

DRAFT PAPER

GREENHOUSE EQUITY AS THE BASIS FOR FUTURE GLOBAL EMISSION REDUCTIONS: PRAGMATIC PANACEA OR IDEALISTIC IMPEDIMENT?

THEME: CLIMATE JUSTICE

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“International environmental justice, therefore, is a useful lens to analyze the problem of climate change because the costs and benefits of climate change are unevenly distributed. For a just and fair arrangement to be set up, the costs and benefits of climate change must be equally distributed in order to allow more and more countries to cooperate ... No country will be willing to participate in an

agreement that seems unjust or unfair. At stake is the protection of the global environment ..."¹

Introduction

The USA refused to ratify the Kyoto Protocol on the basis that the Protocol exempts developing states from contributing to solving global warming and thus in effect permits them with the right to pollute. Developing states, however, do not want to accept mandatory emission reduction commitments as they argue that they are not responsible for climate change. Furthermore, they do not possess the capacity to address the climate change problem. Developing states argue that they should also be allowed to emit greenhouse gases (GHGs) in pursuance of much needed development, which could alleviate poverty.

It is, however, estimated that more than two thirds of cuts in greenhouse gas emissions, which are needed by 2030, will have to come from developing countries. Pragmatism accordingly dictates global action to ensure the survival of mankind. Developing states will in the long term be the victims of climate change as they in general do not possess the technology to adapt. Thus, tension exists between equity (the right of developing states to pursue development in the same manner as developed states did) and pragmatism (the urgent need for all states to address climate change). The question arises how this tension can be solved through negotiations which would result in post-2012 emission targets. It can be deduced from the United Nations Framework Convention on Climate Change of 1992 (UNFCCC) that future emission reductions should be based on *inter alia* equity and the principle of common but differentiated responsibilities (CBDR). Thus, it may *prima facie* seem that these principles may guide negotiators towards a solution. However, various problems arise in this regard. CBDR is a principle and not a steadfast rule, which means that it does not dictate quantifiable targets. Furthermore, the application of this principle through the

¹ See R Anand *International Environmental Justice A North-South Divide* (2004) 55.

Kyoto Protocol is viewed as an obstruction to a global solution. Thus, it is the main aim of this paper to investigate how equity and CBDR may guide negotiations pursuant to future emission reductions. Therefore, I shall explain "what might be" on the basis of the aforementioned principles. Furthermore, I refer to potential problems that exist in the international structure, which may hamper a global solution. Accordingly, I also acknowledge "what is" from an international relations perspective in order to generate solutions which are realistic. Thus, this paper marries pragmatism and equity in order to suggest a path of survival for humankind.

What might be?

The narrative of the current climate change regime

Article 3 UNFCCC embodies principles which shall guide the actions of the Parties pursuant to the objective and implementation of the provisions of the Convention. It is the ultimate objective of the Convention to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.² Article 3(1) refers to (intergenerational) equity as well as the CBDR principle as it reads that:

“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof”.³

² Article 2.

³ Furthermore, subarticle 4 refers to sustainable development.

The articulated objective of the UNFCCC is also applicable to any related legal instruments that the Conference of the Parties may adopt.⁴ Thus, the Kyoto Protocol of 1997, which was adopted under Article 17 of the Convention, follows the blueprint of the UNFCCC.⁵

The “Bali Action Plan”⁶ affirms the importance of the principles of the UNFCCC and Kyoto Protocol for a future climate change agreement.⁷ The Action Plan predetermines that a long-term goal for emission reductions, pursuant to the objective of the Convention, shall take place in accordance with the principles and the provisions of the UNFCCC and “in particular the principle of common but differentiated responsibilities”.⁸ It is fair to state that post-2012 consensus must be negotiated on the basis of sustainable development, intergenerational equity and in particular CBDR. Thus, negotiations⁹ of emission reductions need to be

⁴ *Ibid.*

⁵ Article 3(1) of the Protocol obliges Parties included in Annex I of the UNFCCC (developed countries) to ensure, individually or jointly, that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases included in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008-2012. In terms of Article 3(2) the Parties are required by 2005 to have made progress in achieving their commitments under the Protocol. Furthermore, Article 12 provides for the possible participation of developing countries in clean development projects (CDM) in furtherance of the obligations of Annex I countries and to assist parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention. Article 10 structures certain obligations of the parties according to CBDR. Article 10(c), for instance, instructs developed countries to “take all practicable steps to promote, facilitate and finance the transfer of, or access to, environmentally sound technologies, know-how, practices and processes ... in particular to developing countries”. For a discussion of various aspects of the Protocol: D Freestone and C Streck (eds.) *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (2005).

⁶ Hereafter Action Plan.

⁷ The preamble makes it clear that the COP resolves to enhance implementation of the UNFCCC in order to achieve its objective “in full accordance with its principles and commitments”. The United Nations Conference on Climate Change (COP 13), which was held in Bali, Indonesia in 2007 adopted the “Bali road map” for a future international agreement. The “Bali road map” includes *inter alia* the Bali Action plan which charts the course for a new negotiation process that addresses climate change post-2012. {Found at: http://unfccc.int/meetings/cop_13/items/4049.php as on 10 August, 2008}

⁸ Hereafter CBDR. See paragraph 1(a) of the Action Plan.

⁹ Article 3(9) of the Kyoto Protocol mandates that “commitments for subsequent periods” will be established by way of amendments to Annex B. These negotiations are set to be concluded at the next COP-meeting in Copenhagen (by the end of 2009). The *Ad Hoc* Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) was established to conduct the process. {Found at http://unfccc.int/meetings/cop_13/items/4049.php as on 10 August, 2008} See

guided by the aforementioned principles.¹⁰ It is therefore important to briefly reflect on the principles in order to determine in which manner these principles may guide negotiations towards a future international agreement.

Principles are the beacons towards the dawn of a new regime?

What is the implication of the statement that negotiations need to be guided by the aforementioned principles? Sustainable development may be viewed as the overarching goal of international environmental law.¹¹ Intergenerational equity is a constituent element¹² of sustainable development and the CBDR principle is a principle that pursues sustainable development.¹³ Thus, a reflection concerning the manner in which the CBDR principle may further intergenerational equity and therefore sustainable development is warranted.

Firstly, it is necessary to understand what equity in international environmental law entails. In accordance with intergenerational equity current residents of the earth hold the earth in trust for future generations and at the same time the present generation is entitled to reap benefits from it.¹⁴ However, it is recognised that wealthier countries have to contribute to the costs incurred by poor countries

for a discussion of the onset of the post-2012 process: C Bausch and M Mehling "Alive and Kicking": The First Meeting of the Parties to the Kyoto Protocol" *RECIEL* (2006) 195 at 196-201.

¹⁰ Principles may form the basis for the negotiation of new treaties. J Verschuuren *Principles of Environmental Law The Ideal of Sustainable Development and the Role of Principles of International, European and National Environmental Law* (2003) 45.

¹¹ The exact nature of sustainable development has been a source of discourse among scholars. See P Lang (ed.) *Sustainable Development and International Law* (1995); P Sands *Principles of International Environmental Law* (2003) 252ff and the dissenting opinion of Judge Weeramantry in the *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ Reports 1997 (Gabčíkovo-Nagymaros Project-case). See, however, Verschuuren n 9 at 24.

¹² Sands above at 253. The New Delhi Principles states that "the principle of equity is central to the attainment of sustainable development." It is interesting to note that this principle is referred to as the "principle of equity and the eradication of poverty". See *International Law Association's Principles of International Law relating to Sustainable Development* (UN Doc. A/57/329), hereafter New Delhi principles. {Found at: <http://www.ilahq.org> as on 11 August, 2008}.

¹³ Paragraph 3 of the New Delhi principles recognises the CBDR principle as one of the seven leading law principles of sustainable development law.

¹⁴ See E B Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989).

in protecting resources for future generations.¹⁵ This is known as intragenerational equity. I have in a previous critical discussion of intergenerational equity illustrated that the different interests of the North and South also may be evident in the distinction between intergenerational and intragenerational equity.¹⁶ The North mostly focuses on the pursuit of intergenerational equity, whereas the South is sceptical of intergenerational equity. The South is of the opinion that it is impossible to reflect on the needs of unknown and uncertain future generations while the largest part of the current generation does not have the means to address their most basic needs. Thus, I came to the conclusion that in our present world equity first needs to be achieved in order to bestow upon future generations an equitable world. This proposal does not negate the interests of future peoples. It entails a disregard for the dualism implicit in our understanding of equity in international environmental law and dictates a re-interpretation of intergenerational equity.

The suggested re-interpretation pays heed to the Brundtland¹⁷ definition of sustainable development as development “that meets the needs of the present without compromising the ability of future generations to meet their own needs.” It is actually the needs and interests of current generations that serve as a point of departure. Thus, in order to pursue future equity, current inequity must be a priority. This amounts to a call for some sort of distributive justice.¹⁸ The process of distributive justice is, however, qualified by the role of future generations.

¹⁵ *Ibid* at 28.

¹⁶ W Scholtz “Intergenerational Equity is not Equity!” (Paper presented at the 5th IUCN Colloquium: Rio+15: A Legal Critique of Ecologically Sustainable Development, 31 May-5 June 2007, Paraty and Rio de Janeiro) The paper will be published in a forthcoming publication of the IUCN. The title of the contribution is: “Equity+15: The dawn of a new (sustainable) international environmental order.”

¹⁷ *Our Common Future* (1987).

¹⁸ See S R Chowdhury, “Intergenerational Equity: Substratum of the Right to Sustainable Development” in: Chowdhury, *The Right to Development in International Law* (1992) 256 at 240. It is not the intent of the author to discuss this issue in detail. Conventional theories of distributive justice focus on benefits, such as wealth. Caney investigates whether this can be extended to environmental burdens and benefits in a global context. S Caney “Cosmopolitan Justice, Responsibility, and Global Climate Change” (2005) *LJIL* 747 at 749. Harris defines distributive justice as a “fair and equitable sharing among countries of benefits, burdens and decision-making authority associated with international relations.” See P G Harris “Defining International

The pivotal role of equity in international environmental law implies that states have differential obligations pursuant to the common goal of sustainable development. Thus, cooperation between states to combat climate change should take place on the basis of differential treatment¹⁹. The principle which most clearly reflects the essence of differential treatment in international environmental law is the principle of common but differentiated responsibility.²⁰ The CBDR principle is based on equity in international environmental law. Therefore the inclusion of obligations, relating to *inter alia* emission reductions, on the basis of the CBDR principle may in theory further intergenerational and intragenerational equity.²¹ The provisions of the Kyoto Protocol serve as an example of the way in which the CBDR principle may guide the negotiation, interpretation and implementation of a treaty. Thus, the Protocol illustrates the manner in which the CBDR principle may give effect to concrete rules.²² If one therefore accepts that future international reductions must be based on the

Distributive Justice: Environmental Considerations” (2000) *International Relations* 55. See in this regard: C R Beitz “Justice and International Relations” in: H S Richardson (ed.) *Opponents and Implications of a Theory of Justice* (1999) 122. The Millennium declaration also affirms the need for distributive justice. See para. I, subpara. 5 of UN GAR 55/2 of 18 September 2000. The issue of distributive justice relates to the question whether more affluent states have some sort of responsibility to relieve the poverty of the South. See the interesting discussion of T Pogge *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002). He argues that the developed Western states have a negative duty to alleviate the poverty of the globally worst-off as Western governments imposes a coercive global order that perpetuates poverty. See 23.

¹⁹ See for a discussion of differential treatment: L Rajamani *Differential Treatment in International Environmental Law* (2006).

²⁰ See M-C Cordonier Segger *et al* “Prospects for principles of international sustainable development law after the WSSD: Common but differentiated responsibilities, precaution and participation” (2003) *RECIEL* 54-68.

²¹ Thus, equity needs to “guide international standard-setting and law-making in the process of promoting a new socio-political order of sustainable development”. See K Ginther, “Comment on the Paper by E B Weiss” in: W Lang (ed.) *Sustainable Development in International Law* (1995) 30. The G 8 leaders agreed to adopt a goal of achieving “at least 50% reduction of global emissions by 2050, recognizing that this global challenge can only be met by a global response, in particular, by the contributions from all major economies, consistent with the principle of common but differentiated responsibilities”. See paragraph 23 of the G8 Hokkaido Toyako Summit Leaders Declaration of 2008. {Found at http://www.g8summit.go.jp/eng/doc/doc080714__en.html as on 12 August 2008}

²² This is in accordance with the view that it is a principle, which may be the source of emerging rules. U Beyerlin “Different types of norms in international environmental law: policies, principles and rules” in D Bodansky, J Brunnée and E Hey (eds.) *The Oxford Handbook of International Environmental Law* (2007) 442.

CBDR principle, then it is safe to say that the current provisions of the Kyoto Protocol may serve as an example for future obligations. Therefore, it may be assumed that developed states need to incur more cumbersome obligations relating to emission reductions. This is especially important in the light of the non-compliance of most developed states. Further differential provisions concerning technology transfer, a cleaner development mechanism, capacity building and financial assistance may be included for the benefit of developing states. On the basis of equity it may then be argued that developing states should not be encumbered with any compulsory emission reductions as they are not responsible²³ for the problem and don't possess the required capability to address the problem.²⁴

Unfortunately the issue is a bit more complex than it seems. Not all states share a uniform approach concerning the interpretation and application of the CBDR principle.²⁵ The debate concerning the application of the CBDR principle in the Kyoto Protocol clearly illustrates this. The primary reason for the refusal of the USA to ratify the Protocol was that it exempted all developing countries from contributing to solving climate change.²⁶ Furthermore, the Protocol was seen as

²³ Anand above at 28. GHGs remain in the atmosphere for decades and therefore developed states have "banked" an even greater percentage of the total responsibility for the climate change problem. See D Hunter, J Salzman and D Zaelke *International Environmental Law and Policy* (2002) 612. A more complex issue is how the burden of climate change should be distributed. See the interesting exposition of Caney n 747-775. He rejects the historical approach to the issue and proposes a hybrid account. See 772-774 for a discussion of the differences and commonalities of the CBDR principle and the hybrid account.

²⁴ Principle 7 of the Rio declaration states that: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command". *Report of the United Nations Conference on Environment and Development* UN Doc A/CONF 151/26 (1992).

²⁵ The USA's main concern with the CBDR principle is the implication that developed states bears legal responsibility for past emissions and that their current capacity should therefore dictate a leading role. See J Brunnée "The United States and International Environmental Law: Living with an Elephant" (2004) *EJIL* 617 at 630.

²⁶ See Fleischer *Press Briefing* {Found at <http://www.whitehouse.gov/news/briefings/20010328.html#Kyoto> Treaty as on 6 August 2007}. See Bush Administration *Global Climate Change Policy Book: Executive Summary* {Found at

detrimental to the US economy. The CBDR principle has furthermore been the recipient of harsh critique from international law scholars, who do not agree with the existence and/or application of this principle in international environmental law.²⁷ Thus, the largest emitter²⁸ of greenhouse gas did not join the Protocol, which of course affects the possibility to find a global solution to a global problem. The cooperation of the USA is essential to global consensus on emission reductions.

It is of course evident that an effective solution to combat climate change also is not possible without some form of participation from developing states, in particular China, India and Brazil.²⁹ It is estimated that more than two thirds of cuts in greenhouse gas emissions, which are needed by 2030, will have to come from developing countries.³⁰ Up to now developing countries have not been willing to accept obligations to limit or to reduce greenhouse gas emissions.³¹ Thus, it may be assumed that developing states ultimately favour an international

<http://www.whitehouse.gov/news/releases/2002/02/climatechange.html> as on 6 August 2007}. It is of course not unthinkable that a new Administration may choose a different, more environmental friendly course and thus ensure American participation. It must, however not be forgotten that the resistance of the USA was already evident during the Clinton Administration. The Byrd-Hagel Resolution indicates that the reluctance to join a global climate change regime could not merely be attributed to the Republican Congress. See for a thorough exposition: Brunnée above 617-649.

²⁷ M Weisslitz "Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential versus Absolute Norms of Compliance and Contribution in the Global Climate Change context" (2002) *Colo J Int'l Env't L & Pol'y* 473 at 480 and C D Stone "Common but Differentiated Responsibilities in International Law" (2004) *Am J Int'l L* 276 at 299.

²⁸ E R De Sombre *The Global Environment And World Politics* (2006) 101. It further seems that the total amount of emissions from the USA continues to rise. See *Global Environmental Change Report* 17 (2005) 3.

²⁹ The G 8 declaration acknowledges this fact as it reads that: "A successful global response to climate change requires a partnership between developing and developed countries. Developing countries' efforts to put in place appropriate national mitigation and adaptation plans to build low carbon, climate resilient economies, should be supported by scaled up assistance from developed countries". See paragraph 29.

³⁰ United Nations Framework Convention on Climate Change (UNFCCC) *Investment and financial flows relevant to the development of an effective and appropriate international response to Climate Change* {Found at http://unfccc.int/cooperation_and_support/financial_mechanism/items/4053.php as on 1 September 2007}.

³¹ L Wicke *Beyond Kyoto – A new global climate certification system* (2005) 64. In general developing states prefer voluntary commitments as well as a transfer of technology from the developed to the developing world. See Anand above at 44.

agreement based on the CBDR principle that does not prescribe mandatory emission reductions. This will also please their self-interest and notion of equity. The USA, in particular, might favour an international agreement which includes mandatory emission reductions for certain developing states. They may opine that the CBDR may be made concrete through other differential treatment provisions.³² Thus, in this instance it seems that the divergence concerning the CBDR principle may also in future result in an *impasse*.

The viewpoint of developing states seems to satisfy the need for equity, but is not very pragmatic as climate change can only be solved through a concerted global effort. It is actually the developing states that are most vulnerable to the effects of climate change.³³ The viewpoint of the USA does not do justice to the fact that they are the largest polluters, but it does reflect some pragmatic thinking. Thus, the question arises how the CBDR can be optimised through a future international agreement in order to further equity.

What is?

I have, in the previous part of the paper, explained that the post-2012 Protocol ought to be based on the CBDR principle, in order to further equity. I have, however, illustrated that this proposal does not guarantee a solution to the problem. States don't share the same views concerning the CBDR principle and equity. Thus, this divergence in opinion results in an *impasse*. This may influence the lives of all of humankind; irrespective of their nationality or residence.

What is called for is a pragmatic approach that also serves equity and induces universal consensus on future GHG reductions. In order to determine "what

³² It is interesting to note that Harris, for instance, argues that Resolution 98 (the "Byrd-Hagel Resolution") "was not a renunciation of the CBDR principle but rather an alternative interpretation of it, albeit a less robust one than the developing countries wanted". See 42.

³³ Anand above at 28 & 29.

might be” in future, cognisance needs to be taken of “what is”. An understanding of the dynamics of the international structure is required.

The ideal climate treaty-negotiating scenario would be where the developed states recognise the need to negotiate an agreement on the basis of equity.³⁴ This may result in an optimal situation of international cooperation between the developing and developed world. This scenario seems unlikely. At present it seems that some of the developed states, in particular the USA, make use of *realpolitik* in order to dictate the provisions of an agreement in order to satisfy self-interest. Such an approach clearly frustrates optimal international cooperation.

International relations (IR) theory may explain the conduct of the USA and shed some light on the behaviour of the role of states relating to climate change negotiations.³⁵ It is the task of political scientists to explain “what is”, and therefore suggest “what might be”. Lawyers primarily explain what might be. Thus, my proposal concerning the role of equity in climate change negotiations (“what might be”) must be tempered by the behaviour of states in the international structure (“what is”) in order to temper my proposal and propose a more realistic “what might be”.

The IR framework has been driven by certain theories. Realism has been the most prominent of these theories.³⁶ Realist schools in general view the

³⁴ This seems to be a central theme of the debate concerning future emission reductions as developing states argue that they are not responsible for the problem and therefore do not need to solve it. Gupta distinguishes between three different hypothetical possibilities. See J Gupta *The Climate Change Convention and Developing Countries: From Conflict to Consensus?* (1997) 176.

³⁵ It is not my intent to discuss IR theory, and its relationship with law in detail. I merely need to allude to the relevance thereof *in casu*. See S D Krasner “International Law and International Relations: Together, Apart, Together?” *Chicago Journal of International Law* (2000) 93-100 and A-M Slaughter, A S Tulumello and S Wood “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship” (1998) *AJIL* 367-397. See, however, the objection of Koskeniemi concerning the American dominance of international relations theory: M Koskeniemi “C Schmitt, H Morgenthau, and the Image of Law in International Relations in: M Byers (ed.) *The Role of Law in International Politics* (2000) 17 at 22.

³⁶ See J Donnelly *Realism and International Relations* (2000).

international system as an anarchic system³⁷ which consists of sovereign states that pursue their own national interest. The overriding “national interest” is national security and state survival. Relations between states are therefore determined by military and economic power.³⁸ Furthermore, there are no universal principles that guide state action and states must follow a pragmatic approach to resolve issues that may arise.³⁹ In accordance with this approach it does seem that the pursuit of self-interest by states, in particular the USA, may have resulted in a lack of action on the climate change issue.⁴⁰ This is because self-interest does not always coincide so as to result in the good for the global environment.⁴¹ States prioritize the preservation of nation-state autonomy and have therefore been unwilling to act as guardians of the global environment.⁴² Governments are reluctant to take long-term interests in account and this

³⁷ Realism provides important insights in state behaviour in environmental negotiations. "Hence, the classic realist explanatory forces of power and state-centrism still provide the broad parameters within which any kind of environmental regime can emerge." See D Armstrong, T Farrel and H Lambert *International Law and International Relations* (2007) 270. Neo-liberal institutionalism views market failure as the primary problem of international politics. In order to deal with market failures states create international institutions. Thus, cooperation may even take place in the absence of a central authority.

³⁸ Liberalism challenges this notion as it was concerned with arguments of interdependence and transnationalism. In terms of liberal thinking outcomes are the result of bargaining among various actors. Thus, it recognizes the importance of non-state actors in the international system. Non-state actors fulfil a very important role in international environmental law. See, for instance, F Yamin "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities" (2001) *RECIEL* 149-162. The primary shortcoming of liberalism was that it could not explain any outcomes *ex ante* due the divergence of interest and the amount of actors. Krasner above at 95.

³⁹ In terms of Constructivism the behaviour of actors in an international society is based on shared norms. It is, however, difficult to demonstrate this empirically as the beliefs of actors must be inductively derived. Krasner above at 98. Falk opines that "a pluralist view of civilizational identity argues that there are notable divergences on matters of values and beliefs." Falk above at 21.

⁴⁰ It would actually be better to refer to the perception of self-interest at a given time as that what is seen as self-interest by a government may not really realise the national interest of a given state in the long-term. Events *ex post facto* may proof that a set course may eventually harm the interest of a state. It is not my intent to suggest that realism is the only perspective that may shed light upon the dynamics of international environmental law, but that the realist approach to the importance of self-interest and the primary role of state actors as well as the absence of universal values may shed light on the issue at hand. Liberal and constructivist approaches are also of importance in order to grasp the dynamics of international environmental law.

⁴¹ A Gillespie *International Environmental Law, Policy and Ethics* (1997) 27. See also J L. Goldsmith & E A Posner *The Limits of International Law* (2005). They argue that international law is the product of states that act rationally to maximize their own interests. Thus, international law is the product of state self-interest. Self-interest may, however, also benefit the environment.

⁴² Werner Scholtz "Northern NGOs, Southern NGOs and International Environmental Law: The common interest of humankind is the interest of Northern mankind!" *SAYIL* (2007).

impedes the adoption of policies, where the results may only be visible in the future.⁴³ Furthermore, the absence of universal principles in international law, such as a clear and defined notion of equity⁴⁴, does not lead states to abdicate self-interest for the collective good. This is evident from the disagreement that exists on the application of the CBDR principle in climate change negotiations. The mere fact that interdependence between states dictates cooperation concerning global climate change therefore does not mean that states may accept obligations on the basis of altruism. Furthermore, the proliferation of international institutions that need to facilitate cooperation does not mean that the cooperation may be for the common good. It is frequently argued that it is national egoism that actually is responsible for many of the problems that we experience in the modern world.⁴⁵ Thus, one is tempted to propose that egoistic national behaviour must make way for some form of behaviour that satisfies equity. In the case of climate change one may argue that states will not be able to guarantee state security through the pursuit of mere narrow national interests as all states have a common interest in the survival of humankind.⁴⁶ But even

⁴³ A Kiss "The Protection of Environmental Interests of the World Community Through International Environmental Law" 1-12 in: R Wolfrum (ed.) *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (1996) at 3. In democracies elections induce the pursuit of short-term results, whereas authoritative regimes mostly use resources for their own power and prestige rather than long-term environmental considerations.

⁴⁴ Traditionally, equity is awarded a very restrictive role in international law and in general it is used in a corrective fashion to adjust the harshness of law. Under Article 38(2) of the Statute of the International Court of Justice (ICJ), the ICJ may decide cases *ex aequo et bono* with the consent of the parties. The Third World equity doctrine differs from the traditional Western concept. T Nawaz "Equity and the New International Economic Order: A Note" 113-122 and S Khurshid "Justice and the New International Economic Order" in: K Hossain (ed.) *Legal Aspects of the New International Economic Order* (1980) 108-112.

⁴⁵ J A Camilleri & J Falk *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992) 192.

⁴⁶ Judge Weeramantry in his dissenting opinion states that: "A balanced view of the matter is that no one group of nations - nuclear or non-nuclear - can say that its interests are most specially affected. Every nation in the world is specially affected by nuclear weapons, for when matters of survival are involved, this is a matter of universal concern". Para. VI of *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* I.L.M. 809 (1996). It is his belief that the threat to the survival of humankind may result in the convergence of values and beliefs of civilization and form the normative basis for international law. See the discussion of R Falk "The Coming Global Civilization: Neo-Liberal or Humanist?" 15-32 in A Anghie and G Sturgess (eds.) *Legal visions of the 21st Century: essays in honour of Judge Christopher Weeramantry* (1998) 21. The Report of the Commission on Global Governance affirmed the need to address international environmental problems "as the pose a danger to the very survival, not just the well-being, of

common interest is a mere convergence of self-interest.⁴⁷ Enters the question whether climate change is really such a global problem, which may lead to the pursuit of common interest. Climate change is viewed as a truly global issue, “because the location of greenhouse gas emissions is relatively unimportant - at least in terms of their climate change effects”.⁴⁸ It is indeed true that the location of emissions is not that important, but not all states are affected in the same manner. Thus, this global problem may not really result in a truly global consensus concerning the measures, which need to be undertaken to avoid disaster. This means that differential threats may not induce required altruistic state action, which may save distant people, from a small island state.

Proposals

In this paper I have made the attempt to demonstrate that a post-2012 emission reduction consensus needs to be based on intergenerational and intragenerational equity. Thus, the CBDR principle should serve as the basis for a future agreement. The Kyoto Protocol serves as an example of an agreement, which is based on this principle. However, the differential emission reduction targets were said to have impeded the participation of the largest emitter of GHGs. Furthermore, certain developing states have experienced rapid growth and will be responsible for a lion's share of global emission. A global solution therefore needs to ensure the participation of the largest emitters of GHG in order to address the problem. Thus, the CBDR principle may not be applied in a similar manner. Pragmatism dictates that all states contribute in order to avoid global disaster. However, it must also be acknowledged that developed states are mainly responsible for climate change, that they have the capacity to address the problem and that the developing world is most vulnerable to the effects of

whole societies. In this sense, together with nuclear war, they constitute the ultimate security risk”. Commission on Global Governance *Our Common Future* (1995) 83.

⁴⁷ J Brunnée “Common Interest’ – Echoes from an Empty Shell? Some thoughts on Common Interest and International Environmental Law” (1989) *ZaöRV* 791-808.

⁴⁸ See I H Rowlands “Atmosphere and Outer Space” 316-336 in D Bodansky, J Brunnée and E Hey (eds.) *The Oxford Handbook of International Environmental Law* (2007) 327.

climate change. These issues make one wonder whether the CBDR principle should serve as the basis for future negotiations. Does it really provide any answers to this dilemma?

It should be borne in mind that principles, such as the CBDR principle⁴⁹, are optimisation commands. The mandatory degree of fulfilment of principles depends on the actual facts as well as the legal possibilities. The legal possibilities are determined by countervailing principles and rules. Principles may accordingly be fulfilled in different degrees.⁵⁰ It is important to remember that principles may be fulfilled in different degrees. The mandatory degree of fulfilment of principles depends on the actual facts as well as the legal possibilities. Thus, the actual facts may influence the manner in which the CBDR principle may be applied through the provisions of a treaty. In this instance it may therefore reconcile the pursuit of equity and the need for pragmatism.

Furthermore, my proposal concerning a future international agreement needs to take cognisance of the dynamics of the international structure. In this instance it is important that self-interest is still an important objective of states and that most states are reluctant to pursue altruism. Even the "global" problem of climate change may not be "global" enough to constitute a common interest of states. The shared norms of the international structure may therefore not facilitate optimal action that may avoid disaster. However, self-interest may compel states, such as the USA, to accept emission obligations as they may not want to be excluded from a global trading market for greenhouse gases.⁵¹ Joining a future international agreement may ensure further advantages, such as energy

⁴⁹ Beyerlin regards it as a principle, which may be the source of emerging rules. U Beyerlin "Different types of norms in international environmental law: policies, principles and rules" in: D Bodansky, J Brunnée and E Hey (eds.) *The Oxford Handbook of International Environmental Law* (2007) 442.

⁵⁰ R Alexy "On the Structure of Legal Principles" (2000) *Ratio Juris* 294-304. Rules on the other hand are definitive commands, which entails that rules can either be complied with or not. In the instance of a valid rule, one must do exactly what the rule requires. See, however, R Dworkin *Taking Rights Seriously* (1977) 22ff.

⁵¹ T J Schoenbaum *International Relations. The Path not Taken. Using International Law to Promote World Peace and Security* (2006) 224-228.

efficiency and independence from foreign oil. Thus, the United States may also gain economic benefit from participation.

My proposal is therefore that a future international agreement must be guided by the CBDR principle in order to pursue equity. The actual circumstances must determine its application. Thus, in accordance with the above discussion I attempt to present an example of a possible solution. This does not mean that this is the only solution to the dilemma.

It is not realistic to approach developing states as a single entity for purposes of emission reductions.⁵² It is ludicrous to compare China with Zimbabwe or Lesotho. Thus, it is important to establish a framework, which distinguishes between states for the purpose of a future climate change agreement.⁵³ The Human Development Index may be used to differentiate between developing and developed states. Accordingly developing states that annually emits GHGs above a threshold may be encumbered with emission targets.⁵⁴ Thus, states, such as China, India and Brazil may incur emission reduction obligations. But this does not seem to be fair as developed states are responsible for the predicament and have "banked" GHG emissions. They also have the capacity to respond to the problem. Thus, generous concrete differential provisions need to "compensate" larger developing states for their contribution.⁵⁵ The

⁵² Developing states do not constitute a homogenous group and it must be borne in mind that no uniform definition defines this notion. A low level of GDP is mostly an important indicator of the poor economic growth of developing states. See M Bulajić *Principles of International Development Law Progressive Development of the Principles of International Law relating to the New International Economic Order* (2nd ed 1993) 168. It should of course be borne in mind that there are also differences between developed states. The climate change regime recognises the differences between various states. See, for instance, Articles 4(8) and 4(10). Furthermore, individual developed states have different targets, depending on their particular circumstances.

⁵³ Article 5 of the Montreal Protocol of 1987 distinguishes between states in accordance with their *per capita* emissions. The point of departure is that all persons have an equal *per capita* right to emit. See R Atfield *Environmental Ethics* (2003) 179-180. See, however, Caney 770. It would not be viable to introduce this mechanism in a future agreement as this would lead to the exclusion of China and therefore impede global action.

⁵⁴ For example: 200 000 metric tons of CO₂ emissions.

⁵⁵ This may be done through capacity building, technology transfer and financial mechanisms. The Adaptation Fund is of particular importance in this regard. {Found at:[16](http://www.adaptation-</p></div><div data-bbox=)

implementation of obligations by developing states in terms of the suggested framework should depend on the effective implementation of the provisions on financial co-operation, technology transfer and capacity building.

This does not mean that other developing states, which do not incur emission obligations, should refrain from implementing any measures to combat climate change. They may adopt national policies on a voluntary basis in terms of Article 4(2)(b) of the UNFCCC.⁵⁶ These states may even at a later stage “graduate” to states that may accept emission reduction targets when they have reached a negotiated threshold.⁵⁷

Thus in this instance the concretization of the CBDR principle is tempered by pragmatism (the need for the more industrialised states to accept emission reduction targets), but also equitable considerations (the assistance to developing states to address the problem in a sustainable manner so as to increase economic development, while also leaving future generations with options). It can only be hoped that this proposal may reconcile different interest in order to ensure that states establish future international consensus, which facilitates determinative action in a concerted manner as guardians of the global environment and its people.

fund.org/aboutthefund.html as on 18 August 2008}. See MJ Mace “Funding for Adaptation to Climate Change: UNFCCC and GEF Developments since COP 7” *RECIEL* (2005) 225-246.

⁵⁶ See, for instance, Department of Environmental Affairs and Tourism A National Climate Change Response Strategy {Found at: <http://www.saaqis.org.za/filedownload.aspx?fileid=11> as on 18 August 2008}

⁵⁷ The South African National Climate Response Strategy seems to pre-empt future emission reductions. It emphasises that although South Africa is not an annex 1 country, “consideration of possible mitigation options is useful and it can point the way in which trends could emerge in the future”. See 23.