avoid conflicts and enhance synergies with other field of international law. In order to achieve this aim, it might be interesting to explore if legal principles exist to assist in enhanced coordination and synergies between the climate change regime and others, and, if so, to identify what these legal principles are and how they could be applied.

(a) Interrelationship with Other Fields of International Environmental Law

Measures to address climate change and its impacts may at times have an adverse impact on other environmental problems. A few examples follow.

Climate measures and the Ozone Regime: Destruction projects for HFC23, a potent GHG resulting from the production of HCFC22, offer cost-effective reductions and hefty profits. However, some argue that profits arising from such CDM projects subsidize the production of HCFC22, both an ozone depleting substance and a GHG, and discourage developing countries from taking stringent action to phase out or even halt an increased production of HCFC22, in turn undermining the effectiveness of the ozone protection regime. The Committee may choose to consider how the climate change regime interacts substantively and procedurally with the Montreal Protocol, 1987?

Climate measures and Biodiversity protection: Another example is the case of CDM afforestation and reforestation (CDM/AR) project activities. The rules on CDM/AR leave to the host country's discretion the judgment of whether the projects will cause significant negative socio-economic impacts and environmental impacts. Due to lack of international rules and standards, the host countries, attracted by short-term economic interest generated through CDM, might disregard environmental and social values such as biodiversity, which may adversely impact their implementation of CBD. The Committee may choose to consider how the climate change regime interacts substantively and procedurally with the CBD?

Climate measures and the protection of marine environment: Mitigation technologies such as ocean based carbon sequestration, or potential climate geoengineering schemes, such as ocean iron fertilization, if mismanaged, might risk impacting marine organisms and affect the marine ecosystem. Yet, recent scientific findings indicate that increasing GHG emissions enhance ocean acidification and result in the deterioration of the marine ecosystem, which in turn undermines one of the key objectives of the United Nations Convention on the Law of the Sea (UNCLOS), in particular its Part XII (Protection and Preservation of the Marine Environment). The Committee may choose to consider how the climate change regime interacts substantively and procedurally with the UNCLOS?²⁵⁰

Duplication and/or overlap of “competences” of the FCCC with the International Civil Aviation

Organization and the International Maritime Organization: There are proposals introduced in the FCCC process to set a target and/or to introduce mitigation measures in the field of “bunker fuels” - international aviation and maritime transport. If such proposals are agreed upon, it would lead to a duplication and/or overlap of competences between the FCCC and ICAO and IMO. The Committee may choose to consider how

²⁵⁰ Comment by Committee member Boyle.

the competences of the climate change regime and ICAO and IMO overlap and how the overlap may be managed?

(b) Interrelationship with Other Fields of International Law

Climate change and International Trade Law: A whole range of possibilities for synergy, overlap, and conflict exist between climate change law and international trade law. Committee members have recommended examining the following: the relevance of Trade Related Intellectual Property Rights (TRIPS) to technology transfer in the climate context, in particular in the proposed Technology Mechanism under the Copenhagen Accord;²⁵¹ the proposals for border carbon adjustment measures in the US and EU, in the context of the threat of WTO challenge from developing countries, should these come to be legislated;²⁵² and, the possibility of re-structuring WTO law to promote greater energy efficiency and enhanced sustainable development in developed and developing countries.²⁵³

The Possibility and Management of Conflicts: FCCC Article 3 (5) stipulates that, “[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.” The principle suggests that climate measures, whether multilateral or unilateral, should not be in violation of existing WTO rules.

Conflicts are not inevitable when two different legal regimes deal with the same subject matter. Such conflicts do occur, however, when the later treaty imposes upon the Contracting Parties legal obligations, the implementation of which would trigger the violation of a previous treaty. If the later regime only permits its contracting parties to engage in certain behaviour (“The Contracting Parties may”), the issue of conflict may be avoided should they behave carefully. If the later regime however imposes legal obligations (“The Contracting Parties shall”), it would be difficult, if not impossible, to avoid the conflict. If conflicts occur, how can such conflicts between the climate change legal regime and other treaty regimes be addressed? Pauwelyn categorizes “conflict of norms” into four situations:

- (a) where Norm 1 provides that State A shall do X, while Norm 2 provides that State A shall do Y (Y being either different from or mutually exclusive with X)
- (b) where Norm 1 provides that State A shall do X, while Norm 2 provides that State A shall not do X.
- (c) where Norm 1 provides that State A shall do X, while Norm 2 provides that State A need not do X.
- (d) where Norm 1 provides that State A shall not do X, while Norm 2 provides that State A may do X.²⁵⁴

Although there are several approaches to the concept of “conflict of norms,”²⁵⁵ this categorisation is a useful starting point. As it is conceivable that a post-2012 climate change regime would allow Parties to take trade restrictive measures prohibited under the WTO agreements (situation 4 above)²⁵⁶, it is worth examining some fundamental systemic issues concerning such normative conflicts at this stage, and, methods to resolve them.

Interpretation: When treaty regimes conflict, one approach is to adopt an interpretation that harmonises the “conflicting” treaty provisions at issue. A trade restrictive measure based on the climate change regime, for instance, may be justified in the WTO regime if we interpret the Article XX exceptions to the WTO agreements in such a way as to coordinate the two treaty regimes. For this approach, Article 31 (3)(c) of the VCLT is of particular importance.²⁵⁷

According to the Study Group on the International Law Commission on Fragmentation of International Law, Article 31 (3)(c) of the VCLT is based on the “principle of systemic integration.” The Study Group emphasises the need to interpret the text of a treaty, taking into account other rules of international law that might have

²⁵¹ Comments by Committee member Halvorssen.

²⁵² Comments by Committee member Maljean-Dubois.

²⁵³ Comments by Committee member Boyle.

²⁵⁴ JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 179 (2003).

²⁵⁵ Harro Van Asselt, Francesco Sindico and Michael A. Mehling, *Global Climate Change and the Fragmentation of International Law*, 30 LAW & POL’Y 429-430 (2008).

²⁵⁶ Similar potential conflicts emerged during the negotiations on the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

²⁵⁷ Committee member Maljean-Dubois also highlights the importance of Article 31(1), as the Shrimp -Turtle WTO Appellate Body Report and the EC-Biotech Panel Report suggest its use can help link conflicting international regimes.

bearing upon a case.²⁵⁸ The WTO Panel in *EC-Biotech Products* stated, however, “the parties” in Article 31 (3)(c) should be interpreted as “all the parties to the treaty that is being interpreted” and refused to take into account the Convention on Biological Diversity and the Cartagena Protocol in interpreting the WTO agreements.²⁵⁹ Although this is neither the jurisprudence of the Appellate Body nor of the International Court of Justice, it would be inevitable for us to evaluate the Panel’s understanding of Article 31 (3)(c) when we consider the conflict between the climate legal regime and other treaty regimes.

Application: If normative conflicts remain after the process of interpretation, the treaty provisions relevant to the case at hand must be identified, and VCLT Article 30 applied. Article 30 lists the rules for the application of successive treaties relating to the same subject-matter, paragraph 4 in particular is of importance.

If two States are parties to both a new climate treaty and an existing treaty in any other field of international law and if the parties to the new climate treaty (“the latter treaty”) do not include all the parties to the existing treaty (“the earlier treaty”), the *lex posterior* principle which is provided in paragraph 3 of VCLT Article 30 applies. However, it should be noted that in a case where one of the two States is a party to the existing treaty but is not a party to the new climate treaty, only the former applies to the case. Also, even if two States are parties to a new climate treaty and another treaty at issue, we should bear in mind that questions would be raised as to what would be the applicable law(s) would be in a particular dispute settlement procedure. For example, the Dispute Settlement Understanding of the WTO has no provision on the applicable law. Whether WTO panels and Appellate Body may apply treaties other than the WTO agreements is still an unresolved issue.²⁶⁰ It is also worth noting that while the principle of *lex specialis derogat legi generali*, grounded in the idea that the most closest, detailed, precise or strongest expression of state consent, as it relates to a particular circumstance, ought to prevail, was not included in the VCLT, it has been invoked in several international and national fora. As such, it might be germane to determining what regime should control if there’s an unavoidable conflict between two or more regimes.²⁶¹

Forum Selection: The issue of forum selection comes into the picture when both treaties have a dispute settlement clause. In a case where both the climate treaties and other treaties apply to the same dispute, it is crucial to determine which dispute settlement body has jurisdiction over the dispute. In reality, Contracting Parties’ discretions will be the decisive factor in forum selection. It may be useful to discuss the issue of forum selection in general terms, such as, whether a dispute settlement procedure whose applicable law is strictly limited, is a relevant forum to deal with a case involving the conflict of treaty regimes. It is also necessary to address the issue of exclusive jurisdiction clauses in some treaties,²⁶² since such a clause, if included in a new climate treaty, may be determinative on the issue of forum selection.

Climate change and Human Rights Law: Another area of considerable topical interest is the relationship between climate change and human rights law. It is axiomatic that climate impacts, especially where severe, because of the unequal distribution of emissions and physical effects, are likely to undermine the realization of a range of protected human rights. Yet it is only in the recent past that an explicit human rights approach has been brought to bear on the climate change problématique. Scholars and human rights bodies have begun increasingly to advocate a human rights-centred approach to climate change - an approach which would place the individual at the centre of inquiry, and draw attention to the impact that climate change could have on the realization of a range of human rights.²⁶³ The UN Human Right Council, in March 2008, adopted resolution 7/23 and requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to conduct a detailed analytical study on the relationship between climate change and human rights. This study has since been submitted.²⁶⁴ In March 2009 the Council adopted Resolution 10/4 titled Human rights and Climate Change

²⁵⁸ Report of the Study Group on the International Law Commission on Fragmentation of International Law, A/CN.4/L.628 206-244 (Aug. 1, 2002), ¶¶ 410-480.

²⁵⁹ Panel Report, European Communities-Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) ¶ 7.71.

²⁶⁰ Mitsuo Matsushita, et al. (eds.), *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY* 109-111 (2nd edn., Oxford University Press, 2006).

²⁶¹ Comment by Committee member Burns.

²⁶² For example, NAFTA Article 2005 (1) provides that “[s]ubject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.”

²⁶³ See generally, Stephen Humphreys, *THE HUMAN RIGHTS DIMENSIONS OF CLIMATE CHANGE: A ROUGH GUIDE* 3 (The International Council on Human Rights Policy, 2008).

²⁶⁴ Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 (Jan. 15, 2009)

which recognizes that climate change-related impacts have a range of implications for the effective realization of human rights, and that human rights obligations and commitments have the potential to inform and strengthen international and national policy-making.²⁶⁵ The OHCHR is currently engaged in soliciting views from a range of stake holders on the relationship between climate change and human rights.²⁶⁶

Another event of note, which captured the popular imagination, is the Inuit petition before the Inter-American Commission on Human Rights. The Inuit claimed that the impacts of climate change, caused by acts and omissions of the United States, violated their fundamental human rights – in particular the rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home.²⁶⁷ These rights, they argued, were protected under several international human rights instruments, including the American Declaration of the Rights and Duties of Man.²⁶⁸ The Commission refused to review the merits of the petition on the grounds that the “information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”²⁶⁹ But it did lead to a “Hearing of a General Nature” on human rights and global warming and ongoing study of the topic by the Commission as part of its larger engagement with environmental rights.²⁷⁰ There are also several cases of a similar nature before other international human rights bodies and some national courts.

The Committee may wish to consider ways in which climate impacts and mitigation measures impact the realization of human rights, and the value and limits of adopting human rights approaches to climate protection. Core issues to consider include:²⁷¹

- When do the impacts of climate change implicate and/or violate human rights?
- When these climate change-related human rights impacts and/or violations take place, who is responsible and what is the appropriate remedy?
- Which forums are best suited to addressing these issues and which international, regional, national, and subnational human and civil rights laws should apply?
- How do the complex spatial and temporal scales of the problem condition responses to the above questions?

4. Negotiating a post-2012 Climate Change Regime: the Legal Challenges Ahead

Negotiations for a post-2012 climate change regime are currently underway. Given the failure of Parties to reach a legally binding agreement in Copenhagen, and the ongoing uncertainty in the negotiations, it may not be fruitful to engage in speculative exercises seeking to predict the architecture of the post-2012 regime. Once the post-2012 regime is firmly in place, the Committee may choose to consider the relationship of a new legal framework with the current regime and with general international law. For now, however, it may be useful to provide a preliminary analysis of the current status of negotiations so as both to provide a basis for the Committee’s future work, and ensure that the Committee’s work, while anchored in law and legal doctrine, remains policy relevant and influential. A preliminary analysis of the current state of negotiations, with an indication of legal challenges ahead, is offered below. This analysis proceeds on the basis that the issue of legal form is of primary importance to international legal scholars, and albeit seemingly procedural, it captures the key disagreements in the climate change regime.

²⁶⁵ Office of the United Nations High Commissioner on Human Rights, Human rights and climate change, Resolution 10/4 (Mar. 25, 2009).

²⁶⁶ Submissions to the OHCHR available at <<http://www2.ohchr.org/english/issues/climatechange/submissions.htm>> (visited May 31, 2010); For examination on how the issue may be tackled in the work of the Committee on Economic, Social and Cultural Rights, see Marcos A. Orellana, Miloon Kothari & Shivani Chaudhry, *Climate Change in the Work of the Committee on Economic, Social and Cultural Rights*, Friedrich Ebert Stiftung, 2010.

²⁶⁷ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (2005), available at <<http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>> (visited May 31, 2010).

²⁶⁸ *Id.* O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

²⁶⁹ Quoted in Jane George, *ICC Climate Change Petition Rejected*, NUNATSIAQ NEWS (2006), available at, <http://www.nunatsiaq.com/archives/61215/news/nunavut/61215_02.html> (visited May 31, 2010).

²⁷⁰ Press Release No 8/07, Inter-American Commission on Human Rights, IACHR Announces Webcast of Public Hearings of the 127th Regular Period of Sessions, 26 February 2007, available at, <<http://www.cidh.org/Comunicados/English/2007/8.07eng.htm>> (visited May 31, 2010).

²⁷¹ Questions offered by Committee member Osofsky.

(i) Legal Form of the “Agreed Outcome”²⁷²

The chapeau to the first operative paragraph of the Bali Action Plan, 2007, which launched the current phase of negotiations, reads: [the Conference of Parties (COP)] “[d]ecides to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session, by addressing, inter alia...” The term “an agreed outcome,” in the Bali Action Plan indicated a lack of agreement on both the legal form that the likely outcome of this process could take, and the level of ambition that it should reflect. The Berlin Mandate, comparable to the Bali Action Plan in so far as it too launched a process to advance the climate change regime, explicitly specified the legal form of the outcome - “a Protocol or another legal instrument.”²⁷³ The legal form that the outcome of the Bali Action Plan could take is however is left open. A range of legal form options exist, among them:

- A legally binding instrument either to:
 - supplement the FCCC and Kyoto Protocol, or
 - replace the Kyoto Protocol
- An amendment or set of amendments to the FCCC including to the Annexes, and by adding Annex/es
- A single COP decision or a set of COP decisions to further implement the FCCC
- A Ministerial Declaration containing the elements of the political agreement, details of which may be worked out later, and
- Any combination or package of the above.

Options other than a Protocol replacing Kyoto would likely be accompanied by a set of amendments to the Kyoto Protocol, in particular to Annex B, pursuant to Kyoto Article 3 (9), requiring new targets for industrialized countries. There is a process underway –*Ad Hoc* open-ended Working Group to consider further commitments for developed countries beyond 2012 under the Kyoto Protocol (AWG-KP) - for this purpose.²⁷⁴

Most developed countries favour a single integrated instrument that replaces the Kyoto Protocol which would, in their view, ensure greater participation and therefore effectiveness of the climate change regime. This would in particular ensure the participation of the United States that is responsible for 20% of the world’s annual emissions and 30% of historical emissions (1900-2000).²⁷⁵ The United States has long considered the Kyoto Protocol to be “ineffective and unfair,” in part because it does not include mitigation commitments for major “population centers” such as China and India.²⁷⁶ It has also in the recent negotiations proven resistant to the charm of Kyoto’s accounting and compliance rules. The United States is unlikely to ratify the Kyoto Protocol, even if comprehensively amended. Since other developed countries consider it essential that they are in the same legal instrument as the United States - subject to the same flexibility and constraints (or lack thereof) and standards - they are willing to transition to a new integrated instrument. Developed countries are also arguing for a single integrated instrument because they view the two-track process to be burdensome and unwieldy. A new instrument incorporating key elements of the Kyoto Protocol, they believe, would ensure greater policy coherence and institutional coordination in the climate change regime. Their position is ultimately based on the political judgment that if they were to transition to a single integrated outcome that captures market-friendly elements of the Kyoto Protocol, permits flexible approaches tailored to national circumstances, and defers to domestic political constraints, the United States will become a party to it.

²⁷² See Lavanya Rajamani, *Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime*, 58 INT’L & COMP. L.Q. 803-834 (2009) for a detailed analysis of the various legal form options on the negotiating table.

²⁷³ The Berlin Mandate, *supra* note 18, ¶ 3.

²⁷⁴ Many Annex I countries are seeking, through this process, to initiate extensive amendments to the Kyoto Protocol, but there is considerable resistance to this from developing countries who argue that the mandate of the AWG-KP is limited to considering further commitments for Annex I Parties in accordance with Protocol Article 3 (9). See, Decision 1/ CMP 1, Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol, in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005 FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006). Japan, in seeking to integrate the work of the AWG-KP and AWG-LCA, submitted its proposed Protocol, to both the AWG-KP and the AWG-LCA.

²⁷⁵ Contributions to Global Warming: Historic Carbon Dioxide Emissions from Fossil Fuel Combustion, 1900-1999, Earth Trends, Environmental Information, World Resources Institute, available at, <<http://earthtrends.wri.org/>> (visited May 31, 2010).

²⁷⁶ Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts, The White House, Office of the Press Secretary, Mar. 13, 2001; See also, Byrd Hagel Resolution, S. Res. 98, July 25, 1997.

Most developing countries are however opposed to a single integrated instrument as this instrument is likely, given emerging political realities, to have a fundamentally different character to that of the Kyoto Protocol. It is likely to reflect a bottom-up rather than top-down approach, to breach the perceived Bali “firewall,”²⁷⁷ and to cherry-pick from the Kyoto Protocol,²⁷⁸ in the process altering, they fear, the balance of responsibilities in the climate change regime. They are also concerned that in the process of transitioning to a single integrated instrument, many key elements of the Kyoto Protocol, in particular, the compliance system, will be abandoned, and that other rules will be diluted.²⁷⁹ Proposals by developed countries advocate mitigation requirements applicable to *all* Parties not tailored to developed and developing countries respectively, as envisaged by the Bali Action Plan. Their proposals, drawing on FCCC Article 4(1), focus on the common responsibilities Parties share and are guarded on differentiation or specific commitments of developed countries.

(ii) The Copenhagen Accord, 2009

The 2009 Copenhagen Accord, tenuous as its legal status is,²⁸⁰ is the only substantive outcome that emerged from the Copenhagen conclave. The Accord, however, did not resolve the fundamental cleavages between Parties. On the fate of the Kyoto Protocol, it was silent. The only reference to the Kyoto Protocol occurred in paragraph 4 relating to Annex I mitigation targets. The pertinent part reads: “Annex I Parties that are Party to the Kyoto Protocol will thereby further strengthen the emissions reductions *initiated* by the Kyoto Protocol.”²⁸¹ The careful use of the word “initiated” serves to keep this provision relevant whether or not the Kyoto Protocol survives beyond its first commitment period. The CMP decision extending the work of the AWG-KP does capture a resolve “to ensure that there is no gap between the first and second commitment periods of the Kyoto Protocol,”²⁸² but the Accord itself does not explicitly support the survival of the Kyoto Protocol. The fact that this battle is yet to be fought is evident from the recent Japanese submission that reiterates its support for a “single, extensive and ambitious agreement.”²⁸³

The Copenhagen Accord does not offer guidance on the issue of legal form or architecture of the future climate change regime. An earlier draft of the Accord carried a paragraph requiring Parties to negotiate “one or more legal instruments under the Convention, ideally within six months but no later than December 2010.”²⁸⁴ This disappeared in the final draft, as did a similar reference to a “legally binding instrument” in the COP decision extending the work of the AWG-LCA.²⁸⁵ The Accord may be perceived as tending towards a bottom-up non-prescriptive architecture, in that States self-select their targets and actions and inscribe them in the Appendices. However, the Kyoto Protocol also contains Annexes with targets. The distinction between the Accord and the Kyoto Protocol is first, that the former is a political instrument and the latter a legal instrument. This explains the second distinction, that the former allows, by necessity, self selection of targets/actions, whereas the latter combines initial self-selection of targets and actions with subsequent international negotiation of these. The fact, therefore, that the Accord contains Appendices listing targets and actions by countries, does not predetermine the architecture of the future climate change regime.

²⁷⁷ The Bali Action Plan uses different formulations in paragraphs 1(b)(i) and 1(b)(ii) for developed and developing country commitments/actions, and the distinction between them has come to be characterized by developing countries as the “firewall.” Some, notably the US, however, perceive the Bali Action Plan as representing a bridge, rather than a firewall.

²⁷⁸ If Parties decide to terminate or supersede Kyoto they will have to determine which parts of Kyoto they would like to incorporate in the new instrument, and which parts of it they will discard. This cherry-picking is evident in the proposed Japanese Protocol (*see* Draft protocol to the Convention prepared by the Government of Japan for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/3, May 13, 2009,) as well as in Australia’s preferred one-treaty model (Draft protocol to the Convention prepared by the Government of Australia for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/5, June 6, 2009).

²⁷⁹ The proposals that raise this specter lie in Non-paper 28 of 2009. Non-paper 28 collates proposals, primarily from the United States, Australia, Canada and Japan that suggest a recasting of the differentiation that currently exists in the climate change regime. Non-paper 28, Non-paper by the Chair, Revised Paragraphs 1-37 of Annex III to Document FCCC/AWGLCA/INF.2, Oct. 9, 2009, available at <http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/5012.php> (visited May 31, 2010).

Non-papers are unofficial documents produced during negotiating sessions containing Party proposals. Non-papers are not reproduced with the FCCC signage or translated, but important non-papers are electronically archived.

²⁸⁰ The FCCC secretariat has clarified, on being requested to do so, that the provisions of the Accord “do not have any legal standing within the UNFCCC process.” *See, supra* note 98.

²⁸¹ Emphasis added.

²⁸² *See, supra* note 33.

²⁸³ *See*, Japan’s Submission on the process of the AWGs in 2010, Feb. 16, 2010.

²⁸⁴ *See*, Copenhagen Accord, Draft Version, Dec. 18, 2009, on file with the Rapporteur.

²⁸⁵ Draft decision -/CP.15, Proposal by the President, Dec. 18, 2009, on file with the Rapporteur.

Finally it could be argued that the Accord does not provide any guidance on the differentiation debate. Admittedly, developing countries have taken several steps forward in the Bali Action Plan, and in the Accord – both in terms of agreeing to list their actions, and permitting, in whatever form, measurement, reporting and verification of these actions.²⁸⁶ However, the Accord does endorse differential treatment for developing countries in several important ways. First, Annex I countries are obliged to adopt targets, while non-Annex I countries are only required to implement mitigation actions.²⁸⁷ Second, the language used to frame Annex I targets is prescriptive – “Annex I Parties commit to...” – while the language used to frame non-Annex I mitigation actions is predictive – “non-Annex I Parties... will implement...”²⁸⁸ Moreover, non-Annex I mitigation actions are also anchored in FCCC Articles 4 (1), and 4(7), and sustainable development. Although the Accord envisages that such mitigation actions will be “voluntary and on the basis of support” with regard to least developed countries and small island developing States,²⁸⁹ many large developing countries have in their submissions emphasized that their submitted actions are undertaken on a “voluntary”²⁹⁰ basis. Meanwhile, the United States has reiterated its preference for a “legally binding outcome in Mexico provided that the legally binding elements in an otherwise acceptable agreement would apply in a symmetrical manner to all major economies.”²⁹¹ This is yet another issue that awaits resolution.

(iii) The Challenges Ahead

The Copenhagen Accord, for all its imperfections, has dominated much of the popular and political discourse in the aftermath of the Copenhagen conference. The Accord, however, does not represent the “agreed outcome” mandated by the Bali Action Plan. The “agreed outcome” of the two-year process by the ad hoc working group on long-term cooperative action (AWG-LCA), launched by the Bali Action Plan in December 2007 is a COP decision that extends the mandate of the AWG-LCA, and imposes a new deadline of COP-16, scheduled to be held in November-December 2010 in Mexico.²⁹² The AWG-LCA was tasked with continuing on the basis of the work that had been undertaken thus far.²⁹³ The work under the ad hoc working group on the Kyoto Protocol (AWG-KP) to arrive at targets for Kyoto’s developed countries is also set to continue.²⁹⁴ In April, in a short session in Bonn, Parties agreed to schedule two extra weeks of negotiations this year, as well as to authorize the Chairs to produce draft negotiating texts, on the basis of the work done thus far.²⁹⁵ The work undertaken thus far is considerable - reams of party proposals, months of painstaking negotiations, and numerous versions of negotiating texts under both tracks.

The road ahead is likely to be a difficult one, for the Copenhagen Accord did not settle any of the fundamental cleavages that currently exist: the fate of the Kyoto Protocol; the legal form and architecture of the future legal regime; and the nature and extent of differential treatment between developed and developing States.

While a single integrated legal instrument would be the most policy coherent and structurally appealing option, the possibility of a post-2012 architecture that contains overlapping and related legal instruments, possibly of differing legal status, and with differences in terms of membership, given the politics explored above, is not unlikely. And, such a complex, layered and inter-linked regime will pose considerable legal and governance challenges.²⁹⁶ At a minimum there must be coordination among the instruments in order to ensure that these instruments and their implementation work as a whole, and parts of the whole do not undermine the regime or compromise its environmental integrity. Ensuring consistency in the rules on crediting schemes and on compliance is also critical to ensuring the sound operation of the carbon market. In such a package approach, the

²⁸⁶ Some scholars read this as beginning to “break the so-called firewall between developed and developing countries.” Bodansky, *supra* note 95.

²⁸⁷ The Copenhagen Accord, *supra* note 34, ¶¶ 4 and 5.

²⁸⁸ *Id.*

²⁸⁹ The Copenhagen Accord, *supra* note 34, ¶ 5.

²⁹⁰ *See, e.g.*, Letter including India’s domestic mitigation actions, Jan. 30, 2010.

²⁹¹ Submission of the United States of America, Organization of the Work of the AWG-LCA in 2010, Feb. 26, 2010.

²⁹² *See, supra* note 32.

²⁹³ *See*, draft decision -/CP.15, *supra* note 32, listing in particular a set of draft decisions, that are included in an Annex to Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its eighth session, held in Copenhagen from 7 to 15 December 2009, and draft decisions annexed thereto, FCCC/AWG/LCA/2009/17 (Feb. 5, 2010).

²⁹⁴ *See*, Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on its tenth session, held in Copenhagen from 7 to 15 December 2009, and draft decisions annexed thereto, FCCC/KP/AWG/2009/17 (Jan. 28, 2010).

²⁹⁵ *See, supra* note 147.

²⁹⁶ Comment by Committee member French.

coordination of the timing and conditions of entry into force of the instruments will also be critical. In principle, States have the discretion to choose whether or not to ratify an international treaty, therefore, it is possible that States may ratify only one of the packaged instruments. Thus, the packaged instrument approach presents a higher risk of undermining the integrity of the regime, since the applicable climate change regime may differ from one country to another depending upon its ratification record.

5. Other Issues Which Could Be Examined by the Committee

(i) Issues Related to post-2012 Kyoto Compliance

- (a) Kyoto Compliance cycle
- (b) Lessons from the functioning of the Kyoto mechanisms, and CDM and Joint Implementation beyond 2012
- (c) Lessons from the Kyoto Compliance System for the Post-2012 Climate Change Regime
- (d) Issues related to Leakage

(ii) Legal Problems Arising Out of Specific Measures

- (a) "Cap and Trade" and Flexible Mechanisms (including Emission Trading)
- (b) Tax and Subsidies
- (c) Voluntary Agreements
- (d) Sector-Based Approaches
- (e) Standard-setting / Labelling (Top-runner approach, Carbon-footprint, etc.)
- (f) Bubble
- (g) REDD+

(iii) Participation and Forum

- (a) UN Forum
- (b) Major Economies' Forum
- (c) G-8, 20, etc
- (d) Private Sector Forum
- (e) Others

(iv) Compliance, Transparency and Accountability

- (a) Nature of Commitments and Actions
- (b) Measurement, Reporting and Verification
- (c) Facilitative Approach
- (d) No-lose Approach
- (e) Enforcement Approach
- (f) Power of the Conference of the Parties and the Revision of the Agreements

(v) Conflict and Coordination with WTO Rules

- (a) Climate treaties
- (b) Domestic Measures