

International Law Association - Washington Conference (2014): Legal Principles Relating to Climate Change

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Version Committee Report

Citation (published version) Rajamani, Lavanya and Peel, Jacqueline and Hohmann, Harald and Schwarte, Christophe and Shibata, Akiho and Brunnée, Jutta and Burleson, Elizabeth and Halvorsen, Anita Margrethe and Murase, Shinya and Maljean-Dubois, Sandrine and Osofsky, Hari M. and Takamura, Yukari and Gavouneli, Maria and Brus, Marcel and French, Duncan and Ronne, Anita and Strydom, Hennie and Bodansky, Daniel, International Law Association - Washington Conference (2014): Legal Principles Relating to Climate Change (July 2, 2014). Report of the International Law Association's Committee on Legal Principles Relating to Climate Change (Washington, 2014).

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INTERNATIONAL LAW ASSOCIATION

WASHINGTON CONFERENCE (2014)

LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE

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**REPORT AND DRAFT DECLARATION
FOR CONSIDERATION AT THE 2014 CONFERENCE**

INTRODUCTION

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, the Kyoto Protocol of 1997 and the decisions of Parties under these instruments. 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 work of this Committee is intended to inform this effort.

The Committee on the ‘Legal Principles Relating to Climate Change’ submitted its First Report to the ILA Hague Conference in August 2010. The First Report focused on clarifying the scope and methodology of the Committee’s work. The First Report adopted a ‘laundry list’ approach in that it listed and discussed all the possible principles, concepts and notions relating to climate change, and questions that arise therefrom, that could usefully be considered by the Committee. At the ILA Hague Conference, the Committee met in open and closed meetings, and used the insights generated, to narrow the scope of the Committee’s work. The Committee engaged intensively in 2011-2012 including at a meeting generously hosted by the Dutch and Japanese Branches of the ILA at Deventer in January 2012. The Committee submitted its Second Report to the ILA Sofia Conference in August 2012. The Second Report sought to flesh out selected legal principles relating to the existing climate change regime. The Committee engaged on a continual basis in 2013-14, including through a meeting generously hosted by the French and Japanese Branches of the ILA at Aix-en-Provence in June 2013. This Third (and final) Report of the Committee takes the form of Draft Articles titled ‘Legal Principles Relating to Climate Change’ and attached commentaries.¹ The Third Report of the Committee will be submitted

¹ The Draft Articles and Commentaries were drafted by the following members of the Committee: Lavanya Rajamani, Jacqueline Peel, Harald Hohmann, Christoph Schwarte, Akiho Shibata, Jutta Brunnée, Anita Halvorssen, Shinya Murase, Sandrine Maljean-Dubois, Hari Osofsky, Yukari Takamura and Maria Gavounelli. The following members of the Committee commented extensively on various iterations of the text: Marcel M T A Brus, Duncan French, Anita Rønne, Hennie Strydom, and Daniel Bodansky. The Chair and Rapporteur are particularly grateful to Jacqueline Peel for her exceptional contribution to the work of the Committee, and for acting as Rapporteur at the ILA Sofia Meeting in

to the ILA Washington Conference in April 2014 for its consideration and adoption. The work of the Committee, given the fluid nature of the international climate change negotiations, has the potential to shape and influence the evolution of the climate change regime. It may also provide guidance on the design and implementation of the agreement that is slated to emerge from the UN Durban Platform negotiations due to conclude in 2015 and take effect from 2020.

ILA Legal Principles Relating to Climate Change

DRAFT ARTICLES

Draft Article 1. Scope

- 1. The present draft Articles apply to the conduct of States in managing and regulating human activities that directly or indirectly affect climate change and have or are likely to have significant adverse effects on human life and health and the Earth's natural environment.**
- 2. The draft Articles refer to the foundational legal principles relating to climate change as well as to their inter-relationship.**

Commentary

(1) This draft Article clarifies the scope of this particular set of draft Articles, which is primarily based on the work of the Committee as reflected in its first and second reports (2010 and 2012). The draft Articles cover human activities causing climate change as well as the conduct of States relating to mitigation of and adaptation to climate change. As stated in *paragraph 2*, the draft Articles are limited to stating the most fundamental legal principles that should guide States in their attempts to develop and operate an effective legal regime on climate change.

(2) In clarifying the scope of the draft Articles, it is necessary to address the main elements to be encompassed. Generally, the provisions of environmental conventions address either the effects of pollution (e.g. 'significant adverse effects') or its causes (e.g. 'human activities', 'deleterious substances', etc.). Causes and effects are difficult to separate strictly as climate change is the result of a complex interaction between human activities and natural phenomena. Moreover, addressing climate change requires mitigation as well as adaptation measures. The draft Articles aim at formulating international legal principles covering all these aspects.

(3) Draft Article 1 indicates that the draft Articles address only damage caused by human activities. Accordingly, their scope would not extend to damage caused by natural phenomena such as meteoritic bombardment and volcanic eruption. The term 'human activities' includes not only those activities conducted by States but also those conducted by natural and juridical persons.

(4) The main cause of climate change is considered to be the anthropogenic alteration of the composition of the atmosphere by the emission of greenhouse gases (in contrast to air pollution that is defined as the introduction of deleterious substances into the atmosphere²). The United Nations Framework Convention on Climate Change (FCCC) defines ‘climate change’ as ‘a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere...’.³ However, it may be noted that, in recent years, some of the deleterious substances causing air pollution, such as black carbon and tropospheric ozone, are considered to have global warming effects as well. Accordingly the Gothenburg Protocol to the 1979 ECE Convention on Long-Range Transboundary Air Pollution (LRTAP) in 2012 was amended to include these substances for regulation.⁴

(5) Article 1, paragraph 1, of the FCCC defines ‘[a]dverse effects of climate change’ as ‘changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare’. It should be stressed that only adverse effects that are ‘significant’ warrant international regulation.

(6) The draft Articles address the issue of ‘inter-relationship’ between climate change and other areas of law such as international trade law, international human rights law and the law of the sea. However, linkages between climate change and other environmental damage such as transboundary air pollution, stratospheric ozone depletion, biodiversity/forests and water – albeit extremely important in the overall discussion on climate change – are not explicitly addressed. Instead these topics are referred to only in so far as they are relevant to other parts of the draft Articles.

Draft Article 2. Objectives

² The ECE Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 UNTS 217, art. 1, subparagraph (a) defines ‘Air Pollution’ as ‘the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects....’.

³ United Nations Framework Convention on Climate Change, May 29, 1992, 1771 UNTS 107, *reprinted in* (1992) 31 ILM 849 [hereinafter FCCC], art. 1, para. 2. See generally, D Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, (1993) 18(2) Yale J. of Int’l L. 451.

⁴ At their 30th meeting in May 2012, the Parties to the LRTAP Convention made a historic decision with regard to the policy on black carbon (BC), tropospheric ozone and methane (as a precursor of tropospheric ozone). In response to scientific research, in particular, that contained in the 2010 report on the 2010 Hemispheric Transport of Air Pollution, the Parties agreed to: (1) include BC – as a component of particulate matter – in the ongoing revision of the Gothenburg Protocol, and (2) include BC, ozone and methane in the medium and long-term work-plans of the Conventions as important air pollutants and short lived climate forcers (SLCFs).

The purpose of the present draft Articles is to set out legal principles applicable to States in addressing climate change and its adverse effects, bearing in mind that change in the Earth's climate and its adverse effects are a common concern of humankind.

Commentary

(1) The term 'legal principles', for the purposes of these draft Articles, encompasses both emerging and legally binding principles. Such principles can emerge from the practices and policies of international actors, evolve into customary international law, find expression in non-legally binding international instruments, or be enshrined in treaties. They provide considerations that decision-makers must take into account; they 'set limits, or provide guidance, or determine how conflicts between other rules and principles will be resolved'.⁵ The draft Articles are intended to reflect the current understanding of the legal principles applicable to States in addressing climate change and its adverse effects.

(2) The phrase 'climate change and its adverse effects' draws on terminology that is familiar from the FCCC. The FCCC defines 'adverse effects of climate change' as laid out above.⁶

(3) Addressing climate change and its adverse effects is generally understood to encompass both mitigation and adaptation actions. The legal principles relating to climate change, therefore, pertain to measures designed to anticipate, prevent and minimise the causes of climate change (mitigation actions), as well as to anticipating its adverse effects and taking appropriate measures to prevent or minimise the damage they may cause (adaptation actions).⁷ The draft Articles elaborate on the mitigation and adaptation dimensions to the legal principles relating to climate change in particular through the principles concerning sustainable development, equity, special circumstances and vulnerability, and prevention and precaution (draft Articles 3, 4, 6 and 7).

(4) The FCCC acknowledges, in the opening recital of its preamble, that 'change in the Earth's climate and its adverse effects are a common concern of humankind'.

⁵ A E Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, (1999) 48(4) Int'l & Comp. L. Qtr'l'y 901, 907.

⁶ FCCC, art. 1, para. 1.

⁷ The IPCC defines 'mitigation' as an 'anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases', and 'adaptation' as '[a]djustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities'. See J T Houghton et al (eds), *Climate Change 2001: The Scientific Basis. A Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change*, (2001, Cambridge University Press, Cambridge).

The idea that climate change is a common concern is universally accepted,⁸ as is the proposition that all states have a common responsibility to take appropriate measures to address the concern. The latter proposition finds confirmation in the FCCC and in the practice of States under the auspices of that regime, as does the notion that States' attendant individual and collective responsibilities are differentiated, including on the basis of groups of Parties, such as developed and developing countries.⁹ The draft Articles address this common responsibility dimension to the legal principles relating to climate change, in particular through the principles concerning sustainable development, equity, common but differentiated responsibilities, and international cooperation (draft Articles 3-5 and 8).

Draft Article 3. Sustainable Development

- 1. States shall protect the climate system as a common natural resource for the benefit of present and future generations, within the broader context of the international community's commitment to sustainable development.**
- 2. In the sustainable and equitable use of natural resources, including the climate system as a common natural resource, States shall anticipate, prevent and minimise the causes of climate change, and mitigate its adverse effects for the benefit of present and future generations in accordance with FCCC Article 3.4.**
- 3. In the context of addressing climate change and its adverse effects, sustainable development requires States to balance economic and social development and the protection of the climate system and supports the realisation of the right of all human beings to an adequate living standard and the equitable distribution of the benefits thereof. To that extent, policies and measures taken in response to climate change must integrate environmental, economic and social matters.**
- 4. Social and economic development plans, programs and projects must be integrated with climate change responses in order to avoid adverse impacts on the latter, taking into account the priority needs of developing countries for the achievement of sustainable economic growth and poverty eradication.**

⁸ See also, UN General Assembly, 'Protection of global climate for present and future generations of mankind', UN Doc A/RES/43/53 (Dec. 6, 1988), available at, <<http://www.un.org/documents/ga/res/43/a43r053.htm>>.

⁹ See e.g. FCCC, preambular recital 6 and art. 3, para. 1. See detailed discussion in J Brunnée, 'Common Areas, Common Heritage and Common Concern', in D Bodansky, J Brunnée and E Hey (eds), *Oxford Handbook of International Environmental Law*, (2007, Oxford University Press, Oxford), 550, 564-7; and P Birnie, A Boyle and C Redgwell, *International Law and the Environment*, (2009, 3rd edn, Oxford University Press, Oxford), 129-130, 337-9.

5. Where social and economic development plans, programs or projects may result in significant emissions of greenhouse gases or cause serious damage to the environment through climate change, States have a duty to prevent such harm or, at a minimum, to employ due diligence efforts to mitigate climate change impacts.

Commentary

(1) The principle of sustainable development was the subject of in-depth inquiries by two consecutive International Law Association (ILA) committees on international law and sustainable development, culminating respectively in the 2002 New Delhi Declaration of Principles on International Law relating to Sustainable Development¹⁰ and the 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development.¹¹ It is not the intent of draft Article 3 to duplicate that work. Instead, this draft Article is restricted to issues relating to the concept of sustainable development that are closely relevant to the climate change regime. In particular it focuses on the climate change-specific ramifications of New Delhi Declaration Principle 1, the duty of States to ensure sustainable use of natural resources, and Principle 7, the principle of integration and inter-relationship.

(2) Article 3, paragraph 4 of the FCCC lays out the general right and duty of States to promote sustainable development. It proceeds to focus on policies and measures taken ‘to protect the climate system against human-induced change’. Article 4, paragraph 1 states the commitments of all Parties to ‘promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs ..., including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems’.¹² Paragraph 1 of draft Article 3 of these principles restates this duty to promote sustainable development in terms of a requirement on States to protect the climate system as a common natural resource.

(3) Recognition of the climate system as a common natural resource is an emerging concept of international (environmental) law. It builds on the preambular designation in the FCCC of ‘change in the Earth’s climate and its adverse effects’ as ‘a

¹⁰ Adopted by the ILA at its seventieth conference (New Delhi, 2002). Submitted as Annex to Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d’affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations, UN Doc A/57/329 (Aug. 31, 2002) [hereinafter New Delhi Declaration].

¹¹ Adopted by the ILA at its seventy-fifth conference (Sofia, 2012). See Committee on International Law on Sustainable Development, Conference Resolution No. 7/2012.

¹² FCCC, art. 4, para. 1(d).

common concern of humankind'.¹³ Supporting State practice exists at the national¹⁴ and regional levels. For instance, the EU's Sixth Environment Action Programme¹⁵ had sustainable use and management of resources as one of the priority areas for action and called for the preparation of 'a thematic strategy on the sustainable use and management of resources...'.¹⁶ The Resource Strategy defined natural resources as encompassing all raw materials including minerals, biomass and biological resources; air, water and soil; resources such as wind, geothermal, tidal and solar energy; and space (land). It also emphasised the need to take into account life cycle and global perspectives when tackling unsustainable use of natural resources. Sustainable use of natural resources and resource efficiency has been recognised as critical for further economic development in the EU and became the core of one of the seven flagship initiatives within the 'Europe 2020 Strategy'.¹⁷

(4) Conceptualising the global climate as a common natural resource may be seen to run counter to established principles on the treatment of natural resources in contemporary international law, starting with the principle of permanent sovereignty of natural resources,¹⁸ enshrined in UN General Assembly Resolution 1803 (XVII)¹⁹ and common Article 1 of the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and

¹³ FCCC, preambular recital 1. See also, UN Doc A/RES/43/53 (see footnote 8 above). See also, P Birnie et al (see footnote 9 above), at 338-339; J Brunnée, 'Common Areas, Common Heritage, and Common Concern', in D Bodansky et al (see footnote 9 above), 564-565; and S Murase, 'Protection of the Atmosphere and International Lawmaking', in Miha Pogačnik (ed), *Challenges of Contemporary International Law and International Relations: Liber Amicorum in Honour of Ernest Petrič*, (2011, Evropska Pravna Fakulteta Nova Gorica, Slovenia).

¹⁴ Like the EU, some States have adopted constitutional provisions or acts that require sustainable use of the natural environment and natural resources. The principle of sustainable use is reflected in the Constitution of the Republic of South Africa Act 1996, as amended, ss. 24-25 and in the Norwegian Constitution 1814, as amended, art. 110b. See also the Constitution of Greece 1975, as amended, art. 24. The Mexican Constitution 2005 highlights in art. 25 'national development which will be integral and sustainable' and according to article 27 must 'prevent ... the destruction of natural resources'.

¹⁵ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002, OJ 2002 L 242/1 (Sept. 10, 2002).

¹⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Thematic Strategy on the sustainable use of natural resources, COM (2005) 670 final (Dec. 21, 2005).

¹⁷ Communication from the Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final (Mar. 3, 2010).

¹⁸ B S Chimni, *The principle of permanent sovereignty over natural resources: toward a radical interpretation*, (1998) 38 Indian J. Int'l L. 208. See also, N Schrijver, 'Unravelling State sovereignty: The controversy on the right of indigenous peoples to permanent sovereignty over natural wealth and resources', in I Boerefijn and J Goldschmidt (eds), *Changing perceptions of sovereignty and human rights: Essays in honour of Cees Flinterman*, (2008, Intersentia, Antwerp), 85-98.

¹⁹ UN General Assembly, 'Permanent Sovereignty over natural resources', UNGA Res. 1803 (XVII) (Dec. 14, 1962).

Cultural Rights.²⁰ The preamble of the FCCC affirms the principle of permanent sovereignty as it recalls that States have the sovereign right to exploit their own resources.²¹ However, the development of international environmental law and prominence of sustainable development has had a profound impact on the interpretation of permanent sovereignty. This is recognised in the relevant preambular provision of the FCCC which affirms that permanent sovereignty must be exercised pursuant to environmental and development policies and should not cause damage to other States.²² Furthermore, the interdependence of States has resulted in the increasing emergence of international legal regimes for the cooperative management of natural resources pursuant to sustainable development.²³ Thus, the need for concerted global action, based on notions such as the common concern of humankind²⁴ has become an important aspect of the management of resources.²⁵ This phenomenon has also resulted in changes to the notion of permanent sovereignty.²⁶ The language 'common concern of humankind' in the FCCC preamble implies that permanent sovereignty should be exercised for the benefit of humankind, which consists of present and future generations.²⁷

(5) While climate change is a matter of common concern, *paragraph 1* acknowledges that it needs to be tackled within the broader context of the international community's commitment to sustainable development. It requires action across a wide array of fields, including regulation and technology having environmental, developmental and social implications. Moreover, sustainable development is a dynamic and evolving principle that is both shaping and being shaped by the climate change regime.

(6) As a common natural resource, the climate system is subject to the principle of sustainable and equitable use as outlined in *paragraph 2* of draft Article 3. This principle is reflected in the objective of FCCC Article 2 'to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to

²⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, *reprinted in* (1967) 6 ILM 368; and International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3, *reprinted in* (1967) 6 ILM 360 [hereinafter ICESCR].

²¹ FCCC, preambular recital 8.

²² *Ibid.*

²³ O Schachter, *Sharing the World's Resources*, (1977, Columbia University Press, New York).

²⁴ J Brunnée (see footnote 13 above).

²⁵ F X Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, (2000, Kluwer Law International, The Hague). See generally, N Schrijver *Sovereignty over Natural Resources: Balancing Rights and Duties*, (1997, reprinted in 2008, Cambridge University Press, Cambridge).

²⁶ W Scholtz, *Custodial Sovereignty Reconciling Sovereignty and Global Environmental Challenges Amongst the Vestiges of Colonialism*, (2008) 55(3) *Neth. Int'l L. Rev.* 333.

²⁷ See in this regard, A A C Trindade, *International Law for Humankind*, (2010, Martinus Nijhoff, Leiden), 327-352.

enable economic development to proceed in a sustainable manner'. 'Sustainable use' is a principle that is employed quite extensively in treaty law either directly or via the reference to concepts of conservation, sustainable management, optimal, efficient and rational use and sometimes via the broader notion of 'protection' as included in the FCCC.²⁸ It entails use 'in a way and at a rate that does not lead to long-term decline' of the resource.²⁹ In order to ensure sustainable and equitable use of the common natural resource of the climate system, *paragraph 2* enjoins State action to anticipate, prevent and minimise the causes of climate change, and mitigate its adverse effects for the benefit of present and future generations.

(7) *Paragraphs 3, 4 and 5* elaborate the requirements of sustainable development in the context of addressing climate change and its adverse effects. *Paragraph 3* emphasises that sustainable development requires States to balance economic and social development and the protection of the climate system, which in turn requires that policies and measures taken in response to climate change must integrate environmental, economic and social matters. This balancing takes place in a broader context, acknowledged in indirect terms in Principle 1 of the Rio Declaration,³⁰ in terms of the link between individual human rights and sustainability. This social dimension of sustainable development was already implied in the Rio Declaration but has become more prominent and specific in subsequent

²⁸ The Convention on International Watercourses merely refers to 'optimal and sustainable utilization.' See Convention on the Law of the Non-navigational Uses of International Watercourses, UN Doc A/51/869, May 21, 1997, (1997) 36 ILM 700, art. 5. The Convention on Co-operation for the Protection and Sustainable Use of the River Danube includes the term in the title and in the text but at the same time refers to 'conservation', 'rational use' and 'sustainable management'. See Convention on Co-operation for the Protection and Sustainable Use of the River Danube, OJ 1994 L 342/19 (Dec. 12, 1997), arts 2, 5 and 6, but also conservation, rational use sustainable management in the preamble, arts 2 and 6. Likewise the UN Fish Stocks Agreement employs 'sustainable use', 'conservation', and 'long-term sustainability'. See 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, Sept. 8, 1995, A/CONF.164/37, arts 2 and 5(b). The International Tropical Timber Agreement refers to 'sustainable utilization' but also to 'management' and 'conservation.' See International Tropical Timber Agreement, Jan. 10, 1994, (1994) 88 ILM 1014, art. 1, subparagraphs (e) and (l). The Convention to Combat Desertification and Drought refers to 'sustainable use', 'sustainable management', 'conservation' and 'efficient use'. See United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, (1994) 33 ILM 1328, arts 2, 3, 10(4), 11, 17 and 19.

²⁹ See Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79, 143, *reprinted in* (1992) 31 ILM 818 [hereinafter CBD], art. 2.

³⁰ Rio Declaration on Environment and Development, June 13, 1992, A/CONF.151/5/Rev.1, *reprinted in* (1992) 31 ILM 874 [hereinafter Rio Declaration], principle 7.

decades through the outcomes of the World Summit on Sustainable Development³¹ and Rio+20 UN Conference on Sustainable Development.³²

(8) The importance of integration as an element of the legal notion and operationalisation of sustainable development was recognised by the International Court of Justice (ICJ) in the *Gabcikovo-Nagymaros* case, which stated that the ‘need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development’.³³ Echoing the ICJ’s findings, the World Trade Organisation (WTO) Appellate Body in the *Shrimp-Turtle* case noted that the concept of sustainable development recognised in the preamble to the WTO Agreement, ‘has been generally accepted as integrating economic and social development and environmental protection’.³⁴ The Arbitral Tribunal in the *Iron Rhine* case confirmed that the integration of appropriate environmental measures in the design and implementation of economic development activities is a requirement of international law.³⁵

(9) In the international climate change regime, the importance of integration as an element of the principle of sustainable development is expressed in the preamble to the FCCC. This affirms ‘that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty’.³⁶ Paragraph 4 of draft Article 3 amplifies this requirement. Consequently it provides that social and economic development plans, programs and projects must be integrated with climate change responses in order to avoid adverse impacts that would thwart the effectiveness of such responses. Nonetheless, special account is to be taken in this process of the priority needs of developing countries for the achievement of sustainable economic growth and poverty eradication. These qualifications seek to preserve a degree of autonomy for

³¹ World Summit on Sustainable Development, Plan of Implementation, (Sept. 4, 2002), available at, <http://www.un.org/jsummit/html/documents/summit_docs/2309_planfinal.htm>.

³² Rio+20 United National Conference on Sustainable Development, Outcome of the Conference, ‘The Future We Want’, June 19, 2012, A/CONF.216/L.1.

³³ Case concerning *Gabčíkovo – Nagymaros Project*, (Hungary v Slovakia), 1997 ICJ Reports 15 [hereinafter *Gabčíkovo – Nagymaros*], para. 140.

³⁴ United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998), para. 129.

³⁵ *Iron Rhine (IJzeren Rijn) Arbitration (Belgium–Netherlands) Award of 2005*, in Permanent Court of Arbitration Award Series (2007) [hereinafter *Iron Rhine Arbitration*], paras 59 and 243. See also, *Case concerning Pulp Mills on the River Uruguay*, (Argentina v Uruguay), 2010 ICJ Reports 14 [hereinafter *Pulp Mills case*], para 197.

³⁶ FCCC, preambular recital 21.

developing countries in relation to their economic development.³⁷ Consequently, the principle of sustainable development in the climate change context would not appear to call for a halt to development processes with environmental impacts, such as energy generation, but rather that these are undertaken in ways that minimise greenhouse gas emissions (for instance, the progressive substitution of coal-fired power with renewable energy generation).

(10) While the requirements of balancing and integration point to the need for 'responses to climate change' to be coordinated with social and development goals by, for example, minimising their economic costs,³⁸ the implementation of social and economic development plans should not come at the cost of dangerous anthropogenic climate change contrary to the objective of the FCCC. *Paragraph 5* expresses this limitation. It provides that in circumstances where social and economic development plans, programs or projects may result in significant emissions of greenhouse gases or cause serious damage to the environment through climate change, States have a duty to prevent such harm or, at a minimum, to employ due diligence efforts to mitigate climate change impacts.³⁹ In this way, the practice of integrated decision-making in the context of sustainable development is tied to the obligation to prevent damage through climate change.

Draft Article 4. Equity

- 1. States shall protect the climate system on the basis of equity, of which the principle of common but differentiated responsibilities and respective capabilities, laid out in draft Article 5, is a major expression.**
- 2. States shall protect the climate system in a manner that equitably balances the needs of present and future generations of humankind, keeping in mind that:**
 - (a) Present generations in developing States have a legitimate expectation of equitable access to sustainable development. This recognises that to the extent**

³⁷ The Cancun Agreements added further gloss to the obligation developing countries have to develop sustainably. Developing countries, in particular BASIC, argued for and obtained recognition for 'equitable access to sustainable development': Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', in FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter Cancun Agreements (LCA)], para. 6.

³⁸ This is a prominent rationale for the emissions reduction mechanisms employed in the 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 ILM 22 [hereinafter Kyoto Protocol], namely, joint implementation, the Clean Development Mechanism and emissions trading (arts 6, 12 and 17).

³⁹ As an increasingly important aspect on a range of issues in international law, framing both the conduct of States and consequently their responsibility, the ILA has recently established a Study Group on Due Diligence in International Law.

that per capita emissions in developing countries are still low, these will grow, within reason and in a sustainable manner, to meet their social and development needs.

(b) Future generations in all States have a legitimate expectation of equitable access to the Earth's resources. This requires that current generations hold the increase in global average temperature to the multilaterally agreed global goal.

3. States shall protect the climate system as a matter of urgency, keeping in mind that to the extent that they delay taking adequately ambitious mitigation action to meet the multilaterally agreed global goal, the locus of action will shift, of necessity, to adaptation and the burden of responsibility to the most vulnerable and least responsible States.

Commentary

(1) Draft Article 4 deals with the legal principle of equity in its application to climate change. *Paragraph 1* of draft Article 4 introduces the principle of equity and explains its relationship to the principle of common but differentiated responsibilities and respective capabilities (CBDRRC). FCCC Article 3, paragraph 1 identifies equity as a basis, in addition to CBDRRC, for sharing the burden of protecting the climate system. FCCC Article 3, paragraph 1 does not define the notion of equity, either generally or in its application to climate change. The language ('accordingly') however suggests that an application of the notion of equity would require developed countries to take the lead in combating climate change and the adverse effects thereof. Parties to the FCCC frequently invoke the notion of equity in their submissions and it features in several Conference of Parties (COP) decisions, as for instance in the Berlin Mandate that launched the process that led to the Kyoto Protocol.⁴⁰ 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.⁴¹ In the FCCC process, although equity is frequently invoked as an appropriate basis for burden sharing, its constituent elements and the mechanics of its application are rarely articulated.

(2) The principles of equity and CBDRRC (see draft Article 5 below) have differing emphases, but they are inextricably linked. Equity is a broader concept in that it

⁴⁰ See, 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', in FCCC/CP/1995/7/Add.1 (June 6, 1995) [hereinafter The Berlin Mandate].

⁴¹ Decision 2/CP.15, 'Copenhagen Accord', in FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) [hereinafter Copenhagen Accord], para. 1.

arguably encompasses a range of visions of justice, whereas the notion of common but differentiated responsibilities and respective capabilities relates principally to burden sharing between the Parties to the FCCC.⁴² In this sense, as *paragraph 1* of draft Article 4 states, common but differentiated responsibilities and respective capabilities is a major expression of equity in the climate change regime. In any case, FCCC Article 3, paragraph 1 makes it clear that both are required to address the intra-generational and inter-generational effects of climate change.

(3) *Paragraph 2* of draft Article 4 states that States shall protect the climate system in a manner that equitably balances the needs of present and future generations of humankind. Equity, linked inextricably to the CBDRRC principle, offers a substantive basis for burden sharing in the climate change regime. Intra-generational and inter-generational concerns are explicitly articulated in FCCC Article 3, paragraph 1 ('Parties should protect the climate system for the benefit of present and future generations of humankind'). These are related to 'equity' in so far as they are referred to in the same sentence as equity in FCCC Article 3, paragraph 1, and they flow from the notion of sustainable development in FCCC Article 3, paragraph 4. Both intra-generational and inter-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'.⁴³ This widely accepted principle by its terms refers to inter-generational equity, a concern for social equity between generations. The Brundtland Commission emphasised that inter-generational equity is logically extendable to equity within each generation, viz. to intra-generational equity.⁴⁴ Intra-generational equity and inter-generational equity complement, yet also limit each other. They complement each other since intra-generational equity is a prelude to inter-generational equity. Nonetheless, there is a tension between them, in that limits are placed, in the interests of leaving sufficient resources for the future, on how present generations utilise resources. Although it is clear that intra- and inter-generational equity, as encompassed within the sustainable development principle and referenced in FCCC Article 3, paragraph 1, are legitimate aims of the climate change regime, it is less clear what means are necessary for their achievement.

(4) *Paragraph 2 subparagraph (a)* of draft Article 4 lays out the notion of intra-generational equity as it has developed in the climate change regime. The Cancun Agreements urge Parties to work towards identifying a timeframe for global peaking

⁴² This is substantiated by FCCC, preambular recital 6. In the context of an effective and appropriate international response to climate change this recital refers to CBDRRC but not to equity.

⁴³ World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development* (1987), available at, <<http://www.un-documents.net/our-common-future.pdf>>, chap. 2, para. 1.

⁴⁴ *Ibid.* at chap. 2, para. 3.

of GHGs based on, *inter alia*, 'equitable access to sustainable development'.⁴⁵ The term 'equitable access to sustainable development,' is an unwieldy compromise between the more controversial 'equitable access to atmospheric space' that may be interpreted as a right to emit and 'sustainable development' that signals restraint. Experts from BASIC (Brazil, South Africa, India and China) countries have sought to further develop this notion.⁴⁶ In its current articulation, this notion, if operationalised, would provide developing countries the access they need to meet their social and developmental needs. The Africa Group,⁴⁷ and South Africa⁴⁸ in particular, are advocating in the negotiations for a 2015 agreement, an equity or principle-based reference framework to operationalise the notion of 'equitable access to sustainable development'. The principle-based reference framework is designed to assess the adequacy and fairness of the mitigation targets and actions that States select and commit to.⁴⁹ Further development of the notion of 'equitable access to sustainable development' will have to take account of its roots in the provisions of the FCCC recognising that 'per capita emissions in developing countries are still relatively low', 'the share of global emissions originating in developing countries will grow to meet their social and development needs'⁵⁰ and that 'economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties'.⁵¹ This would suggest that present generations have a legitimate expectation of 'equitable access to sustainable development'.

(5) *Paragraph 2 subparagraph (b)* of draft Article 4 lays out the notion of inter-generational equity as it has developed in the climate change regime. FCCC Article 3 identifies future generations, along with present generations, as the beneficiaries of

⁴⁵ Cancun Agreements (LCA) (see footnote 37 above), para. 6.

⁴⁶ Experts from BASIC countries, *Equitable access to sustainable Development, Contribution to the Body of Scientific Knowledge - A Paper by Experts from BASIC Countries* (2011), available at, <http://www.erc.uct.ac.za/Basic_Experts_Paper.pdf>.

⁴⁷ Submission by Swaziland on behalf of the Africa Group In respect of Workstream I: 2015 Agreement under the ADP (Apr. 30, 2013), available at, <http://unfccc.int/files/bodies/awg/application/pdf/adp_2_african_group_29042013.pdf>.

⁴⁸ Submission by South Africa (Sept. 30, 2013), available at, <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1_mitigation_20130930.pdf>.

⁴⁹ See X Ngwadla, *Equitable Access to Sustainable Development: Relevance to Negotiations and Actions on Climate Change* (Mar. 1, 2013, Mitigation Action Plans & Scenarios (MAPS) Research Paper Issue 10, Cape Town), available at, http://www.mapsprogramme.org/wp-content/uploads/EASD-Relevance-to-negotiations_Paper.pdf, for an early development of the idea of an Equity Reference Framework (ERF). See further X Ngwadla and L Rajamani, *Operationalising an Equity Reference Framework in the Climate Change Regime: Legal and Technical Perspectives* (forthcoming March 2014, MAPS Research Paper, Cape Town).

⁵⁰ FCCC, preambular recital 3.

⁵¹ FCCC, art. 4, para. 7. See also, FCCC, preambular recitals 3, 21 and 22.

climate protection.⁵² The notion of inter-generational equity has long provenance in international environmental law.⁵³ The explicit reference to future generations in FCCC Article 3 bolsters the notion that future generations have a legitimate expectation of equitable access to planetary resources. To the extent that present generations irretrievably change the planet, thereby limiting and altering planetary resources, as well as constraining options for future generations, it will thwart their legitimate expectations. The extent of change that is acceptable, however, is a political decision. This suggests that present generations must hold the increase in global average temperature to the multilaterally agreed global goal. FCCC Article 2 identifies the ultimate objective of the Convention as ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous anthropogenic interference with the climate system’. It does not, however, specify what this level should be. In the Cancun Agreements, 2011, Parties agreed to a long-term global goal – ‘to hold the increase in global average temperature below 2°C above pre-industrial levels’.⁵⁴ Parties also agreed to consider strengthening this long-term global goal, ‘including in relation to a global average temperature rise of 1.5 °C’.⁵⁵ This process is underway. The multilaterally agreed global goal, when it emerges from the negotiations must be adhered to.

(6) *Paragraph 3* of draft Article 4 stresses the importance of urgency in taking mitigation action, in particular in light of the relationship between mitigation and adaptation. It is evident that the more successful States are in mitigating climate change, the less need there will be for adaptation. The burden of mitigation falls on the international community - with equity and CDRRC functioning as the metric to determine burden shares between nations. Although the international community plays a role in financing adaptation, and creating frameworks for facilitation and coordination of adaptation actions, the burden of implementing adaptation rests primarily on individual States. For some States, as for instance the small island States and those in the African dry regions, this burden is entirely disproportionate to their contribution to the problem and their ability to address it. The continuing impasse in the negotiations, and in fleshing out the burden sharing formula for mitigation, will have the consequence of shifting the emphasis onto adaptation and the burden of responsibility to more vulnerable nation States.

Draft Article 5. Common but Differentiated Responsibilities and Respective Capabilities

⁵² FCCC, art. 3, para. 1.

⁵³ E Brown Weiss, *In Fairness to Future Generations*, (1989, Transnational/ United Nations University).

⁵⁴ Cancun Agreements (LCA) (see footnote 37 above), para. 4

⁵⁵ *Ibid.*

1. States shall protect the climate system in accordance with their common but differentiated responsibilities and respective capabilities.
2. All States have a common responsibility to cooperate in developing an equitable and effective climate change regime applicable to all, and to work towards the multilaterally agreed global goal. In exercise of this common responsibility all States shall, subject to their national circumstances:
 - (a) Take policies and measures to address climate change and its adverse effects, and report periodically on these;
 - (b) Promote sustainable development, as laid out in draft Article 3;
 - (c) Cooperate as laid out in draft Article 8, in particular in:
 - i. development, application and diffusion of relevant mitigation and adaptation technologies;
 - ii. exchange of scientific and technological information relating to the climate system, and to information relating to their response measures to address climate change; and,
 - iii. preparation for adaptation to the impacts of climate change.
3. Since States have differing historical, current and future contributions to climate change, differing technological, financial and infrastructural capabilities, as well as diverse economic fortunes and other national circumstances, States have differentiated responsibilities to address climate change and its adverse effects. In determining if a State's commitments have been adequately tailored to its differentiated responsibilities, the following shall be taken into account:
 - (a) Developed States, in particular the most advanced amongst them, shall take the lead in addressing climate change by adopting more stringent mitigation commitments and in assisting developing States, in particular the least developed among them, small island developing States, and other vulnerable States, to the extent of their need, in addressing climate change and adapting to its adverse effects.
 - (b) Developing States, in particular the least developed among them, small island developing States, and other vulnerable States shall be subject to less stringent mitigation commitments, and benefit from, *inter alia*, delayed compliance schedules and financial, technological and other assistance.
4. States' commitments, given their differentiated responsibilities, shall fall along a spectrum of commitments, and these commitments shall evolve over time

as their contributions, capabilities, economic fortunes and national circumstances evolve.

Commentary

(1) Draft Article 5 fleshes out the principle of common but differentiated responsibilities and respective capabilities found in FCCC Article 3. Draft Article 5, *paragraph 1*, identifies the obligation States have to protect the climate system in accordance with their common but differentiated responsibilities and respective capabilities. This obligation can be sourced most directly to FCCC Article 3. The CBDRRRC principle has considerable legal gravitas. The CBDRRRC principle is referred to in the Rio Declaration,⁵⁶ the FCCC,⁵⁷ numerous FCCC COP decisions,⁵⁸ the Johannesburg Plan of Implementation 2002,⁵⁹ and the outcome of the Rio+20 UN Conference on Sustainable Development.⁶⁰ In addition differential treatment, which is the application of CBDRRRC, is evident in its varying forms in most international environmental agreements entered into in the last few decades.⁶¹ Differential treatment with respect to implementation and assistance are integral to the Vienna Convention,⁶² Montreal Protocol,⁶³ CBD, FCCC and Convention to Combat Desertification; five environmental treaties with near-universal participation. It could

⁵⁶ Rio Declaration (see footnote 30 above), principle 7.

⁵⁷ FCCC, art. 3.

⁵⁸ See, e.g. The Berlin Mandate (see footnote 40 above) and Decision 1/CP.13, 'Bali Action Plan', in FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter Bali Action Plan].

⁵⁹ See World Summit on Sustainable Development (see footnote 31 above). There are six references to CBDR in the Plan including in the Introduction (para. 2) and in the context of changing unsustainable patterns of consumption and production (para. 13), climate change (para. 36), air pollution (para. 37) and means of implementation (para. 75).

⁶⁰ Rio+20 United National Conference on Sustainable Development (see footnote 32 above), paras 2 and 191.

⁶¹ Earlier instruments such the Convention on International Trade in Endangered Species, 1969, and the Convention for Protection of the World Natural and Cultural Heritage, 1972, for instance, do not contain differential treatment. It is worth noting that differential treatment, albeit pervasive today, may appear to be a departure from the doctrine of sovereign equality of states, a constituent element of the international legal order. However it could be argued that it is the exercise of equal sovereignties in a world of unequal states that results in unequal rights and duties. See L Rajamani, *Differential Treatment in International Environmental Law*, (2006, Oxford University Press, Oxford), 2. See also, J Brunnée, 'Climate change, global environmental justice and international environmental law', in J Ebbesson and P Okowa (ed), *Environmental Law and Justice in Context* (2009, Cambridge University Press, Cambridge), 316, 327; E Melkas, *Sovereignty and Equity within the Framework of the Climate Change Regime*, (2002) 11(2) Rev. Eur. Com. Int'l Env't'l L. 115, 123; and H. Xue, *Transboundary Damage in International Law*, (2003, Cambridge University Press, Cambridge), 324.

⁶² Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 UNTS 323, *reprinted in* (1987) 26 ILM 1529.

⁶³ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 UNTS 3, *reprinted in* (1987) 26 ILM 1550.

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.⁶⁴ In the climate change regime CBDRRC is an overarching principle guiding the development of the regime.⁶⁵ It is found in two operational provisions, in addition to preambular, paragraphs of the FCCC and reiterated in the preamble of the Kyoto Protocol.⁶⁶ It is also routinely referred to in FCCC COP decisions and Ministerial Declarations. Even though this principle does not contain a defined legal obligation, it forms the basis for the interpretation of existing obligations and the elaboration of future obligations within the regime in question.⁶⁷ Indeed, 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.⁶⁸

(2) *Paragraph 2* of draft Article 5 elaborates on the common responsibility that States share by virtue of the CBDRRC principle. There is general agreement that the protection of the climate system is a common responsibility of all Parties to the FCCC, developed and developing.⁶⁹ This common responsibility could be said to flow from the common concern occasioned by climate change and its adverse effects.⁷⁰ 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.⁷¹ Accordingly, draft Article 5, *paragraph 2* contains commitments common to all Parties.

(3) States have an obligation to cooperate in developing an equitable and effective climate change regime that is applicable to all. The agreement must be

⁶⁴ L Rajamani (see footnote 61 above), 118-125.

⁶⁵ *Ibid.* See also, J Brunnée and S J Toope, *Legitimacy and Legality in International Law: An Interactional Account*, (2010, Cambridge University Press, Cambridge), 162 and 166, and J Brunnée and C Streck, *The UNFCCC as a negotiation forum: towards common but more differentiated responsibilities*, (2013) 13(5) *Climate Pol’y* 589, 590

⁶⁶ FCCC, preambular recital 6, art. 3, para 1 and art. 4, para. 1

⁶⁷ L Rajamani (see footnote 61 above), 160; and Brunnée and Toope (see footnote 65 above), 162.

⁶⁸ A E Boyle (see footnote 5 above), 908. See also, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, *reprinted in* (1969) 8 ILM 679 [hereinafter VCLT], art. 26 and art. 31, para. 1.

⁶⁹ Brunnée and Toope (see footnote 65 above), 154, 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 by Singapore therein at 66, ‘Paper No. 19: Singapore – Work Programme for the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention’.

⁷⁰ See, FCCC, preambular recital 1; See also, Rio Declaration (see footnote 30 above), principle. 7; P Sands et al, *Principles of International Environmental Law*, (2012, 3rd edn, Cambridge University Press, Cambridge), 234; L Rajamani (see footnote 61 above), 134-136.

⁷¹ FCCC, art. 3, para. 1.

‘equitable’ as equity and CBDRRC, as principles of the Convention are central to the climate change regime.⁷² The agreement must be ‘effective’ so as to meet the objects and purposes of the climate change instruments. The agreement must be ‘applicable to all’ as the Durban Platform decision that launched the negotiations towards a 2015 climate agreement explicitly requires it to be so.⁷³ The term ‘applicable to all’ signals universality rather than uniformity of application. It does, nevertheless, suggest that a future climate agreement may be based on a more nuanced form of differentiation than has thus far been the case.⁷⁴ Finally, the 2015 climate agreement, or any other future agreement, must be directed at achieving the multilaterally agreed global goal, as discussed above under draft Article 4, *paragraph 2 subparagraph (b)*.

(4) The common responsibilities require States to take policies and measures on climate change and its adverse effects (FCCC Article 4, paragraph 1); to promote sustainable development as elaborated in draft Article 3 above and stated in FCCC Article 3, paragraph 4; and, to cooperate as elaborated in draft Article 8 below and as stated in FCCC Articles 4, paragraph 1, 5 and 6.

(5) *Paragraph 3* of draft Article 5 elaborates on the differentiated responsibilities States have by virtue of the principle of common but differentiated responsibilities and respective capabilities. As noted above there is general agreement that States share a common responsibility to protect the climate system. There is also general agreement that this responsibility falls differently on different States or groups of States (FCCC preamble, Article 3, paragraph 1 and Article 4, paragraph 2). Notably, there is consensus that many, albeit not all, of the responsibilities of States under the climate change regime are subject to differentiation.⁷⁵ This approach accords with Principle 7 of the Rio Declaration and with the practice under other multilateral environmental agreements (MEAs). It is also reflected in the distinction between Annex I, non-Annex I, States with economies in transition, and least developed States, among others, that is drawn in FCCC Article 4, as well as the distinctions between Annex I and non-Annex countries in the Berlin Mandate and the Kyoto

⁷² References to ‘under the Convention’ and the ‘principles of the Convention’ in Decision 1/CP.17, ‘Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011’, in FCCC/CP/2011/9/Add.1 (Mar. 15, 2012) [hereafter Durban Platform], para. 2; Decision 2/CP.18, ‘Advancing the Durban Platform’, in FCCC/CP/2012/8/Add.1 (Feb. 28, 2013), preambular recital 4; and Decision -/CP.19, ‘Further advancing the Durban Platform’, available at, <http://unfccc.int/files/meetings/warsaw_nov_2013/decisions/application/pdf/cop19_adp.pdf>, preambular recital 4.

⁷³ Durban Platform, *ibid.* at para. 2.

⁷⁴ L Rajamani, *The Durban Platform for Enhanced Action and the Future of the Climate Regime*, (2012) 61(2) Int’l & Comp. L. Qtrly 501, 507-10.

⁷⁵ Not all responsibilities are differentiated. FCCC, art. 4, para. 1 contains responsibilities applicable to all Parties.

Protocol, and between developed and developing countries in the Bali Action Plan.⁷⁶ The Copenhagen Accord, although devoid of formal legal status,⁷⁷ recognises the distinction between ‘targets’ and ‘actions’ for Annex I and non-Annex I countries respectively.⁷⁸ The Cancun Agreements also recognise a distinction between ‘quantified economy-wide emission reduction targets’⁷⁹ for developed countries and ‘nationally appropriate mitigation actions’⁸⁰ for developing countries.

(6) There is general understanding that such differentiated responsibilities stem from real differences between Parties. However much less common ground exists on the relevant criteria for differentiation.⁸¹ The principle of CBDRRC explicitly indicates only one basis for such differentiation - ‘respective capabilities’. The reference in *paragraph 3* of draft Article 5 to financial, technological, and infrastructural capabilities, economic fortunes and national circumstances, highlights in an illustrative manner the relevant ‘respective capabilities’ that States possess. There is, however, another basis for differentiation implicit in this principle. In the 1980s, in the process leading up to the 1992 Rio conference,⁸² and at Rio, in particular in the climate negotiations,⁸³ there was a growing,⁸⁴ albeit not universal acknowledgement,⁸⁵ of industrial country contributions to the global environmental crisis.⁸⁶ This acknowledgement was articulated as the CBDRRC principle in Rio Principle 7. Rio Principle 7 by its terms assigns a leadership role to industrial countries based on their enhanced contribution to environmental degradation. The

⁷⁶ Brunnée and Toope (see footnote 65 above), 155.

⁷⁷ See Notification to Parties, Clarification relating to the Notification of 18 January 2010 (Jan. 25, 2010).

⁷⁸ Copenhagen Accord (see footnote 41 above), paras 4, 5.

⁷⁹ Cancun Agreements (LCA) (see footnote 37 above), para. 36

⁸⁰ *Ibid.* at para. 49.

⁸¹ Brunnée and Toope (see footnote 65 above), 154.

⁸² The discussions at the Second Meeting of the Parties to the Montreal Protocol, London, 1990, formed part of the backdrop to Rio. At the London Conference, developing countries led *inter alia* by then Indian Minister, Maneka Gandhi, took the position, ‘[w]e did not destroy the ozone layer, you have done that already. Don’t ask us to pay the price’. See, M Gandhi, ‘A lesson for humanity: The London meeting’, in S O Anderson and K M Sarma, *Protecting the Ozone Layer: The United Nations History*, (2002, Earthscan, London), 12.

⁸³ See e.g. Hague Declaration on the Environment, UN Doc A/44/340-E/1989/120, Annex 5, Mar. 11, 1989, (1989) 28(5) ILM 1308-1310; and Noordwijk Declaration on Atmospheric Pollution and Climatic Change, (1989) 5 American Univ. J. of Int’l L. & Pol’y 592.

⁸⁴ See, for example, UN General Assembly, ‘United Nations conference on environment and development’, UN Doc A/Res/44/228 (Dec. 22, 1989), para. 9, noting that developed countries have the ‘main responsibility’ for pollution abatement.

⁸⁵ See UN General Assembly, Report of the United Nations conference on environment and development, A/CONF.151/26, Vol. IV (Sept. 28, 1992), para. 16, for the US reservation on Principle 7. The US noted, ‘The United States understands and accepts that principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities’.

⁸⁶ L Rajamani (see footnote 61 above), 136.

terms of FCCC Article 3 are, however, less clear. 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 ambiguity created in the notion of CBDRRC due to the differing terms of FCCC Article 3 and Rio Principle 7 has resulted in two incompatible views on the basis on which responsibilities between Parties are 'differentiated'. One, that the CBDRRC principle is based on differences relating to economic development alone and, second, that the CBDRRC principle is based on 'differing contributions to global environmental degradation and not in different levels of development'.⁸⁷ Arguably, however, Rio Principle 7 and FCCC Article 3 reinforce each other.⁸⁸ The terms of Principle 7 emphasise both the enhanced contribution of industrial countries to environmental degradation as well as the developmental challenges faced by developing countries. FCCC Article 3 refers to 'common but differentiated responsibilities and respective capabilities'. If CBDRRC, as some argue, refers to differentiation based on capability alone the use of the term 'respective capabilities' would be superfluous. It follows that the negotiated agreement intended to highlight differentiation based on two markers – one based on capability and the other, drawing from Rio Principle 7 which contains the authoritative definition of CBDRRC, based on contribution to environmental harm.⁸⁹ It is also worth noting that although there are two distinct markers for differentiation in the CBDRRC principle, these are linked.

(7) Contribution to climate harm is therefore evidently relevant in determining differentiated responsibilities of States, however, disagreements remain on whether or not historical emissions (and if yes, from 'when') are an appropriate criteria for differentiation. The FCCC includes a preambular recital noting that the 'largest share of historical and current global emissions of greenhouse gases has originated in developed countries'. The Cancun Agreements, 2011, note that owing to 'historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof'.⁹⁰ Brazil has sought in the past to elaborate on 'historical responsibility'.⁹¹ But these efforts have not met with much success.

⁸⁷ International Law Association, International Committee on Legal Aspects of Sustainable Development, report of the Sixty-Sixth Conference (1995), 116.

⁸⁸ L Rajamani, 'The reach and limits of the principle of common but differentiated responsibilities and respective capabilities in the climate change regime', in N K Dubash (ed), *Handbook of Climate Change and India*, (2012, Oxford University Press, Oxford), 118, 121.

⁸⁹ *Ibid.*

⁹⁰ Cancun Agreements (LCA) (see footnote 37 above), para. 35.

⁹¹ Submission by Brazil, Proposed elements of a protocol to the UNFCCC, presented by Brazil in response to the Berlin mandate, in FCCC/AGBM/1997/MISC.1/Add.3 (May 30, 1997); Submission by Brazil, in FCCC/AWGLCA/2008/MISC.5 (Oct. 27, 2008); and Submission by Brazil, Development of a Reference Methodology on Historical Responsibilities by the IPCC to Guide Domestic Consultations for the ADP 2015 Agreement (Sept. 19, 2013), available at,

While it may prove difficult to assign historical responsibilities to States, there is general agreement that historical emissions are relevant factors, among others, in determining differentiated responsibilities of States.

(8) There is general agreement that current emissions form the primary reference point for determining differentiated responsibilities under the climate change regime. That international law recognises and holds States accountable for current contributions to environmental degradation flows from the customary international law obligation of States to ‘ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control’.⁹² There is also general agreement that future emissions are relevant. There is considerable support in international law both for ‘preventive action’⁹³ as well as ‘precaution’⁹⁴ as elaborated below in draft Article 7. These principles require countries to take action where significant (and irreversible) environmental harm is foreseeable.

(9) Therefore, historical, current and future emissions at varying levels are taken within the fold of the CBDRRC principle. The relevance of climate degrading activities across different temporal spaces enriches the CBDRRC principle as it will lead in time to the most equitable and effective result. Equitable, for it privileges neither those who committed greenhouse gas transgressions in the past (regardless of whether the transgressions were recognised as such) and reaped the benefits thereof, nor those who commit such transgressions today (when transgressions are recognised as such) without regard for the future. And effective, for it recognises responsibility across temporal spaces and emphasises both corrective and preventive action.⁹⁵

(10) *Paragraph 3 subparagraph (a)* of draft Article 5 captures the incontrovertible position that developed countries should lead in action to address climate change.⁹⁶ The phrase ‘in particular the more advanced among them’ acknowledges that differences exist among developed countries, and that some may be in a better

<http://unfccc.int/files/na/application/pdf/substa_submission_by_brazil_-_brazilian_proposal_final_corrected.pdf>.

⁹² *The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ Reports 226 [hereinafter *Nuclear Weapons Advisory Opinion*], 242, para. 29 (holding that this notion is ‘part of the corpus of international law relating to the environment’).

⁹³ United Nations Environment Programme, Declaration of the United Nations Conference on the Human Environment, UN Doc A/Conf.48/14/Rev.1, June 16, 1972, (1972) 11 ILM 1416 [hereinafter *Stockholm Declaration*], principles 6, 7, 15, 18 and 24; CBD (see footnote 29 above), preambular recital 8 and art. 1.

⁹⁴ Rio Declaration (see footnote 30 above), principle 15; FCCC, art. 3; Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 UNTS 208, *reprinted in* (2000) 39 ILM 1027, art. 1, art. 10, para. 6 and art. 11, para. 8.

⁹⁵ L Rajamani (see footnote 61 above), 148.

⁹⁶ FCCC, art. 3. See also, Fulfilment of the Bali Action Plan and components of the agreed outcome – Note by the Chair, FCCC/AWGLCA/2009/4 (Part II) (Mar. 18, 2009), para. 30.

position to assume a leadership role than others. The differentiated mitigation commitments of Parties in Annex B of the Kyoto Protocol substantiate the point that differences among developed countries are relevant in the climate change regime.

(11) Developed countries by virtue of their leadership role are required to take more stringent mitigation commitments and offer assistance to developing countries that need it. This draws directly from the balance of responsibilities in the FCCC and its Kyoto Protocol. Differentiation between developed and developing countries takes many forms in the FCCC and the Kyoto Protocol.⁹⁷ There are provisions that differentiate between developed and developing countries with respect to the central obligations contained in the treaty, such as emissions reduction targets and timetables.⁹⁸ There are also provisions that differentiate between developed and developing countries with respect to compliance, such as permission to adopt subsequent base years,⁹⁹ delayed reporting schedules,¹⁰⁰ and softer approaches to non-compliance,¹⁰¹ and provisions that grant assistance, *inter alia* financial¹⁰² and technological.¹⁰³ Differentiation with respect to central obligations, as the battle over the second commitment period of the Kyoto Protocol demonstrates, is most controversial and is unlikely to find a place in a future agreement. There is a general expectation that developed countries, in particular the more advanced among them, will take more stringent mitigation commitments and that the other forms of differentiation in relation to compliance and assistance will continue to play a role in the climate change regime.

(12) Correspondingly, *paragraph 3 subparagraph (b)* of draft Article 5 recognises that developing countries shall be subject to less stringent mitigation commitments than developed countries and shall benefit from forms of differentiation relating to compliance and assistance. The term ‘in particular the least developed among them, small island developing States, and other vulnerable States’ recognises the differences that exist among developing countries. There is support for such differentiation among developing countries in the FCCC and in the climate change regime. The commentaries below relating to draft Article 6 (special circumstances) elaborate on this aspect. The FCCC, recognising differences between States, singles

⁹⁷ For a full typology of norms of differential treatment, see L Rajamani (see footnote 61 above), 93-118.

⁹⁸ See e.g. The Kyoto Protocol (see footnote 38 above), art. 3.

⁹⁹ See e.g. *Ibid.* at art. 3, para. 5.

¹⁰⁰ See e.g. FCCC, art. 12, para. 5.

¹⁰¹ See e.g. Decision 24/CP.7, ‘Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol’, in FCCC/CP/2001/13/Add.3 (Jan. 21, 2002).

¹⁰² See e.g. FCCC, art. 4, para. 3.

¹⁰³ See e.g. *Ibid.* at art. 4, para. 5.

some out for special treatment as for instance least developed countries.¹⁰⁴ The FCCC, however, recognises differences among developing countries that necessitate special consideration for some over others, rather than differences that necessitate greater action on the part of some over others. The Copenhagen Accord reflects differentiation of both kinds.¹⁰⁵ 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. 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’.¹⁰⁶ The Accord also identifies ‘the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa’ as priority recipients of adaptation funding.¹⁰⁷ The Cancun Agreements follow a similar line.¹⁰⁸ Accordingly, the more needy developing countries are entitled to take less stringent commitments and to greater assistance than other developing countries.

(13) *Paragraph 4* of draft Article 5 captures the dynamism inherent in the principle of CBDRRC. There are two elements here. First, that, given the recognised differences among States, commitments of States will fall along a spectrum. Second, commitments shall evolve as these recognised differences diminish. There is general agreement on the first in so far as the FCCC and Kyoto Protocol recognise and respond to differences among States. The second appears intuitive, but is nevertheless contested. 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 relevant 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.¹⁰⁹

(14) This is contentious in the climate negotiations. Today, by some accounts, fifty non-Annex I Parties have higher per capita income than the poorest Annex I Party, leading some countries to argue that the Annex I/Non-Annex I distinction should not

¹⁰⁴ FCCC, art. 4, paras 8 and 9.

¹⁰⁵ See generally, D Bodansky, *The Copenhagen Conference: A Post-Mortem*, (2010) 104(2) Am. J. Int’l L. 231; and L Rajamani, *The Making and the Unmaking of the Copenhagen Accord*, (2010) 59(3) Int’l & Comp. L. Qtrly 824.

¹⁰⁶ Copenhagen Accord (see footnote 41 above), para. 5.

¹⁰⁷ *Ibid.*

¹⁰⁸ Cancun Agreements (LCA) (see footnote 37 above), para. 95. See generally, L Rajamani, *The Cancun Climate Agreements: Reading the Text, Subtext, and Tea Leaves*, (2011) 60(2) Int’l & Comp. L. Qtrly 499.

¹⁰⁹ L Rajamani (see footnote 61 above), 173.

be the basis of the climate change regime going forward. Although this point is contentious and resisted by some key States,¹¹⁰ a growing number of developed and developing countries accept that differences amongst developing countries are relevant. The developments in the climate negotiations since 2007 pursuant to the Bali Action Plan, the Copenhagen Accord, Cancun Agreements and the Durban Platform can be read as demonstrating a steadily growing support for the proposition that there should be differentiation amongst developing countries in relation to mitigation actions and greater parity in actions and commitments taken by developed and some developing countries.¹¹¹ The Durban Platform decision launching a process to negotiate an agreement by 2015, for instance, does not contain a reference to ‘common but differentiated responsibilities.’ This is no oversight. Developed countries were unanimous in their insistence that any reference to ‘common but differentiated responsibilities’ must be qualified with a statement that this principle must be interpreted in the light of ‘contemporary economic realities.’ They were also insistent that the future regime must be ‘applicable to all’. Some developing countries, argued in response that this would tantamount to amending the FCCC.¹¹² The final decision launched a process to negotiate ‘a Protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all’.¹¹³ The term ‘under the Convention’ implicitly engages its principles, including the principle of common but differentiated responsibilities.¹¹⁴ The term ‘applicable to all’ signals a shift away from previous perceived binary division of responsibilities between developed and developing countries. Subsequent decisions at Doha and Warsaw contain specific references to the principles of the Convention, albeit in preambular recitals.¹¹⁵ Nevertheless, it is clear that Durban signaled a significant shift in the negotiating dynamics and States

¹¹⁰ 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 FCCC/AWGLCA/2008/MISC.5 (Oct. 27, 2008), 34. See also, China’s Submission on the Work of the Ad Hoc Working Group on Durban Platform for Enhanced Action (Mar. 5, 2013), available at, <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_china_workstream_1_20130305.pdf>; and Submission by India on the work of the Ad-hoc Working Group on the Durban Platform for Enhanced Action Work-stream I (Mar. 9, 2013), at <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_india_workstream_2_20130309.pdf>.

¹¹¹ Some differentiation between developing countries is recognised in the FCCC itself. See for instance, FCCC, art. 4, para. 8 and art. 12.

¹¹² L Rajamani (see footnote 74 above), 508.

¹¹³ Durban Platform (see footnote 72 above), para. 2.

¹¹⁴ L Rajamani (see footnote 74 above). See generally, D Bodansky, *The Durban Platform Negotiations: Goals and Options* (July 2012, Harvard Project on Climate Agreements, Massachusetts), 3, available at, http://belfercenter.ksg.harvard.edu/files/bodansky_durban2_vp.pdf.

¹¹⁵ Decision 2/CP.18 (see footnote 72 above), preambular recital 4; and Decision -/CP.19 (see footnote 72 above), preambular recital 4.

will likely explore a more nuanced and dynamic form of differentiation in a future agreement.

Draft Article 6. Special Circumstances and Vulnerability

- 1. States shall take full account of the special circumstances and needs of developing countries particularly vulnerable to the effects of climate change, specifically but not limited to the Least Developed Countries and Small Island Developing States.**
- 2. The rights and obligations of developing countries with regard to climate change and its impacts shall be differentiated based on their special circumstances and vulnerability.**
- 3. Developed States shall assist in developing insurance mechanisms to support, in accordance with draft Article 5.3, developing countries that are particularly vulnerable to the effects of climate change.**

Commentary

(1) The concept of ‘special circumstances and vulnerability’ informs the application of other legal principles, in particular the principle of CBDRRC. Principle 6 of the Rio Declaration reads, ‘[t]he special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority...’. The FCCC in addition also refers to developing States that would have to bear a disproportionate or abnormal burden under the Convention.¹¹⁶ This describes, for example, the impact of climate mitigation measures on oil exporting economies.

(2) The specific concept of special circumstances and vulnerability under the FCCC is fleshed out in several provisions.¹¹⁷ States have agreed in the FCCC that when implementing their commitments, they shall give special consideration to particularly vulnerable groups of developing countries¹¹⁸ and take ‘full account of the special needs and situations of least developed countries’ (LDCs) in the context of funding and technology transfer. LDCs are designated by the UN Economic and Social Council according to a set of criteria including low income, human resource

¹¹⁶ FCCC, art. 3, para. 2.

¹¹⁷ FCCC, art. 4, para. 4.

¹¹⁸ FCCC, art. 4, para. 8.

weakness and economic vulnerability.¹¹⁹ While all LDCs would fit into one or more of the described groups of developing countries they were explicitly separated out in Article 4, paragraph 9 during the drafting process of the Convention. In addition, States shall also ‘take into consideration’ the situation of States with economies that are vulnerable to the adverse effects of climate change response measures.¹²⁰

(3) The legal significance of the different FCCC provisions addressing special circumstances and vulnerabilities and their relationship with each other has been subject to some debate. Some commentators hold that the provisions do not provide a substantive right for developing countries to demand funding, insurance, technology transfer or other actions but establish procedural ‘signposts’ for further consideration by the States.¹²¹ Draft Article 6 does not take a position on this question but rather focuses on special circumstance and vulnerability as a qualitative criterion for differentiation.

(4) As the result of a drafting process that aimed to integrate a variety of different interests, the concept of special circumstances and vulnerability under the FCCC is wider and more diverse than Principle 6 of the Rio Declaration. *Paragraph 1* of draft Article 6, however, reflects that in the subsequent practice, the notion of vulnerability to climate change impacts has emerged as primary concern. For example, a special work programme for LDCs and a LDCs Expert Group were established.¹²² The treatment of small island developing states those territorial integrity, and in the case of some low lying islands, existence in the medium term, is threatened by the impacts of climate change on an equal footing with LDCs was reinforced by the Nairobi Work Program.¹²³ Thus, by focusing on the needs of countries particularly vulnerable to the effects of climate change (and not response measures), Parties to the FCCC have effectively reinterpreted ‘special circumstances and vulnerability’ in the sense of Principle 6 of the Rio Declaration.

(5) The current climate negotiations indicate a gradual movement away from the strict differentiation between the commitments of developed and developing

¹¹⁹ The most recent list is available at, http://www.un.org/en/development/desa/policy/cdp/lcd/lcd_list.pdf. It currently includes 48 countries: 33 in Africa, 14 in Asia and the Pacific and one in Latin America.

¹²⁰ FCCC, art. 4, para. 10.

¹²¹ F Yamin and J Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures*, (2004, Cambridge University Press, Cambridge), 227.

¹²² Decision 5/CP.7, ‘Implementation of Article 4, paragraphs 8 and 9, of the Convention’, in FCCC/CP/2001/13/Add.1 (Jan. 21, 2002), 32.

¹²³ Report of the Conference of the Parties on its twelfth session, held at Nairobi from 6 to 17 November 2006, Addendum Part Two: Action taken by the Conference of the Parties at its twelfth session, FCCC/CP/2006/5/Add.1 (Jan. 26, 2007); Report of the Subsidiary Body for Scientific and Technological Advice on its 25th session, held at Nairobi from 6 to 14 November 2006, FCCC/SBSTA/2006/11 (Feb. 1, 2007), paras 11 to 71.

countries. In this context there is a proposal, for example, to use gross domestic product as a criterion.¹²⁴ But there are also criteria inherent in the FCCC. *Paragraph 2* of draft Article 6 emphasises that, based on the preceding analysis, the notion of vulnerability to climate change impacts has emerged as a strong legal paradigm. While some form of differential treatment between developed and developing country Parties as defined under the FCCC remains at the heart of CDRRC and equity, the concept of special circumstances and vulnerability provides some legal guidance to the international community on how to differentiate between different groups of developing countries.

(6) *Paragraph 3* of draft Article 6 reiterates the obligation of developed countries to provide support in accordance with the principle of CDRRC and Article 4, paragraph 8 of the FCCC. As mitigation and adaptation efforts will not prevent a certain degree of loss and damage attributable to global warming, the international community is increasingly debating the approaches, methods and tools required to understand and manage risks associated with climate change. In this context, risk transfer and sharing has been identified as a crucial component.¹²⁵ Insurance schemes will require the involvement of the private sector, but developed countries have an important role to play in providing start-up finance, credit insurance and additional support where the development of commercial products is problematic. The international mechanism for loss and damage established at the Warsaw climate conference in November 2013 may gradually provide the required institutional framework.¹²⁶

Draft Article 7. Prevention & Precaution

Draft Article 7A. Obligation of prevention

1. States have an obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, including damage through climate change.

¹²⁴ See, for example, Ethiopia's Submission on Increasing the Level of Ambition at the Negotiations of the Ad Hoc Working Group on the Durban Platform for Enhanced Action towards Producing a new International Law under the Convention (Feb. 18, 2013), available at, <<http://unfccc.int/bodies/awg/items/6656.php>>, 6.

¹²⁵ Decision 3/CP.18, 'Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity', in FCCC/CP/2012/8/Add.1 (Feb. 28, 2013).

¹²⁶ Decision -/CP.19, 'Warsaw international mechanism for loss and damage associated with climate change impacts', available at, <http://unfccc.int/files/meetings/warsaw_nov_2013/decisions/application/pdf/cop19_lossanddamag e.pdf>.

2. States shall exercise due diligence to avoid, minimise and reduce environmental and other damage through climate change, as described in draft Article 7A.1. In exercising due diligence, States shall take all appropriate measures to anticipate, prevent or minimise the causes of climate change, especially through effective measures to reduce greenhouse gas emissions, and to minimise the adverse effects of climate change through the adoption of suitable adaptation measures.

3. In determining whether a State has exercised due diligence in accordance with draft Article 7A.2, economic development and available resources, scientific knowledge, the risks involved in an action, and the vulnerability of affected states shall be taken into account. Measures taken by States to anticipate, prevent or minimise the causes and adverse effects of climate change must be proportionate.

Draft Article 7B. Precautionary principle

1. Where there is a reasonably foreseeable threat of serious or irreversible damage, including serious or irreversible damage to States vulnerable to the impacts of climate change, measures to anticipate, prevent or adapt to climate change shall be taken by States without waiting for conclusive scientific proof of that damage.

2. Precautionary measures for the purposes of draft Article 7B.1 shall include proactive and cost-effective measures which enable sustainable development, maintain the stability of the climate system and protect the climate system against human-induced change.

3. As new scientific knowledge relating to the causes or effects of climate change becomes available, States must continuously assess their obligation of prevention and the necessity for precautionary measures. Where scientific knowledge about damage from climate change improves sufficiently, protective measures shall be continued by States pursuant to their obligation to prevent environmental damage, as described in draft Article 7A.1 above.

4. In light of new scientific knowledge, States must strengthen their emission reduction standards and other preventative and adaptation measures, taking into account the factors listed in draft Article 7A.3.

5. Where there is a reasonably foreseeable threat that a proposed activity may cause serious damage to the environment of other States or areas beyond national jurisdiction, including serious or irreversible damage through climate change to vulnerable States, an environmental impact assessment on the potential impacts of such activity is required.

6. If the assessment indicates a reasonably foreseeable threat of such serious damage, the State under whose jurisdiction or control the activity takes place shall notify and consult with States likely to be affected, shall make available relevant information, and cooperate with a view to reaching a joint decision.

Commentary

(1) Draft Article 7 deals with the legal principles of prevention and precaution in their application to climate change. Prevention and precaution are dealt with together given the close link that exists between State actions required under these principles. Whereas prevention is directed to situations of harm and risks that are known or knowable and are backed by strong scientific evidence, the precautionary principle operates in advance of this.¹²⁷ However, the dividing line between the sphere of prevention and that of precaution is a fine one. Increasingly, therefore, the two principles are treated as forming part of a continuum.¹²⁸ For instance, the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea in its 2011 *Advisory Opinion on the Responsibilities and Obligations of States* pointed out that the precautionary approach is ‘an integral part of the due diligence obligation of sponsoring States, which is applicable even outside the scope of the [Nodules and Sulphides] Regulations’.¹²⁹

(2) State practice, under the environmental law of the European Union, also lends supports to the conclusion that a close connection exists between the prevention principle and the precautionary principle. The European Commission’s Communication on the Precautionary Principle provides: ‘The [precautionary] measures should be maintained as long as the scientific data are inadequate, imprecise or inconclusive and as long as the risk is considered too high to be imposed on society. The measures may have to be modified or abolished by a particular deadline, in the light of new scientific findings. However, this is not always

¹²⁷ See D Freestone, ‘The Precautionary Principle’, in R Churchill and D Freestone (eds), *International Law and Global Climate Change* (1991, Graham & Trotman/ Martinus Nijhoff, London), 21, 31.

¹²⁸ See H Hohmann, *Precautionary Legal Duties and the Principles of Modern International Environmental Law* (1994, Graham & Trotman/Martinus Nijhoff, London), 10 using prevention and precaution synonymously on the basis that a clear-cut threshold between the two is absent. See also, A Nollkaemper, *The Legal Regime for Transboundary Water Pollution* (1993, Martinus Nijhoff/Graham & Trotman, Dordrecht), 72 noting that ‘[t]he first and most sound interpretation of the precautionary principle is that it is a modest specification of the obligation to prevent (appreciable) harm’. See also the critique by E Reh binder, *Das Vorsorgeprinzip im internationalen Vergleich* (Umweltrechtliche Studien vol. 12), (1991, Werner-Verlag, Düsseldorf) that the German differentiation between the principles prevention and precaution does not find justification in international environmental law.

¹²⁹ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion of the Seabed Disputes Chamber of the ITLOS, Case No 17, (Feb. 1, 2011) [hereinafter *Sea Bed Advisory Opinion*], para. 131.

linked to the time factor, but to the development of scientific knowledge'.¹³⁰ While the European Commission was here concerned with the temporary nature of precautionary measures and the need for continual re-evaluation in light of developments in scientific knowledge, that re-evaluation may lead to a finding of stronger evidence of harm, resulting in a transition from precautionary to preventative measures.

(3) *Paragraph 1* of draft Article 7A states the customary law obligation of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. It specifies that this obligation of harm prevention extends to environmental damage, including damage through climate change.

(4) The obligation of prevention is a well-established principle of customary international environmental law that obliges a State, in a transboundary context, 'to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State'.¹³¹ Emanating from the concept of due diligence, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration on Environment and Development, the principle of prevention is regarded as 'part of the corpus of international law relating to the environment'.¹³² This principle, and the corresponding legal duty, has been supported in international cases, such as the *Trail Smelter Arbitration*¹³³ and the Judgment of *Corfu Channel*,¹³⁴ and in the work of the UN International Law Commission (ILC) regarding Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.¹³⁵ According to the ILC's Draft Articles, in order for the prevention principle to be invoked, the degree of harm should be foreseeable and the State must know or should have known that the activity concerned bears the risk of significant harm.¹³⁶ As an obligation of customary international law, failure by a State to fulfill this obligation would give rise to State responsibility for attributable damage to the environment of other States or of areas

¹³⁰ Commission of the European Communities, Communication from the Commission on the Precautionary Principle, Brussels, COM (2000) 1 final (Feb. 2, 2000), 20.

¹³¹ Pulp Mills case (see footnote 35 above), para. 101.

¹³² Nuclear Weapons Advisory Opinion (see footnote 92 above), 242, para. 29. This was subsequently confirmed by the ICJ in *Gabčíkovo – Nagymaros* (see footnote 33 above), and by the Arbitral Tribunal in *Iron Rhine Arbitration* (see footnote 35 above).

¹³³ *Trail Smelter Arbitration (United States /Canada)* 1941 (3) UNRIIA 1905, 1965.

¹³⁴ *The Corfu Channel case (United Kingdom v Albania)*, Merits, Judgment, 1949 ICJ Reports 4, 22.

¹³⁵ International Law Commission, Report of the Commission to the General Assembly on the work of its fifty-third session, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, (2001) vol. II, part Two Yearbook of International Law Commission [hereinafter ILC Draft Articles].

¹³⁶ *ibid.* at 155.

beyond national jurisdiction, including serious or irreversible damage to States vulnerable to the impacts of climate change. Where such serious or irreversible damage occurs, responsibility would be shared between all States which have not fulfilled their obligation to prevent such harm, except where there is a compelling reason (in the sense of draft Article 7A, *paragraph 3*) for this non-fulfillment.¹³⁷

(5) Application of the customary law principle of prevention of environmental damage to the situation of climate change damage is supported by State practice and the writings of international jurists. Principle 2 of the Rio Declaration is repeated in its entirety in the preamble of the FCCC.¹³⁸ While it might be argued that Principle 2 does not apply to climate change as it falls outside the traditional concept of transboundary pollution, ‘neither the decades of ILC debates on the issue of prevention of environmental harm nor international jurisprudence provide evidence that complex instances of environmental change are not to be covered by the general duty to prevent harm and minimise the risk thereof’.¹³⁹ Principle 2 itself deals not just with transboundary harm to other States but also with harm to ‘areas beyond national jurisdiction’, which would extend to the marine environment and the atmosphere.

(6) The prevention principle has both substantive and procedural elements. The latter include the obligation to conduct an environmental impact assessment, and the collateral obligations of consultation and negotiation. These elements are dealt with in draft Article 7B, *paragraphs 5 and 6*. Substantively, there is an obligation on States to avoid, minimise and reduce the likelihood of harm being caused through the requirement of due diligence. This requirement is elaborated in *paragraph 2* of draft Article 7A. It is expressed as being applicable to both environmental and ‘other’ damage caused through climate change. Use of the term ‘other damage’ connotes recognition that damage from climate change may extend beyond pure environmental damage to include, for instance, damage to property, health impacts or loss of life.

(7) *Paragraph 2* builds upon formulations of the due diligence duty in international case law,¹⁴⁰ and the ILC Draft Articles on the Prevention of

¹³⁷ One member of the Committee supported the view that liability in such situations would be joint and several. See also, M G Faure and A Nollkaemper, *International Liability as an Instrument to Prevent and Compensate for Climate Change*, (2007) 43A Stan. J. Int’l L. 123. This view was not, however, a consensus view of the Committee.

¹³⁸ FCCC, preambular recital 8.

¹³⁹ R Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility*, (2005, Martinus Nijhoff, Leiden), 167.

¹⁴⁰ See *Pulp Mills Case* (see footnote 35 above) and *Seabed Disputes Advisory Opinion* (see footnote 129 above).

Transboundary Harm from Hazardous Activities.¹⁴¹ As the ICJ stated in its *Pulp Mills Judgment*, the obligation of due diligence ‘entails not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators’.¹⁴²

(8) *Paragraph 2* speaks of both appropriate climate change mitigation measures responding to the causes of climate change – with a particular focus on effective measures to reduce greenhouse gas emissions – and appropriate climate change adaptation measures addressing the adverse effects of climate change. The paragraph expresses no priority with respect to the adoption of mitigation or adaptation measures, although, where possible, mitigation measures should take priority over adaptation measures. The extent to which States adopt ‘effective measures to reduce greenhouse gas emissions’ will influence the level of effort that needs to be directed towards adaptation measures. However, for some vulnerable developing countries the adoption of adaptation measures will often be a more pressing priority than the mitigation of their already low levels of emissions.

(9) *Paragraph 3* of draft Article 7A specifies the factors to be taken into account in assessing whether a State has exercised due diligence in accordance with draft Article 7A, *paragraph 2*. The reference to ‘economic development and available resources’ reflects a specific application of the principle of CBDRRRC in the context of the obligation of prevention. Other factors to be taken into account in assessing whether State actions have been duly diligent are scientific knowledge, the risks involved in an action and the vulnerability of affected States. Due diligence ‘is a variable concept’.¹⁴³ As such what is considered due diligence may change over time in light, for instance, of new scientific or technological knowledge. The Seabed Disputes Chamber in its *Advisory Opinion on the Responsibilities and Obligations of States* indicated that ‘[t]he standard of due diligence has to be more severe for the riskier activities’.¹⁴⁴ What is judged to be ‘riskier’ will depend upon both the nature of the risks involved in a particular measure (for instance, geoengineering projects involving solar radiation management) and the vulnerability to harm of affected States.

(10) The final sentence of *paragraph 3* of draft Article 7A directs that measures should be ‘proportionate’. In EU environmental law, proportionality is an element of the precautionary principle that requires decisions on measures to be made in light

¹⁴¹ See ILC Draft Articles (see footnote 135 above), art. 3.

¹⁴² See *Pulp Mills Case* (see footnote 35 above), para. 197.

¹⁴³ See *Seabed Disputes Advisory Opinion* (see footnote 129 above), para. 117.

¹⁴⁴ *Ibid.*

of the significance of the harm and its likelihood: the more serious and more likely the risks, the greater the need for measures to be taken.¹⁴⁵ A similar meaning is intended by use of the term 'proportionate' in this paragraph. In other words, it reflects the requirement for a balancing of the factors enumerated in the paragraph in assessing whether the due diligence standard has been met.

(11) Part B of draft Article 7 deals with the legal principle of precaution. As discussed above, this principle is very closely related to that of prevention. It is triggered by some risk potential, not requiring 'full scientific certainty', but instead often requiring risk analysis,¹⁴⁶ or other appraisal, with the aim of reaching a more objective assessment of the threat.

(12) *Paragraph 1* of draft Article 7B defines the sphere of operation of the precautionary principle in terms of two key concepts: (1) reasonable foreseeability of damage falling short of conclusive scientific proof and (2) a threat of serious or irreversible damage. Together these criteria trigger an obligation to act.

(13) As regards the former element of the trigger, *paragraph 1* adopts the terminology, 'reasonably foreseeable'. This departs from the language used in conventional international formulations of the precautionary principle, such as Article 3, paragraph 3 of FCCC and Principle 15 of the Rio Declaration, which refer to 'lack of full scientific certainty'. The 'lack of full scientific certainty' formulation has been criticised in the literature as lacking clarity and having the potential to be applied in an arbitrary fashion, thus undermining legal stability and predictability.¹⁴⁷ Reasonable foreseeability, however, provides a clearer criterion for application of the precautionary principle. A threat will be 'reasonably foreseeable' if there are 'plausible indications of potential risks'.¹⁴⁸ Conclusive scientific proof of threatened damage is not required. Rather the principle operates in situations where scientific evidence concerning the scope and potential negative impacts of an activity is insufficient.¹⁴⁹

(14) The second element of the trigger for operation of the precautionary principle is the requirement for a 'threat of serious or irreversible damage, including

¹⁴⁵ Commission's Communication on the Precautionary Principle (see footnote 130 above), 18. See also, E Rehbinder (see footnote 128 above), 249.

¹⁴⁶ See, e.g., the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 UNTS 493, art. 5, para. 7.

¹⁴⁷ J Ellis, 'The Implications of the Precautionary Principle on Procedure in International Law', in *The Measure of International Law: Effectiveness, Fairness and Validity* (2004, Canadian Council on International Law, Kluwer Law International, The Hague), 351-365. See also, S Murase, *The Scientific Knowledge relating to Climate Change and International Lawmaking*, (2008) 572 Kokusai Mondai [International Affairs], 46-58.

¹⁴⁸ See *Seabed Disputes Advisory Opinion* (see footnote 129 above), para. 131.

¹⁴⁹ *Ibid.*

serious or irreversible damage to States vulnerable to the impacts of climate change'. This terminology largely follows the formulation of the principle found in Article 3, paragraph 3 of the FCCC and Principle 15 of the Rio Declaration but adds a specification regarding damage to climate vulnerable States. It might include, for instance, substantial damage to property, loss of human life or significant biodiversity loss. The threshold of seriousness/irreversibility indicates that the situation must be one where regulatory inaction threatens non-negligible harm.¹⁵⁰

(15) Where those requirements are met, draft Article 7B, *paragraph 1* places a positive obligation on States to take measures to anticipate, prevent or adapt to climate change, notwithstanding remaining scientific uncertainties.¹⁵¹ Precautionary adaptation measures are likely to be the most important in this regard given the significantly greater uncertainties that exist in respect of the regional or local manifestation of climate change impacts, compared with knowledge of the global warming effects of greenhouse gas emissions.¹⁵² Such regional or local circumstances will require specific adaptation measures that draw on the precautionary principle (although the prevention principle will become more relevant as a basis for adaptation measures as uncertainties reduce). In addition, in cases where mitigation measures are not available or cost-effective, adaptation to the effects of past emissions is also urgently required, especially for the most affected developing countries.

(16) *Paragraph 2* of draft Article 7B provides further guidance as to the nature of precautionary measures to be taken by States. These specifications are not exhaustive as indicated by the phrase 'shall include'. In this connection, 'proactive' refers to the anticipation of threats and damage) while 'cost-effectiveness' reflects Article 3, paragraph 3 of the FCCC. The relative cost of different measures, all equally suited to reach the same end, needs to be taken into consideration.

(17) The remaining paragraphs of draft Article 7B address procedural aspects of the application of the principles. *Paragraph 3* states a general obligation of States to assess the need for preventative and precautionary measures to address climate change on an ongoing basis.¹⁵³ This is necessary to ensure that such measures reflect

¹⁵⁰ J Cameron and A Abouchar, 'The Status of the Precautionary Principle in International Law', in D Freestone and E Hey (eds), *The Precautionary Principle and International Law: The Challenge of Implementation*, (1996, Kluwer Law International, The Hague), 29, 45.

¹⁵¹ The Committee chose not to address in these articles the related question of whether application of the precautionary principle requires a 'shifting of the burden of proof'. The Committee's view was that this question was more relevant to the context of dispute settlement, which is not a topic addressed in the present articles.

¹⁵² In other words, in the sphere of mitigation, measures are largely required on the basis of the prevention principle.

¹⁵³ The ILC states in its commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities: '... the precautionary principle constitutes a very general rule of conduct of

the most up-to-date scientific knowledge regarding the causes and effects of climate change. Improvements in scientific knowledge about damage from climate change – for instance, shifting a threat from plausible but not conclusively scientifically proven risk to likely harm – will require the substitution of precautionary measures with preventative measures. *Paragraph 4* specifies that the State obligation to re-evaluate climate change response measures entails a particular requirement to strengthen their emission reduction standards and other preventative and adaptation measures in light of new scientific knowledge. This duty is subject to consideration of the factors listed in draft Article 7A, *paragraph 3*. In particular, the degree to which States will need to strengthen their measures will be affected by their relative level of economic development and available resources to do so, as well as new scientific knowledge concerning the risks involved with particular measures and the vulnerability of affected States.

(18) *Paragraphs 5 and 6* of draft Article 7B address the need for procedural precautions associated with proposed activities that may have transboundary consequences. Under *paragraph 5*, in circumstances where the precautionary principle applies because of a reasonably foreseeable threat of serious damage to the environment of other States (including vulnerable States) or to global commons areas, the State or States undertaking or authorising the activity must first prepare an environmental impact assessment. As the ICJ declared in its *Pulp Mills* judgment, the practice of environmental impact assessment has gained such widespread acceptance among States that ‘it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context’.¹⁵⁴ *Paragraph 5* extends this obligation from situations of known risks to include those where there is a reasonably foreseeable threat that a proposed activity may cause serious environmental damage.

(19) *Paragraph 6* of draft Article 7B imposes further procedural duties upon the State under whose jurisdiction or control an activity is proposed to take place in the event of an environmental impact assessment confirming the existence of a reasonably foreseeable threat of serious environmental damage. That State is required to notify and consult with other likely affected States in order to make

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’, UN General Assembly, ‘Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm’, UN Doc A/RES/62/68 (Jan. 8, 2008), Annex: Prevention of Transboundary Harm from Hazardous Activities; see also, ILC Draft Articles (see footnote 135 above).

¹⁵⁴ *Pulp Mills* case (see footnote 35 above), para. 204. See also, N Craik, *The International Law of Environmental Impact Assessment: process, substance and integration*, (2008, Cambridge University Press, Cambridge); K Bastmeijer and T Koivurova, *Theory and Practice of Transboundary Environmental Impact Assessment*, (2008, Martinus Nijhoff, Leiden).

available relevant information and cooperate with a view to reaching a joint decision on authorisation of the activity.

Draft Article 8. International Cooperation

- 1. States shall cooperate with each other and competent international organisations in good faith to address climate change and its adverse effects.**
- 2. In order to contribute to the effective and appropriate international response to climate change, all States and other relevant actors shall cooperate in good faith and a spirit of partnership in the fulfilment of the principles embodied in these draft Articles and in the further development and more effective implementation of the international legal and governance framework relating to climate change.**
- 3. The international cooperation on climate change shall reflect the responsibility of developed countries to assist developing countries as laid out in draft Article 5.3.**
- 4. All States shall cooperate in further enhancing scientific knowledge relating to the causes and impacts of climate change and in developing and strengthening emission reduction standards and other preventative and adaptation measures based on such scientific knowledge. States shall facilitate the transfer of such scientific knowledge to the States most vulnerable to climate change, if requested.**
- 5. States shall jointly monitor, through an appropriate international or regional organisation, whether emission reduction standards are fulfilled and whether other preventative and adaptation measures are taken to address climate change.**
- 6. To the extent a disaster attributable to climate change exceeds a State's response capacity, States shall cooperate with each other and competent international organisations to provide assistance.**
- 7. In order to respond to new threats to international peace and security attributable to climate change and its adverse effects, States shall adopt new legal frameworks to deal adequately with all aspects of the resulting situation.**
- 8. States shall continuously review and develop the legal and institutional framework of international law to ensure its adequacy to address climate change and its adverse effects.**

Commentary

(1) Draft Article 8 addresses the application of the principle of international cooperation to climate change and its adverse impacts. International cooperation describes the effort of States to accomplish an objective by joint action, where the actions of a single State cannot achieve the same result.¹⁵⁵ While the precise scope and status of the principle under customary law remain controversial¹⁵⁶ it constitutes an underlying general legal principle of international law that provides normative direction to States. The concept has been articulated as ‘States have the duty to cooperate with one another...in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations’.¹⁵⁷

(2) Contemporary international law has largely developed as ‘the international law of cooperation’.¹⁵⁸ The principle of cooperation played a particularly important role in States’ efforts to address common environmental problems and the resulting development of international environmental law to control, prevent, reduce and eliminate the adverse impacts of human activities conducted in all spheres.¹⁵⁹ Principle 24 of Stockholm Declaration on Human Environment provides that ‘International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing’.

(3) In the climate change context the principle of cooperation underpins almost all aspects of State efforts to deal with a common concern of humankind. While *paragraph 1* of draft Article 8 reiterates the overarching general principle, *paragraphs 2 to 5* address its relevance to the wider international legal framework on climate – mainly the FCCC, Kyoto Protocol, related initiatives and the ongoing negotiations. *Paragraphs 6 to 8*, in comparison, focus on the application of the principle outside the current legal regime on climate. If global mitigation and adaptation efforts fail and/or the ongoing negotiations do not deliver meaningful

¹⁵⁵ R Wolfrum, ‘Cooperation’, in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, (2012, Oxford University Press, Oxford), 783, para.2.

¹⁵⁶ *Ibid.* at para. 25; J Delbrück, ‘The International Obligation to Cooperate - an Empty Shell or A Hard Law Principle of International Law?- a Critical Look at a Much Debated Paradigm of Modern International Law’, in H P Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity Liber Amicorum Rüdiger Wolfrum*, (2012, Martinus Nijhoff Publishers, Leiden), 15-16.

¹⁵⁷ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (Oct. 24, 1970), principle 4.

¹⁵⁸ W Friedmann, *The Changing Structure of International Law*, (1964, Columbia University Press, New York).

¹⁵⁹ Stockholm Declaration (see footnote 93 above), principle 24.

outcomes, the principle of cooperation can provide important guidance to the international community.

(4) Climate change represents the accumulation of complex and synergetic effects of diverse contributory factors involving different pollutants and polluters, activities and processes in all parts of the world. Even extremely ambitious mitigation efforts by individual countries can only have a limited impact. *Paragraph 2* of draft Article 8 therefore states the obvious. But while the principle of international cooperation traditionally applies between States, it also requires States to cooperate with other actors – the UN, other intergovernmental organisations, the International Red Cross and Red Crescent and relevant non-governmental organisations. The reference to ‘competent international organisation’ in *paragraph 1* is not meant to preclude other stakeholders and entities such as the UN Environment Programme or subsidiary convention bodies.

(5) Principle 27 of the Rio Declaration extends the scope of international cooperation even further when it states: ‘States 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’. In less explicit terms the FCCC recognises that human behaviour is at the centre of global warming.¹⁶⁰ Consequently, non-state actors such as the industry, civil society and academia all have a potential role to play in addressing a common concern of humankind.

(6) The United Nations General Assembly has often called upon States to cooperate in the development of international law¹⁶¹ and many MEAs contain explicit provisions obliging parties to cooperate in the further development of rules and standards of environmental protection in the relevant subject area.¹⁶² They are also expected to take steps in collaboration with others to achieve the objectives of an international agreement.¹⁶³ Under the FCCC, Annex I Parties commit themselves to a continuous review and law-making process ‘until the objective of the

¹⁶⁰ FCCC, preambular recitals 1 and 6.

¹⁶¹ UN General Assembly, ‘International Co-operation in the peaceful uses of outer space’, UN Doc A/Res/1802 (XVII) (Dec. 14, 1962), Section I, para. 2; UN General Assembly, ‘Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction’, UN Doc A/Res/2749 (XXV) (Dec. 17, 1970), para. 11.

¹⁶² Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 UNTS 323, *reprinted in* (1987) 26 ILM 1529, art. 2, para. 2(c); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 UNTS 126, *reprinted in* (1989) 28 ILM 657, art. 12.

¹⁶³ ICESCR (see footnote 20 above), art. 2, para. 1; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3, *reprinted in* (1982) 21 ILM 1261, arts 143 and 242 to 244; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 UNTS 241, *reprinted in* (1997) 36 ILM 1507, art. 6.

Convention is met'.¹⁶⁴ Thus, the FCCC creates a framework for the application of the principle of international cooperation for the gradual development and implementation of the international legal and governance framework on climate change.

(7) *Paragraph 3* of draft Article 8 reflects that international cooperation on climate change does not operate in isolation and is subject to and further shaped by other relevant principles, in particular CBDRRC. While all countries benefit from information sharing, developing countries, in particular, need access to expertise and financial and technical resources in order to develop appropriate climate change response measures. Under the FCCC the extent to which developing country Parties have to implement their commitments is contingent upon the provision of financial resources and the transfer of technology.¹⁶⁵ Equally, industrialised countries are expected to cover the incremental costs of national or collaborative measures and projects.¹⁶⁶ Thus, cooperation in the climate context is characterised by the responsibility of industrialised countries to shoulder a larger share of the burden as well as take the lead. This climate specific approach to international cooperation is also reflected in the Kyoto Protocol.¹⁶⁷

(8) The ILC in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities considered the principle of international cooperation as a foundational concept for the obligation to prevent transboundary environmental harm.¹⁶⁸ Reinforced by the principle of precaution, the principle of prevention serves as a legal basis for States to cooperate in further enhancing scientific findings relating to climate change and in joint efforts based on such findings. It also extends to taking appropriate measures to identify activities that involve such a risk,¹⁶⁹ and the need to review their obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge.¹⁷⁰ This is addressed in *paragraphs 4 and 5* of draft Article 8.

(9) The FCCC elaborates on specific collaborative activities and approaches. This includes technical cooperation, the conservation and enhancement of sinks and reservoirs, preparations for the adaptation to climate change impacts and research.¹⁷¹ Building on the provisions of the FCCC and the Kyoto Protocol, countries

¹⁶⁴ FCCC, art. 4, para. 2(d).

¹⁶⁵ FCCC, art. 4, para. 7.

¹⁶⁶ FCCC, art. 4, para. 3 and art. 12.

¹⁶⁷ Kyoto Protocol (see footnote 38 above), art. 2, para. 1(b) and art. 11.

¹⁶⁸ ILC Draft Articles (see footnote 135 above), 155-156.

¹⁶⁹ *Ibid.* at 154.

¹⁷⁰ *Ibid.* at 163.

¹⁷¹ FCCC, art. 4, para. 1(c)-(f), (g) and (h) and art. 5.

have regularly emphasised the need to strengthen international cooperation on climate science and technology and there is an ever-increasing number of multilateral and bilateral collaborations that promote clean and efficient technologies and the sharing of scientific information. This includes the Global Methane Initiative,¹⁷² the Carbon Sequestration Leadership Forum¹⁷³ and the Group on Earth Observations¹⁷⁴ to coordinate climate observations throughout the world.

(10) However, mitigation efforts are failing and climate change is rapidly advancing. The effects are already felt in many regions of the world, and dangerous anthropogenic interference with the climate system may be unavoidable. In the FCCC negotiations, this is reflected in the debate on loss and damage associated with the impacts of climate change in developing countries that are particularly vulnerable. Although an institutional mechanism for loss and damage associated with climate change has been formally established its precise scope and functions remain unclear and will only develop over time.¹⁷⁵ *Paragraphs 6, 7 and 8* therefore specifically address the application of the principle of international cooperation outside the existing climate change regime.

(11) The ILC has provisionally adopted several draft articles on the protection of persons in the event of disaster.¹⁷⁶ The draft articles provide that in order to respond to a disaster States 'shall, as appropriate' cooperate among themselves and with relevant intergovernmental and non-governmental organisations.¹⁷⁷ Although not all climate-related disasters may meet the definition used by the Commission ('calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society') *paragraph 6* reiterates the basic rule on joint international relief efforts. Disaster response shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.¹⁷⁸

¹⁷² For further details about the Global Methane Initiative, see, <<http://www.globalmethane.org>>.

¹⁷³ For further details about the Carbon Sequestration Leadership Forum, see, <<http://www.cslforum.org>>.

¹⁷⁴ For further details about the Group on Earth Observations, see, <<http://www.earthobservations.org>>.

¹⁷⁵ Decision 3/CP.18 (see footnote 114 above) and Decision -/CP.19 (see footnote 115 above).

¹⁷⁶ International Law Commission, Report of the International Law Commission, sixty-fourth session, 7 May–1 June and 2 July–3 August 2012, Draft articles on the protection of persons in the event of disaster, UN GAOR Supplement No. 10, UN Doc A/67/10.

¹⁷⁷ *Ibid.* at art 5.

¹⁷⁸ *Ibid.* at art. 6.

(12) Climate change places additional pressure on resources and creates instability in States that are already vulnerable from past conflict and poverty. It also threatens the territorial integrity of coastal and, in particular, low-lying island States. *Paragraph 7* reflects the fact that climate change is, therefore, increasingly perceived in the context of international peace and security. Although several countries have challenged this perception and consider the FCCC the only appropriate forum for deliberations,¹⁷⁹ climate change has been taken before the UN Security Council on at least three occasions.¹⁸⁰ In order to respond to new risks and dynamics of conflict, States may have to revise traditional concepts of international law (e.g. with regard to statehood criteria, maritime boundaries or refugees) and further cooperate to fill existing and emerging legal gaps.

(13) Migration, for example, is a natural adaptation strategy, but people forcibly displaced by climate change do not enjoy specific protection under international law.¹⁸¹ 'Migration' does not trigger international legal duties beyond States' obligations under human rights law generally, which are owed to all people within their territory or jurisdiction.¹⁸² Cross-border movement due to climate change or natural disasters is not covered by the international protection regime.¹⁸³ Exceptionally such movement is covered under the complementary or subsidiary protection measures some states or regions have adopted.¹⁸⁴

(14) The international community must cooperate to address climate change migration more coherently by meeting the victims' protection needs. In general, the humanitarian assistance and human rights communities address the relationship between States and individuals, whereas international environmental law focuses on the State-to-State relationships. There are, however, areas that overlap, specifically when it comes to adaptation.¹⁸⁵ The international community therefore needs to

¹⁷⁹ See for example the UN press release following the meeting of the UN Security Council on 15 February 2013 available at, <http://www.un.org/News/briefings/docs/2013/130215_MI.doc.htm>.

¹⁸⁰ On 17 April 2007 (as part of a debate on the relationship between energy, security and climate initiated by the United Kingdom), on 20 July 2011 (under the agenda item "Maintenance of international peace and security") and on 15 February 2013, in an informal non-public "Arria Formula" meeting.

¹⁸¹ J McAdam, *Climate Change, Forced Migration, and International Law*, (2012, Oxford University Press, Kindle Edition 1), 6. The Cancun Agreements only *invite* Parties to enhance action on adaptation by undertaking, *inter alia*, '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced ... displacement, migration ..., where appropriate, at the national, regional and international levels', Cancun Agreements (LCA) (see footnote 37 above), para. 14(f).

¹⁸² McAdam, *ibid*.

¹⁸³ *Ibid*, 5.

¹⁸⁴ *Ibid*. 112. McAdam highlights Sweden and Finland as examples, and specifies that environmental disasters are covered under 'otherwise need of [refugee-like] protection' in the Swedish Alien Act 2005, Ch.4 Sec.2, para 3.

¹⁸⁵ McAdam (see footnote 181 above), 16.

cooperate to improve the ability of the most vulnerable countries to cope with threats and challenges posed by climate change. If movement becomes necessary, the internally displaced have a right to protection by their own State. The international humanitarian community has produced the non-binding Guiding Principles on Internal Displacement¹⁸⁶ which only addresses internal displacement, but there is no framework to address cross-border migration and displacement.

(15) Addressing existing lacunae in international law and promoting the development of international law, including treaty making, is one of the principal functions of the principle of international cooperation.¹⁸⁷ From the outset the FCCC has included a duty for the Parties to review the legal framework on climate change¹⁸⁸ and the need for its gradual development and extension is reflected in *paragraph 2* of Draft Article 8. *Paragraph 8* emphasises the continued need to evaluate global governance frameworks in general for their adequacy and for further law-making outside the traditional climate change arena if, for example, the existing framework fails to deliver or new problems arise.

Draft Article 9. Good Faith

- 1. States commit themselves to act in good faith in addressing climate change and its adverse effects and to achieve internationally agreed objectives. This includes their good faith commitment to engage in constant monitoring and supervision both at the domestic and international levels to ensure that these objectives are met.**
- 2. The principle of good faiths commits States in negotiations on further legal instruments on climate change and its adverse effects not to insist on their own position without contemplating any modification of it. A State shall faithfully execute unilateral statements declarative of that State's climate policies and measures that generate legitimate expectations among other States.**

Commentary

¹⁸⁶ Guiding Principles on Internal Displacement, available at, <<http://www.idpguidingprinciples.org/>>. However, these principles only deal with forced displacement, not voluntary displacement which could be the situation in cases of slow-onset climate change.

¹⁸⁷ See above draft Article 8 paragraph 2 and commentary.

¹⁸⁸ FCCC, art. 4, para. 2(d).

(1) The concept of good faith, through judicial pronouncements and State practice, has come to acquire concrete legal content and can be considered as a legal principle.¹⁸⁹ In general, the principle of good faith needs no explicit mention in a treaty because it is an implicit foundation for all treaties.¹⁹⁰ As a normative foundation, the principle of good faith in the context of the legal regime relating to climate change plays a distinctive role in its development, implementation and compliance.

(2) The legal regime relating to climate change requires States ‘to co-operate in good faith to promote [its] objectives and purposes’.¹⁹¹ *Paragraph 1* states this overarching normative principle of good faith. Parties to the FCCC have agreed to uphold ‘the ultimate objective’ as provided in FCCC Article 2. This objective has now been elaborated as requiring ‘deep reduction in global greenhouse gas emissions required to hold the increase in global average temperature below 2°C above preindustrial levels’.¹⁹²

(3) *Paragraph 2* stipulates the normative effect of the principle of good faith in law-making and regime evolution. The obligation to negotiate or consult in good faith is recognised as a concrete expression of the principle of good faith.¹⁹³ By committing to ‘a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the United Nations Framework Convention on Climate Change applicable to all Parties’,¹⁹⁴ the members of the legal regime relating to climate change have the good faith obligation ‘to conduct themselves [so] that the negotiations are meaningful, which will not be the case when [any of them] insists upon its own position without contemplating any modification of it’, as pronounced by the ICJ.¹⁹⁵

¹⁸⁹ *Case concerning the land and maritime boundary between Cameroon and Nigeria* (Cameroon v Nigeria) Preliminary Objections, 1998 ICJ Reports 275, para. 38. See generally, R Kolb, *La bonne foi en droit international public : contribution à l'étude des principes généraux de droit*, (2000, PUF, Paris); R Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, (2006) 53(1) *Neth. Int'l L. Rev.* 1.

¹⁹⁰ A D'Amato, 'Good Faith', in R Bernhardt (ed), *Encyclopedia of Public International Law*, Instalment 7, (1984, Elsevier Science Publisher, Amsterdam),¹⁰⁸.

¹⁹¹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, 1980 ICJ Reports 73, para. 49.

¹⁹² Decision 1/CP.18, 'Agreed outcome pursuant to the Bali Action Plan', in FCCC/CP/2012/8/Add.1 (Feb. 28, 2013), Section I, para. 1.

¹⁹³ *Case concerning delimitation of the maritime boundary in the Gulf of Maine area*, (Canada/United States of America), 1984 ICJ Reports 246, para. 87 and para. 112.

¹⁹⁴ Durban Platform (see footnote 72 above), para. 2.

¹⁹⁵ *North Sea Continental Shelf Cases*, (Germany/Denmark, Germany/Netherlands), 1969 ICJ Reports 3, para. 85(a).

(4) In addition, the ICJ recognised that, under certain conditions, States may be legally bound by their unilateral declarations based on good faith.¹⁹⁶ This is an example of the principle of good faith functioning to protect the legitimate expectations of others.¹⁹⁷ For example, the Annex I Parties' implementation of their quantified economy-wide emission reduction targets and non-Annex I Parties' implementation of their nationally appropriate mitigation actions as communicated by them and contained in official FCCC documents¹⁹⁸ may generate legitimate expectations that these targets and actions will be met and undertaken. The elaborate system established by the Cancun Agreements for the institutional implementation of these actions and commitments greatly strengthens such expectations and, consequently, the normative force of these unilateral actions through the operation of the principle of good faith. By protecting the legitimate expectations of the members, the same principle provides a certain normative force to the Parties' unilateral actions pronounced openly in the regime, the implementation of which are ensured through its institutions.

Draft Article 10. Inter-Relationship

1. In order to effectively address climate change and its adverse effects, States shall formulate, elaborate and implement international law relating to climate change in a mutually supportive manner with other relevant international law.

2. States, in cooperation with relevant international organisations, shall ensure that consideration of climate change mitigation and adaptation is integrated into their law, policies and actions at all relevant levels, in accordance with draft Article 3.

3. According to draft Article 8, States shall cooperate with each other to implement the inter-relationship principle in all areas of international law, whenever necessary, as illustrated in the following areas:

(a) *Climate Change and International Trade and Investment: States may take measures to address climate change and its adverse effects, provided that*

¹⁹⁶ *Nuclear Tests Case*, (Australia v France), 1974 ICJ Reports 253, 268, para. 46.

¹⁹⁷ On 'good faith as principle protecting legitimate expectations', see Kolb (2006) (see footnote 189 above), 20-24.

¹⁹⁸ Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention, FCCC/SB/2011/INF.1/Rev.1 (June 7, 2001); and Compilation of Information on Nationally Appropriate Mitigation Actions to be Implemented by Parties not Included in Annex I to the Convention, FCCC/AWGLCA/2011/INF.1 (Mar. 18, 2011).

they shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. In order to prevent any inconsistency or potential conflict, States shall ensure that legal progress regarding climate, trade, and investment in ongoing negotiations conforms to the principle of mutual supportiveness.

(b) *Climate Change and International Human Rights Law:* States and competent international organisations shall respect international human rights when developing and implementing policies and actions at international, national, and subnational levels regarding climate change. In developing and implementing these policies and actions, States shall take into account the differences in vulnerability to climate change of their populations, particularly indigenous peoples, within their borders and take measures to ensure that all their peoples' rights are fully protected.

(c) *Climate Change and Law of the Sea:* States and competent international organisations shall apply, interpret, implement and enforce their rights and obligations under the Law of the Sea in such a manner so as to effectively addressing climate change and its adverse effects. States and competent international organisations shall elaborate and implement international rules as well as national and regional policies and measures relevant to climate change in a manner consistent with rights and obligations under the law of the sea related instruments.

Commentary

(1) The 'principle of integration and inter-relationship, in particular in relation to human rights and social, economic and environmental objectives', is perhaps the most essential of the seven principles of sustainable development identified by the ILA in its 2002 New Delhi Declaration.¹⁹⁹ The notion of inter-relationship reflects the interdependence of social, economic, and environmental issues as well as human rights, and lies at the very foundation of the concept of sustainable development.

(2) The principle of inter-relationship refers to inter-linkages between climate law and laws relating to other environmental issues such as ozone depletion and biodiversity protection, as well as between climate change law and laws of other areas such as trade and human rights. Conflict between them should be avoided as it will impede effective implementation of climate actions and hinder the achievement of other legitimate objectives of the international society. Possibilities for achieving multiple benefits will increase, if policies and measures are designed in

¹⁹⁹ New Delhi Declaration (see footnote 10 above).

a mutually supportive manner. It is thus critically important that the elaboration and implementation of climate change law should be undertaken in a mutually supportive manner, taking into account inter-linkages between issues.

(3) The notion of mutual supportiveness first appeared in the international arena in Agenda 21, which calls upon States to strive to ‘promote and support policies, domestic and international, that make economic growth and environmental mutually supportive’.²⁰⁰ In the context of trade and environment, the 2001 Doha Ministerial Declaration stipulates the conviction of States that ‘the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive’.²⁰¹ FCCC Article 3, paragraph 5 reflects this notion.

(4) *Paragraph 1* of draft Article 10 confirms the duty of States to implement international law relating to climate change in a mutually supportive manner with other relevant international laws. This duty is relevant to the interpretative principle of harmonisation: ‘it is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations’.²⁰² Draft Article 10 also confirms the duty of States to formulate and elaborate international law relating to climate change in a mutually supportive manner with other relevant international law. It requires States to pursue negotiations in good faith with a view to reaching an agreement on such international laws²⁰³.

(5) *Paragraph 2* sets out the obligation of States to integrate climate change considerations into their laws, policies and actions. This is an application of the sustainable development principle of integration in the context of inter-relationship. The duty addresses integration of climate change considerations into the laws, policies and actions of States not only at the local and national levels, but also at the international level, such as the overseas development assistance policy.

(6) *Paragraph 3* supplements draft Article 8, stipulating the duty to cooperate to implement the inter-relationship principle. It amplifies and complements the requirements of draft article 8. It is of particular importance considering the cross-

²⁰⁰ Agenda 21, Report of the UN Conference on Environment and Development, A/CONF.151/26 (Vol. I, II and III) (June 3-14, 1992), para. 2.9.

²⁰¹ Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1 (Nov. 20, 2001).

²⁰² International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702 (July 18, 2006), 8.

²⁰³ R Pavoni, *Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?*, (2010) 21(3) Eur. J. Int’l L. 649-679.

cutting nature of climate change, resulting potentially in numerous inter-linkages, within and outside the field of international environmental law.

(7) While draft Article 10 applies to all areas of international law, these commentaries highlight selected areas outside international environmental law. These are of particular importance, but are intended to be illustrative nature.

(8) *International Trade and Investment Law*: Neither the FCCC nor the Kyoto Protocol should be considered as conflicting with WTO law *prima facie*. FCCC Article 3, paragraph 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', thus reflecting one of the major principles of the WTO agreements.²⁰⁴ The principle is repeated in the Cancun Agreements.²⁰⁵ In trade law, the Marrakesh Agreement establishing the WTO refers to sustainable development and promotes trade liberalisation in order to ensure that it goes hand in hand with environmental and social objectives.²⁰⁶ There is flexibility under the WTO rules to address potential conflicts between these two regimes, by integrating environmental protection at the core of WTO rules (i.e. in the assessment of the likeness of products, extending the findings of the *Asbestos* case²⁰⁷) or using general exceptions such as those under the GATT Article XX. In addition, the current Doha round of the WTO negotiations addresses the relationship between the WTO and MEAs, such as the FCCC, with a view to promoting coherence and mutual supportiveness between trade and climate change regimes. Thus, as *paragraph 3 subparagraph (a)* of draft Article 10 stipulates, States have the right to take measures to address climate change and its adverse effects, provided that they shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

(9) Conflicts may arise when two different legal regimes deal with the same subject matter. In cases where at least one of the regimes allows Parties to engage in certain behaviour ('The Contracting Parties may'), conflict can be avoided if the Parties behave carefully. However, if the regimes impose conflicting legal obligations ('The Contracting Parties shall'), it may be difficult, if not impossible, to avoid conflict.²⁰⁸ Article 30 of the VCLT deals with such potential conflicts quite laconically as already indicated in the Second Report of the Committee, but does not resolve all

²⁰⁴ See also, Kyoto Protocol (see footnote 38 above), art. 2, para. 3.

²⁰⁵ The Cancun Agreements (LCA) (see footnote 37 above), para. 90.

²⁰⁶ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154, *reprinted in* (1994) 33 ILM 1144, preamble.

²⁰⁷ European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R (Mar. 12, 2001).

²⁰⁸ J Pauwelyn, *Conflict of Norms in Public International Law*, (2003, Cambridge University Press, Cambridge), 179.

the delicate issues that emerge in this context. It is worth noting that in practice VCLT Article 30 has had no application in case law and negotiations. However, the work of judicial bodies is important although available tools are not always perfect or effective.

(10) In practice conflicts may arise between international trade law and domestic measures introduced to implement international commitments on emission reduction. Climate change policies and measures may intersect with international trade typically in the following three different ways: in relation to price and market mechanisms aimed at internalising environmental costs of GHG emissions (domestic or border measures); in relation to financial measures such as subsidies to promote the development and deployment of climate-friendly goods and technologies; and, in relation to technical requirements to promote the use of climate-friendly goods and technologies.²⁰⁹ Although the WTO-UNEP Report on Trade and Climate Change argues that ‘mitigation measures should be designed and implemented in a manner that ensures that trade and climate policies are mutually supportive’,²¹⁰ conflicts may nonetheless arise.

(11) One of the important approaches available to prevent possible conflicts involves interpreting relevant treaty provisions in a ‘harmonizing’ manner.²¹¹ A trade restrictive measure based on the climate change regime, for instance, may be justified under the WTO regime, if one interprets the Article XX exceptions to the GATT in a way that allows synergy between the two treaty regimes. In adopting this approach, VCLT Article 31, paragraph 3(c) is of particular importance. It provides a tool to avoid the ‘clinical isolation’ of WTO law from public international law.²¹² According to the Study Group of the ILC on Fragmentation of International Law, VCLT Article 31, paragraph (3)(c) is based on the ‘principle of systemic integration’.²¹³ The Study Group emphasised the need to take into account other rules that might have a bearing on a case in interpreting the text of an international treaty.²¹⁴ The WTO Panel in the *EC-Biotech Products* report, however, stated that ‘the parties’ under Article 31, paragraph 3(c) should be interpreted as ‘all the parties to the treaty which is being interpreted’ and refused to take into account the CBD and the Cartagena

²⁰⁹ L. Tamiotti et al, *Trade and Climate Change, A report by the United Nations Environment Programme and the World Trade Organization*, (2009, World Trade Organisation, Geneva), 88.

²¹⁰ *Ibid.* at v.

²¹¹ E Canal-Forgues, *Le règlement des différends à l’OMC*, (2009, 3rd ed, Bruylant, Brussels).

²¹² United States — Standards for Reformulated and Conventional Gasoline, AB-1996-1, Report of the Appellate Body, WT/DS2/AB/R (Apr. 29, 1996).

²¹³ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.628 (Aug. 1, 2002), paras 410-480.

²¹⁴ *Ibid.*

Protocol while interpreting the WTO agreements.²¹⁵ This issue has not been finally resolved by the Appellate Body. In the climate context it is worth noting that not all Parties to the FCCC or the Kyoto Protocol are members of the WTO.

(12) Historically, the Appellate Body has used VCLT Article 31, paragraph 1 to take into account international agreements negotiated outside the WTO. In this sense, VCLT Article 31, paragraph 1 promotes an interpretative approach that takes into account other international law, but only to a limited extent: other international agreements would be applied not as 'applicable law' but as part of the factual matrix, and therefore at the same level as, for example, resort to dictionaries.²¹⁶

(13) Although interpretative solutions to possible conflicts may be applied, as the second sentence of *paragraph 3 subparagraph (a)* of draft article 10 suggests, in ongoing or future negotiations under the WTO and climate change regime, States should be guided by the principle of mutual supportiveness to prevent any inconsistencies or potential conflicts between future international agreements.

(14) *International Human Rights Law*: The reference to 'international human rights' in *paragraph 3 subparagraph (b)* to draft Article 10 is intended to include the substantive and procedural human rights that international bodies have recognised as relevant to climate change. Specifically, the UN Human Rights Council (HRC) has recognised that climate change has implications for the enjoyment of substantive human rights with the adoption of Resolution 7/23 in 2008.²¹⁷ In Resolution 10/4,²¹⁸ it noted that climate change impacts a range of substantive human rights, including the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing and access to safe drinking water and sanitation.²¹⁹ Each of these rights applicable to climate change is included in an array of human rights instruments.

(15) In addition to these substantive rights highlighted by the HRC, several procedural rights are relevant to the international human rights protections referred to in *paragraph 3 subparagraph (b)* to draft Article 10. The Office of the High

²¹⁵ European Communities – Measures Affecting the Approval and Marketing of Biotech Products, Panel Report, WT/DS292/DS293/R (Sept. 29, 2010); United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R (Oct. 12, 1998). S Maljean-Dubois, *The Phantom of Clinical Isolation: Which Articulation between WTO Rules and Other International Instruments and Principles? About the EC-Biotech Case*, (2008) 5 *Chung-Hsing U. L. Rev.* 127-143.

²¹⁶ As suggested by the US-Shrimp Appellate Body Report and the EC-Biotech Panel Report, *ibid.*

²¹⁷ Human Rights Council, Resolution 7/23 Human rights and climate change (Mar. 28, 2008).

²¹⁸ As reiterated in Resolution adopted by Human Rights Council, Resolution 18/22 Human Rights and Climate Change (Oct. 17, 2011).

²¹⁹ Human Rights Council, Resolution 10/4 Human rights and climate change (Mar. 25, 2009), preamble.

Commissioner on Human Rights (OHCHR) indicated in the context of economic, social, and cultural rights that 'climate change will place an additional burden on the resources available to States'²²⁰ and formulated relevant obligations for States to comply with the ICESCR. It highlighted key procedural rights applicable to climate change as including access to information and public participation in decision-making as referred to in Article 6 of the FCCC.²²¹ In this context, the emerging principle of good governance may also be applicable due to its focus on transparent and accountable management within States, between States and within international governmental organisations and non-governmental organisations.²²²

(16) In accordance with *paragraph 2* of draft Article 10, *paragraph 3 subparagraph (b)* of draft Article 10 requires States to respect human rights obligations in the development and implementation of law and policy related to climate change. The paragraph focuses on international, national, and subnational levels because development and implementation issues relevant to international human rights occur at each of these levels. In requiring States to develop and implement international human rights, the section recognises that barriers to such development and implementation may arise because, at times, establishing a sufficiently precise causal nexus between specific greenhouse gas emissions of individual States and particular alleged human rights violations to meet a State's legal causation requirements may be difficult. In addition, in places facing many other human rights problems, disaggregating the impacts of climate change from other contributing factors to environmental degradation may pose difficulties.²²³ As the OHCHR explains: '[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense'.²²⁴ The Report goes on to note how the multiplicity of causes for environmental degradation and the difficulty of relating specific effects to historic emissions in particular countries make attributing responsibility to any one State problematic. However, in recent years, a number of legal commentators have increasingly argued for the need for conceptions of causality that can address complex phenomena such as climate

²²⁰ 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), para. 75.

²²¹ *Ibid.* at paras 78-79.

²²² New Delhi Declaration (see footnote 10 above), principle 6.

²²³ E Cameron, *Development, Climate Change and Human Rights: From the Margins to the Mainstream?* Social Development Papers, Paper No. 123, (2011, The World Bank, Washington DC), 2.

²²⁴ Report of the Office of the United Nations High Commissioner for Human Rights (see footnote 220 above), para. 70.

change; where such approaches to causation are adopted, causation may serve as less of a barrier.²²⁵

(17) In implementing and developing international human rights under *paragraph 3 subparagraph (b)* of draft Article 10, States may also face barriers related to the issue of extraterritorial application of human rights obligations. Failure by developed States to regulate or control greenhouse gas emissions could amount to breaches of human rights obligations domestically,²²⁶ but the application of obligations to protect human rights from environmental harm extraterritorially is contested. The case law on extraterritoriality of human rights mainly involves occupation or control of territory,²²⁷ and is not helpful to the very different setting of climate change. *Paragraph 3 subparagraph (b)* of draft Article 10 therefore refers to the issue of inter-relationship not only at the national but also at the international level.²²⁸

(18) *Paragraph 3 subparagraph (b)* of draft Article 10 refers to the obligation to take the special position of vulnerable groups, in particular indigenous peoples, into account in accordance with draft Articles 5, 6 and 8. In making such a reference, the paragraph recognises that the above-listed human rights apply to indigenous peoples. However, the paragraph focuses on indigenous peoples in particular because they have additional rights relevant to climate change due to international legal recognition of indigenous peoples' land rights based in their special relationship with land. When climate change impacts land with which indigenous peoples have a special relationship, these impacts provide the basis for an additional type of human rights claim. International bodies have accordingly provided additional recognition of indigenous peoples' land rights.²²⁹ In addition, indigenous peoples have brought human rights claims regarding climate change impacts to the Inter-American Commission on Human Rights. In 2005, a petition on behalf of US and Canadian Inuit delineated US failures to address greenhouse gas emissions adequately, the severe consequences for the Inuit due to the resulting climate change, and the ways in which these impacts violate rights protected under the American Declaration of the

²²⁵ W C G Burns, *A Voice for the Fish? Climate Change Litigation and Potential Causes of Action for Impacts Under the United Nations Fish Stocks Agreements*, (2008) 48 Santa Clara L. Rev. 605, 639-41; and E M Penalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, (1998) 38 Natural Res. L. J. 563, 582-85.

²²⁶ See, A E Boyle, *Human Rights or Environmental Rights? A Reassessment*, (2007) 18 Fordham Env'l L. Rev. 471-511.

²²⁷ See for example *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ Reports 136, para. 109.

²²⁸ T Schulze, H Wang-Helmreich, W Sterk, *Human Rights in a Changing Climate* (2011, FIAN International, Heidelberg), 26; and S I Skogly, *Extra-National Obligations Towards Economic and Social Rights*, International Council on Human Rights Policy, Council Meeting Background Paper (2002), 1.

²²⁹ Office of the High Commissioner for Human Rights, General Comment No. 23, *The Rights of Minorities* (Art. 27) CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994), para. 7.

Rights and Duties of Man.²³⁰ The Inter-American Commission declined to process the petition, but has taken further action to consider the linkages between human rights and climate change.²³¹

(19) *The Law of the Sea*: Climate change will likely cause adverse impacts on the marine environment such as coral bleaching due to temperature rise and harmful effects on crustaceans due to ocean acidification²³². Certain climate mitigation and adaptation measures may also have significant impacts on the marine environment. For instance, carbon capture and storage (CCS), touted as a mitigation technology that could lead to deep emission reductions, could also if the technology is mishandled and/or mismanaged - significant leakage of stored CO₂ occurs to the ocean, for instance - cause damage to the marine environment²³³. Climate geo-engineering is a problem of a similar nature. In the light of such interdependence between climate change and the marine environment, *paragraph 3 subparagraph (c)* of draft Article 10 requires States and competent international organisations to apply, interpret, implement and enforce their rights and obligations under the existing and evolving law of the sea related instruments in such a manner as to effectively address climate change. States and competent international organisations shall also elaborate and implement international rules as well as national and regional policies and measures relevant to climate change in a manner consistent with rights and obligations under the law of the sea related instruments and by considering their impacts on the marine environment.

(20) Although, there are no specific references to climate change in most of the Law of the Sea instruments, there are rules relevant to climate change both under the UN Convention on the Law of the Sea (LOSC) and under customary law in this field. Among others, States have the obligation to protect and preserve the marine environment (LOSC Article 192); the obligation to take all measures that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities (LOSC Article 194.1); and the obligation to adopt laws and regulations to prevent, reduce and control pollution of the marine

²³⁰ Inuit Petition, 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 (Dec. 7, 2005).

²³¹ Letter from A E Dulitzky, Assistant Executive Secretary, Organisation of American States, to P Crowley, Legal Representative for Sheila Watt-Cloutier, et al., (Nov. 16, 2006) (regarding Petition No. P-1413-05), available at, <<http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>>. Letter from Sheila Watt-Cloutier, Martin Wagner, and Daniel Magraw to Santiago Cantón, Executive Secretary, Inter-American Commission on Human Rights (Jan. 5, 2007). See, Letter from the Organisation of American States to Sheila Watt-Cloutier et al., (Feb. 1, 2007) (regarding Petition No. P-1413-05).

environment from or through the atmosphere (LOSC Article 212.1). The last obligation explicitly provides the legal basis for the International Maritime Organisation (IMO) discussions on extending the emissions capping regime to vessel-sourced emissions.²³⁴ Generally speaking, greenhouse gas emissions constitute part of ‘substances or energy’ introduced by man into the marine environment with deleterious effects.²³⁵ Therefore, at least that aspect of the climate change phenomenon would fall within the ambit of the LOSC.²³⁶

(21) The obligation of compatible interpretation, however, goes beyond any common subject-matter of the two conventions. Although celebrated as a ‘constitution for the oceans’, the Law of the Sea Convention does not have any inherent legal status higher than any other convention, including the FCCC. In an attempt to cover any potential gaps and ensure the integrity of the Law of the Sea regime, LOSC Article 311 attempts to (de)limit the contractual freedom of the parties to conclude any subsequent agreement effectively derogating from the precepts of the LOSC provided that any further obligations to be undertaken would not be ‘incompatible with the effective execution of the object and purpose of [the] Convention’ nor would they ‘affect the application of the basic principles embodied therein’.²³⁷ The compatibility of the two conventions is not in doubt at this level.

(22) There is, however, the possibility of potential conflict in that measures implemented in application of the FCCC prevention and/or mitigation obligations may ‘affect the enjoyment by other States parties of their rights or the performance of their obligations under [the] Convention’. Such potential conflict is already addressed in the VCLT Article 41 of which would effectively bypass, under conditions similar to those set out in Article 311, paragraph 3 last phrase, the *lex posteriori* rule set out in VCLT Article 30, paragraph 5.²³⁸

(23) Even in more recent marine pollution instruments, specific references to climate change remain relatively rare.²³⁹ The principle of inter-relationship, however,

²³⁴ International Convention for the Prevention of Pollution from Ships (MARPOL), Annex VI, Prevention of Air Pollution from Ships, available at, <http://www.imo.org/blast/mainframe.asp?topic_id=233#annexvi> which includes a new chapter on mandatory technical and operational measures to reduce GHG emissions from international shipping,

²³⁵ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3, *reprinted in* (1982) 21 ILM 1261, art. 1, para. 1(4).

²³⁶ A Boyle, *Law of the Sea perspectives on Climate Change*, (2012) 27(4) *The Int’l J. of Marine & Coastal L.* 831, 832-833.

²³⁷ LOSC, art. 311, para. 3.

²³⁸ A Boyle, *Further development of the Law of the Sea Convention: Mechanisms for change*, (2005) 54(3) *Int’l & Comp. L. Qtrly* 563, 576-578; and J Pauwelyn (see footnote 208 above), 310-313.

²³⁹ See, for instance, the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 1976, revised 1995, available at, <http://www.unep.ch/regionalseas/regions/med/t_barcel.htm>, preamble. See also, T Scovazzi, *The*

is adopted in the latest such legal instrument, the 2008 Protocol on Integrated Coastal Zone Management in the Mediterranean Sea.²⁴⁰ It includes express reference to the FCCC and to climate change in preambular paragraphs, and in Article 5, paragraph (e) it identifies the obligation of States parties to ‘prevent and/or reduce the effects ... in particular of climate change’,²⁴¹ as one of the objectives of integrated coastal management. In addition, the geographical coverage of the ICZM Protocol may also depend upon circumstances, that ‘take into account the negative effects of climate change’.²⁴²

(24) A better example of how the principle of interrelationship is embodied in the evolution of existing rules may be found in amendments to cover the regulation of carbon capture and storage (CCS) in law-of-the-sea-related instruments. The Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter adopted in 1996 (1996 Protocol)²⁴³ created in a 2007 amendment a new category in the Annex 1 list of wastes and other matter that may be considered for dumping, thereby allowing the storage of CO₂ in sub-seabed geological formations.²⁴⁴ Subsequently, the Parties to the 1996 Protocol adopted a ‘Risk Assessment and Management Framework for CO₂ Sequestration in Sub-Seabed Geological Structures (CS-SSGS)’²⁴⁵ as well as ‘Specific Guidelines for Assessment of Carbon Dioxide Streams for Disposal into sub-Seabed Geological Formations’²⁴⁶. Both documents create a specific regulatory framework on CCS in accordance with the 1996 Protocol and its principles, including the precautionary principle. The 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)²⁴⁷ also adopted a similar amendment²⁴⁸ to allow carbon storage in

developments within the ‘Barcelona system’ for the protection of the Mediterranean Sea against pollution, (2009) 26 *Annuaire de droit maritime et océanique* 201.

²⁴⁰ Protocol on Integrated Coastal Zone Management in the Mediterranean, OJ 2009 L 34/19 (Feb. 4, 2009) [hereinafter ICZM Protocol]. See also, M Gavouneli, *Mediterranean challenges: Between old problems and new solutions*, (2008) 23(3) *The Int’l J. Maritime & Coastal L.* 477.

²⁴¹ ICZM Protocol, preambular recitals 8 and 5, and art. 5, para. (e).

²⁴² *Ibid.* at art. 3, para. 2(b).

²⁴³ Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, 2006 ATS 11.

²⁴⁴ Resolution LP.1(1) on the Amendment to Include CO₂ Sequestration in Sub-Seabed Geological Formations in Annex 1 to the London Protocol (Nov. 2, 2006).

²⁴⁵ Annex 3 to Report of the Meeting of the SG Intercessional Technical Working Group on CO₂ Sequestration, LC/SG-CO₂ 1/7 (May 3, 2006), endorsed by the Parties, Report of the Twenty-Eighth Consultative Meeting and the First Meeting of the Contracting Parties, LC 28/15 (Dec. 6, 2006), para. 75.

²⁴⁶ Annex 4 to Report of the Twenty-ninth Consultative Meeting and the Second Meeting of the Contracting Parties, LC 34/15 (Dec. 14, 2007), annex 8.

²⁴⁷ Convention for the Protection of the Marine Environment of the North-east Atlantic (OSPAR), adopted on Sept. 21-22, 1992.

²⁴⁸ Amendments of Annex II and Annex III to the Convention in relation to the Storage of Carbon Dioxide Streams in Geological Formations (Annex 4), available at, <www.ospar.org>.

geological formations under the seabed complemented by Guidelines adopted by the OSPAR Commission.²⁴⁹ The elaboration of such specific international rules to incorporate climate consideration and marine environment protection would enhance actions at national and international level to achieve both climate and marine environment protection in a mutually supportive manner.

(25) Indeed, the elaboration of specific regional and national policies and measures relevant to climate change in a manner consistent with rights and obligations under LOS-related instruments constitutes a standard feature of environmental treaties, starting with Part XII LOSC, establishing the specificities whereby the obligation of States parties to carry out their obligations in good faith, under VCLT Article 26, is to be measured.

(26) The last element of the obligation set out in *paragraph 3 subparagraph (c)* of draft Article 10 to consider the impact of any climate-change-relevant policy and measure on the marine environment does not merit discussion as it merely reiterates the by now requirement under general international law to conduct a prior environmental impact assessment.²⁵⁰

²⁴⁹ OSPAR Decision 2007/1 to Prohibit the Storage of Carbon Dioxide Streams in the Water Column or Sea-bed (Annex 5); OSPAR Decision 2007/2 on the Storage of Carbon Dioxide Streams in Geological Formations (Annex 6); OSPAR Guidelines for Risk Assessment and Management of CO₂ Streams in Geological Formations (Annex 7), *ibid.*

²⁵⁰ Sea Bed Advisory Opinion (see footnote 128 above), para. 147, quoting Pulp Mills case (see footnote 35 above), para. 204: ‘... a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource’.