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**‘INTRAGENERATIONAL EQUITY’ A KEY CONCEPT IN THE UNITED
NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE**

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I INTRODUCTION

‘Intragenerational equity’ concerns equity issues occurring within a generation and this equity can occur within states and between states.¹ Global climate protection will not succeed without the support of both developed and developing countries² and in order to achieve cooperation to reduce greenhouse gas emissions in the future, it is important to focus upon the role of equity in international environmental law³ and in the *United Nations Framework Convention on Climate Change (UNFCCC)*.⁴

At international law the principle of equity remains controversial⁵ however equity enables states to take into account the consideration of justice and fairness in the operation of a rule of international law⁶. In this paper there is an examination of the

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¹ Ronnie Harding, Michael Young and Elizabeth Fisher, ‘Background Paper Interpretation of the Principles’ Paper presented at the *Fenner Conference on the Environment: Sustainability Principles to Practice* (University of NSW Institute of Environmental Studies: Unisearch, 1994) 21.

² *United Nations Framework Convention on Climate Change* [hereinafter *UNFCCC*] opened for signature 9 May 1992, 1771 UNTS 107 preamble para 1 (entered into force 21 March 1994). P Hassan, ‘Moving Towards A Just International Environmental Law’ in Simone Bilderbeek (ed) *Biodiversity and International Law: The Effectiveness of International Environmental Law* (Amsterdam: IOS Press, 1992) 72, 74.

³ Peter Thacher, ‘Equity Under Change’ (1987) *Proceedings of the American Society of International Law*, 8-11 April, 133, 134.

⁴ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 preamble para 6 (entered into force 21 March 1994). Para 6 states "Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions."

⁵ Patricia Birnie and Alan Boyle, *International Law and the Environment* (2nd ed, 2002) 146.

⁶ Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) 152. See *North Sea Continental Shelf* cases (1982) ICJ Reports 18.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

equitable concept, 'common but differentiated responsibilities' of states as it is elaborated in the provisions of the *UNFCCC*. This is followed by a review of the obligations and commitments of parties to the *UNFCCC* taking into account the role of transfer of financial resources and technology by developed countries to developing countries. The focus in this paper is on intragenerational equity⁷ as it is elaborated in the *UNFCCC* and one of the main environmental concepts of equity, which has emerged from the concept of equity at international law.⁸ This concept is set out in Principle 7 of the *Rio Declaration on Environment and Development (Rio Declaration)* where states have 'common but differentiated responsibilities'⁹ to combat environmental degradation.

II COMMON BUT DIFFERENTIATED RESPONSIBILITY

The application of the sharing of burdens is found in the concept of common but differentiated responsibility. This concept has been outlined in many recent international agreements and it is stated in Principle 7 of the *Rio Declaration*¹⁰ as follows:

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

⁷ The other interpretations of equity in international law will not be included here. See generally Robert Jennings, and Arthur Watts, (eds) *Oppenheim's International Law* (9th ed, 1993) vol 1, 43-45.

⁸ Sands, above n 6 262.

⁹ *Report of the United Nations Conference on Environment and Development* (UNCED), vol I, ch 1, annex I, 'Rio Declaration on Environment and Development' [hereinafter *Rio Declaration*], UN Doc A/CONF.151/26 (1992), 31 ILM 874 (1992) Principle 7.

¹⁰ *Rio Declaration* above n 9. Shawkat Alam, 'The United Nations' Approach to Trade, the Environment and Sustainable Development' (2006) 12 *ILSA Journal of International and Comparative Law* 607 at 617.

At the time of UNCED when developing countries agreed to support *UNFCCC* "developed countries promised to help developing countries by assisting their capacity building efforts, providing increased financial resources, transferring technology..."

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

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.

Sustainable development also indicates the importance of equity in the pursuit of environmental protection. According to the World Commission on Environment and Development, "Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that logically must be extended to equity within each generation".¹¹

This concept of common but differentiated responsibilities has two aspects. Firstly, the common responsibility involves conservation of the environment not only within the jurisdiction of the state but also responsibility in regional and international environmental protection.¹² Secondly, there are environmental standards that lead to differentiated responsibilities of states at different stages of development to control and prevent threats to the environment.¹³ Each state's historical contribution to the development of a particular environmental problem may also be taken into account.¹⁴

Common responsibilities include responsibilities to both the present and future generations to protect the environment. The prevention of environmental damage particularly to areas of common concern (such as the climate and biological diversity) is the responsibility of all states. Principle 7 of the *Rio Declaration* categorises differentiated responsibilities as including the different contributions that states have made to cause the environmental harm.¹⁵ This principle also takes into account the different capabilities of individual states to take action to prevent or control the

¹¹ World Commission on Environment and Development *Our Common Future* (1990) 331. See *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) (Judgement) [1997] ICJ Rep 92.

¹² Sands, above n 6, 286.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ I M Porras, 'The Rio Declaration: A New Basis for International Cooperation' in Philippe Sands, (ed) *Greening International Law* (1993) 28.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

environmental harm.¹⁶ So the issue of equity takes into account those states which bear the responsibility for environmental degradation.¹⁷

The second aspect of the principle carries with it obligations on the part of developed states such as the provision of financial assistance and the transfer of technology.¹⁸ The outcome of the operation of this principle is that it can lead to the imposition of dissimilar environmental standards on different states.¹⁹ This results in the establishment of differentiated standards in international environmental agreements. *UNFCCC* distinguishes between different obligations of developed countries from those of developing countries. In particular, the developed countries are to 'take the lead'²⁰ in reducing their greenhouse gas emissions so they have stricter reporting requirements. Developed states which are parties to this convention and the accompanying protocol, must adopt policies to restrict greenhouse gas emissions²¹ and aim to achieve the limitations on emissions set out in the *Protocol to the Framework Convention on Climate Change (Kyoto Protocol)*.²² The issue of equity has become particularly significant in the

¹⁶ Sands, above n 6, 286.

¹⁷ Edith Brown Weiss, 'Environmental Equity: The Imperative for the Twenty-First Century' in Winfried Lang, (ed) *Sustainable Development and International Law* (1995)18. See Diana Shelton 'Equity' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (2007) 639, 657.

¹⁸ Consider for example, *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(5) (entered into force 21 March 1994).

¹⁹ *Rio Declaration* above n 9, Principle 11 states: "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

²⁰ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 3(1) (entered into force 21 March 1994).

²¹ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(2) (entered into force 21 March 1994).

²² See *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 3(1) (entered into force 21 March 1994) and see Annexes A and B. art 3 generally provides that the developed Parties listed in Annex I of the Convention shall limit their greenhouse gas emissions so as not to exceed their assigned amounts calculated as their quantified emission limitation and reduction commitments set out in Annex B with the aim of reducing their overall emissions by 5 per cent below 1990 levels by 2008 to 2012. The *Protocol to the*

lead up to international negotiations on a post Kyoto agreement. These negotiations could decide on new emission reductions for the next phase after the initial phase 2008-2012 of the *Kyoto Protocol* has ended and may also result in a new negotiated agreement to enter into further climate change commitments. The emission reduction commitments in the *Kyoto Protocol* only account for about 5% of reductions in emissions by developed countries²³ and this is far below emissions required to achieve stabilisation of greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system.²⁴ The actions of states to resolve the equity issues associated with climate change will determine whether future negotiations, to achieve the much more drastic reductions in greenhouse gas emissions by all countries, are successful.²⁵

III THE JUSTIFICATION FOR THE INCLUSION OF INTRAGENERATIONAL EQUITY

In order to achieve the support of developing states, the issue of equity needs to be addressed in international environmental agreements. From the point of view of the developing countries, there are some major areas to be taken into account. As the developed countries have been the major contributors to environmental destruction to date, so too they should bear the burden of most of the costs of environmental protection.²⁶ Another consideration is that the developing states are entitled to continue

Framework Convention on Climate Change [hereinafter *Kyoto Protocol*], opened for signature 11 December 1997, 37 ILM 22 (1998) (entered into force 16 February 2005).

²³ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 3 (entered into force 16 February 2005).

²⁴ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 2 (entered into force 21 March 1994). Intergovernmental Panel on Climate Change *Second Assessment Synthesis of Scientific-Technical Information relevant to Interpreting Art 2 of UNFCCC* (1995) 13, which states: 'Carbon cycle models show that immediate stabilisation of the concentration of carbon dioxide at its present level could only be achieved through an immediate reduction in its emissions of 50-70 per cent and further reductions thereafter'. See Report of Working Group 1 IPCC http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Pub_SPM-V2.pdf at 20 August 2007.

²⁵ Paul Harris, 'The European Union and Environmental Change: Sharing the Burdens of Global Warming' (2006) 17 *Colorado Journal of International Environmental Law and Policy* 309, 316.

²⁶ M Williams, 'Re-articulating the Third World Coalition: the role of the environmental agenda' (1993) 14 (1) *Third World Quarterly* 7, 20. This is particularly the case for global environmental degradation and is

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

to develop.²⁷ These countries have important priorities to deal with such as poverty, food requirements and sanitation needs which do not enable them to combat environmental degradation in the same way that other states can.²⁸ Thirdly, there is the need to ensure that developing countries can gain access to environmentally sound technologies as a requirement for the achievement of sustainable development.²⁹ If developing countries cannot obtain new technology at little or no cost then it may be necessary for them to continue to use technologies that could harm the environment. Finally, it is necessary to fulfil the funding commitments for the implementation of *Agenda 21* for the benefit of developing countries together with the provision of new and additional funding.³⁰

These issues of the provision of adequate financial resources and the transfer of technology to developing countries will be the key concerns to be resolved in future negotiations on further reductions of greenhouse gas emissions by developed and developing countries. This is also a political issue because some countries will only participate if they consider that the new climate regime is equitable.³¹ The following section indicates how the concept of common responsibilities is set out in Article 3 of the *UNFCCC*.

IV THE CONCEPT OF COMMON RESPONSIBILITIES

reflected in international environmental agreements for example, *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 preamble para 3 (entered into force 21 March 1994).

²⁷ *Rio Declaration* above n 9, Principle 3.

²⁸ See *Report of the United Nations Conference on Environment and Development* (UNCED) UN Doc A/CONF.151/26 (1992) *Agenda 21* (New York: United Nations Publications, 1992) [hereinafter *Agenda 21*] paras 3.1-3.12. Andrew Jordan, and Jacob Werksman, 'Incrementality and Additionality: A New Dimension to North-South Resource Transfers?' (1994) 6 (2) *World Resources Review* 178, 184. See the Report of the Commission on Global Governance *Our Global Neighbourhood* (1995) 29-30.

²⁹ *Programme for the Further Implementation of Agenda 21* Adopted by Governments at Earth Summit +5, special session of the United Nations General Assembly, 23-28 June 1997, New York (New York: United Nations Department of Public Information, United Nations Publication 1997) or GA Res Programme for Further Implementation of Agenda 21 s-19/2 19 September 1997 [gopher.un.org.70/00/ga/recs/spec/Res-19.2](http://www.un.org/70/00/ga/recs/spec/Res-19.2) (17/5/98) para 88. See *Agenda 21* above n 28, paras 34.1-34.14.

³⁰ *Report of the World Summit on Sustainable Development Plan of Implementation* [hereinafter WSSD POI] <<http://www.un.org/esa/sustdev/documents/WSSD.POI.PD/English/POIToc.htm>> at 22 January 2007 para 75.

³¹ Harris above n 25, 318.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

The first reference to "common but differentiated responsibilities" in the *UNFCCC* is in the preamble³² and this is followed by the major reference to this concept in Article 3. According to Article 3(1):

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 adverse effects thereof.

Article 3 is entitled "Principles" and so the concepts referred to in this article are described as principles in this context. The insertion of the principles into Article 3 of the convention instead of in the preamble was aimed at introducing guidance for the parties in the performance of the convention.³³ This inclusion implies that these principles are more important than if they had been set out as statements in the preamble.³⁴ These principles could be of assistance in the interpretation of articles which lack clarity in the *UNFCCC*³⁵ and the introduction to the principles set out in Article 3 also indicates that

³² *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 preamble para 6 (entered into force 21 March 1994).

³³ Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal Of international Law* 451, 501. See the Vienna Convention on the Law of Treaties opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

³⁴ Farhana Yamin, 'Principles of Equity in International Agreements with Special Reference to the *UNFCCC*' (unpublished FIELD Working Paper held by the Foundation for International Environmental Law and also held in the Australian Centre for Environmental Law, University of Sydney Library) 18 July 1994, 30. [This paper is hereinafter referred to as "Principles of Equity".] See Farhana Yamin, 'The Use of Joint Implementation to Increase Compliance with the Climate Change Convention' (hereinafter referred to as "Joint Implementation") in James Cameron, Jacob Werksman, and Peter Roderick, (eds) *Improving Compliance with International Environmental Law*, (UK: Earthscan Publications Ltd, 1996) 229, 241.

³⁵ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 3 (entered into force 21 March 1994). Art 3 refers also to the special needs of developing countries, to precautionary measures, sustainable development and cooperation to achieve economic growth and development particularly of developing countries. Philippe Sands, 'The United Nations Framework Convention on Climate Change' (1992) 1(3) *RECIEL* 277.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

they are to guide the parties to the *UNFCCC*.³⁶ However, it has been argued that this different treatment of the principles could have legal implications as it may be possible to interpret them as acting as a source of law for the legal obligations of the parties distinct from the other provisions in the *UNFCCC*.³⁷ According to Yamin, it is possible for Article 3 to be interpreted as not merely a set of guiding principles but as principles aimed at the achievement of the goals of the *UNFCCC* and which could be applied independently of the other provisions.³⁸

Another important aspect of Article 3(1) is the links made between the concept of common but differentiated responsibilities and the concept of intergenerational and intragenerational equity as Article 3(1) emphasises the need to protect the climate system for present and future generations.³⁹ It is arguable that as it is essential for the protection of the Earth's climate to reduce greenhouse gas emissions, these obligations could become *erga omnes* or part of *jus cogens* at international law.⁴⁰ Peremptory norms or *jus cogens* are norms from which no derogation is possible and it may be that damage to the climate could be included amongst these norms. Universal obligations at international law are *erga omnes* and these obligations are owed by all states to the international community⁴¹ so states could argue that climate change is a common concern of humankind and that all states should ensure that the climate is protected. The international community could hold individual states accountable for their obligations as parties to the *UNFCCC* and all states would have standing at the International Court of

³⁶*UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 3 (entered into force 21 March 1994). Art 3 commences "In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following..."

³⁷ Yamin, 'Principles of Equity' above n 34, 30.

³⁸ Ibid 32; see Yamin, 'Joint Implementation' above n 34, 241.

³⁹ See *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 preamble final para (entered into force 21 March 1994).

⁴⁰ Yamin, 'Principles of Equity' above n 34, 34.

⁴¹ See the *Barcelona Traction Light and Power Company Ltd (Second Phase) (Belgium v Spain)* [1970]

ICJ Rep 3, 32.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Justice if there is a breach or they may hold states accountable through institutions such as the Conference of the Parties to the *UNFCCC*.⁴²

It follows that there is a common responsibility held by states to prevent climate change and that all states must contribute to the measures required to prevent climate change.⁴³ The implications in Article 3(1) of the *UNFCCC* are that equitable considerations for both present and future generations must be taken into account as part of the common concern of humankind for the protection of the climate system.⁴⁴ Further, considerations of equity⁴⁵ in the concept of common responsibilities requires action by states to reduce greenhouse gases, to take adaptation measures where climate change occurs and for developed states to assist developing states.⁴⁶ The focus on these provisions of the *UNFCCC* is fundamental as developed states must take the lead on climate change and show that they are prepared to resolve the equity issues because this is likely to determine the future success of international negotiations.⁴⁷ In order to consider how these finances can be transferred to developing countries it is necessary to examine the concept of common but differentiated responsibilities in the *UNFCCC* and how it sets out the different responsibilities of states.

⁴² Birnie and Boyle above n 5, 100.

⁴³ A A Cançado Trindade and David Attard 'Report on the Proceedings of the Meeting' in David Attard (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (1990) 19, 23. See Jutta Brunnée, 'Common Areas Common Heritage and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (2007) 550, 566.

⁴⁴ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 3 (3) (entered into force 21 March 1994). Art 3(3) points to the need to take precautionary measures to prevent the causes of climate change as part of the common concern of humankind. Art 3(4) indicates that Parties should promote sustainable development in order to achieve the aim of the common concern of humankind to protect the Earth's climate.

⁴⁵ Yamin, 'Principles of Equity' above n 34, 34. Yamin regards it as equitable that both *erga omnes* obligations and the rules of *jus cogens* should apply to the protection of the climate system.

⁴⁶ Jutta Brunnée, 'Environmental Security in the Twenty-first Century: New Momentum for the Development of International Environmental Law?' (1995) 18 *Fordham International Law Journal* 1742, 1746. Brunnée states: "the extent of such assistance will depend on each country's economic and technological capabilities and on its responsibility for the 'common concern', for example, because of past forest depletion or greenhouse emissions."

⁴⁷ Harris, above n 25, 317.

V THE DIFFERENTIATED RESPONSIBILITIES OF STATES

The focus of the *UNFCCC* is on differentiating the common responsibilities of states, depending upon the amount of contribution that the particular state has made to the environmental problem and to the state's capacity to assist in the prevention or adaptation to the environmental problem. The *UNFCCC* emphasizes measures to be taken as far as intragenerational equity is concerned.⁴⁸ The preamble to the convention notes:

that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.⁴⁹

There are three classes of states which are parties to the *UNFCCC*. Firstly, there are the developing states, secondly the developed and thirdly there are states with economies in transition. It is important to note that the effective participation by developing countries is dependent upon the degree to which the developed countries implement their commitments on financial resources and technology transfer under the convention.⁵⁰ Both the *UNFCCC*⁵¹ and the *United Nations Convention on Biological Diversity*⁵² have

⁴⁸ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4 (entered into force 21 March 1994).

⁴⁹ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 preamble para 3 (entered into force 21 March 1994).

⁵⁰ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(7) (entered into force 21 March 1994). *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 10 (entered into force 16 February 2005). Art 10 takes into account art 4(7) of the Convention. See Jordan and Werksman, above n 28, 178.

⁵¹ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(7) (entered into force 21 March 1994).

⁵² The *Convention on Biological Diversity*, opened for signature 5 June 1992, 17620 UNTS 79, 31 ILM 818 (1992) art 20(4) (entered into force 29 December 1993).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

incorporated similar provisions on this issue. These articles could be viewed as requiring that the developed countries ensure that they provide assistance to the developing countries. If there is a failure by developed countries to fulfil their commitments then developing countries may not be able to implement these conventions.⁵³

There are lists of states to indicate which states are subject to certain responsibilities in Annexes I and II of the *UNFCCC*. The developed states (including the OECD countries) and countries with economies in transition need to fulfil the requirements set out in this convention, to adopt policies and measures to limit greenhouse gas emissions and to protect greenhouse sinks.⁵⁴ Only the developed states (and not those states with economies in transition) are obliged to provide "new and additional financial resources" to provide for the "agreed full costs incurred" by developing countries.⁵⁵ These costs are those incurred by developing countries in order to report information to the secretariat as required under the provisions of the convention.⁵⁶ Developed countries are also required to provide financial resources as well as the transfer of technology necessary for developing countries to meet their full incremental costs as agreed with the international financial entity, the Global Environment Facility (GEF) of carrying out certain other measures under the convention.⁵⁷ These measures include the publication of inventories of greenhouse gas emissions and removals, the formulation and implementation of

⁵³ Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle, and Michael Anderson, (eds) *Human Rights Approaches to Environmental Protection* (1996) 43, 59.

⁵⁴ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(2) (entered into force 21 March 1994). Art 4(2) "Sinks" are defined as "any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere."

⁵⁵ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(3) (entered into force 21 March 1994).

⁵⁶ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 12(1) (entered into force 21 March 1994).

⁵⁷ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(3) (entered into force 21 March 1994).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

programs to mitigate climate change and to take into account climate change in policy considerations on social, economic and environmental matters.⁵⁸

Overall this convention recognises the need for development to continue in developing countries and the need for equity especially as far as developing countries are concerned. This view is also found in the *Kyoto Protocol* which established "quantified emission limitation and reduction objectives" or targets and timetables to reduce greenhouse gases for developed countries.⁵⁹ In achieving these limitations the developed countries are to minimise adverse effects on other parties and particularly on those which are developing countries.⁶⁰ This protocol also sets out the requirements that developed country parties are to supply new and additional financial resources to meet the agreed full costs of developing countries to provide national inventories of greenhouse gas emissions.⁶¹ A further requirement is that developed countries provide financial resources for the transfer of technology to developing countries.⁶²

⁵⁸ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(10) (entered into force 21 March 1994).

⁵⁹ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 3 (entered into force 16 February 2005).

⁶⁰ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 2(3) (entered into force 16 February 2005).

⁶¹ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) (entered into force 16 February 2005). See art 11(2)(a)(b) in accordance with art 4(1)(a) of the convention. See *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 arts 4(1)(a), 10, 11 (entered into force 21 March 1994).

⁶² *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 11(2)(b)(3) and see art 10. (entered into force 16 February 2005).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Those developed states that have ratified the *UNFCCC* are obliged to fulfil the commitments set out in this convention.⁶³ In 2002 the focus on action by states at all levels to meet their commitments under the *UNFCCC* was emphasized at the World Summit on Sustainable Development (WSSD).⁶⁴ The (WSSD) Plan of Implementation indicates that action at all levels is also necessary to:

provide technical and financial assistance and capacity building to developing countries and to countries with economies in transition in accordance with commitments under the *UNFCCC*...⁶⁵

Significant issues of equity arise over the potential liability of states which exceed their emission limitations and whether states can be liable for past historical excessive emissions. Presumably if parties to the convention fail to adhere to their obligations under the *UNFCCC* this may lead to a basis for potential litigation by present and possibly also by future generations. There is little guidance on compensation in the *UNFCCC* but it is possible that developing countries that are particularly vulnerable to climate change could rely on Article 4(4) of the *UNFCCC* in situations where some of the developed country parties to this convention had failed to assist these countries meet the costs of adaptation to the adverse effects of climate change.⁶⁶ The following section sets out the lack of clarity in the *UNFCCC* for developed states to implement the transfer of financial resources to developing countries.

VI FINANCING THE COSTS OF ENVIRONMENTAL PROTECTION IN RELATION TO THE CLIMATE CHANGE CONVENTION

⁶³ *Vienna Convention on the Law of Treaties* opened for signature 23 May 1969, 1155 UNTS 331 arts 14, 26 (entered into force 27 January 1980).

⁶⁴ WSSD POI above n 30 para 36(a).

⁶⁵ WSSD POI above n 30 para 36(c).

⁶⁶ Harris above n 25, 328.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

The *UNFCCC* will be examined in order to indicate how the terms 'additionality' and 'incrementality' are used in these international environmental agreements.

A The Definition of New and Additional

Even though the terms additional and incremental have been used in some major environmental agreements⁶⁷ there has failed to be any agreement on the amount of money to be transferred to developing states and how these finances should be deployed.⁶⁸

The term used in the *UNFCCC* and in the *Biological Diversity Convention*⁶⁹ are "new and additional finance" which is not defined in these conventions thus leaving them open to different interpretations.⁷⁰ The difference between the application of additionality and incrementality has been described as follows:

⁶⁷ *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1988, 1522 UNTS 3, art 10 (entered into force 1 January 1989) *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(3) (entered into force 21 March 1994). ; *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 11 (entered into force 16 February 2005).and the *Biological Diversity Convention* opened for signature 5 June 1992, 17620 UNTS 79, 31 ILM 818 (1992) art 20(2) entered into force 29 December 1993).

⁶⁸ Andrew Jordan, and Jacob Werksman, 'Financing Global Environmental Protection' in James Cameron, Jacob Werksman, and Peter Roderick, (eds) *Improving Compliance with International Environmental Law* (1996) 247, 248.

⁶⁹*UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(3) (entered into force 21 March 1994);; the *Biological Diversity Convention* opened for signature 5 June 1992, 17620 UNTS 79, 31 ILM 818 (1992) art 20(2) (entered into force 29 December 1993). These terms are also used in the *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 11 (2)(a)(b)(entered into force 16 February 2005). Art 11(2) (a) and (b) indicate that developed countries shall provide new and additional financial resources to meet the agreed full costs of developing countries in advancing the implementation of commitments under the *UNFCCC* to develop and publish inventories of greenhouse gas emissions. They should also provide financial resources and the transfer of technology to meet the agreed full incremental costs of developing countries to meet their commitments under art 4 of the *UNFCCC*.

⁷⁰Jordan and Werksman, above n 68, 250, "The texts of the Climate Change and Biodiversity Conventions do not clarify the meaning of additionality, and merely use the umbrella term 'new and additional finance'.

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2007 Refereed Conference Papers**

Additionality describes the origins of the financial resources needed to solve global environmental problems, while incrementality determines the total *size* of those resources needed to address a particular area of concern (e.g. biodiversity, marine pollution). The concepts, thus, interlock: the greater the incremental costs, the more additional resources will be required; the more additionality that is provided, the greater the 'total' incremental cost that can be met.⁷¹

The terms "new and additional" are also found in Article 46 concerning the provision of financial resources in the *Draft International Covenant on Environment and Development*. The commentary to this *Draft Covenant* describes these funds as distinct from those provided under aid budgets and it has been proposed that they could be raised separately from, and in addition to, regular aid budgets.⁷² The issue of funding to achieve the goals of the conservation of biodiversity and the reduction of greenhouse gas emissions has emerged as a significant area of debate for the North and the South in international negotiations.⁷³

There are different interpretations of the concept of additionality and how to ascertain the additional funding from an agreed benchmark.⁷⁴ One view, which is often used, is that the benchmark would be the current level of development aid.⁷⁵ This means that extra funding provided in excess of the existing provision of aid funds⁷⁶ would be funnelled

If 'existing flows' is to be the baseline, then what is 'additional' can only be calculated on the basis of what a donor would have done had they not entered into an international agreement or pledged to support an international fund. The absence of definition opens up an enormous opportunity for conflicting interpretations and expectations."

⁷¹ Jordan and Werksman, above n 68, 248.

⁷² *Draft International Covenant on Environment and Development* (IUCN Commission on Environmental Law, 2nd ed, 2000) 131. (Note this is only a draft document The Draft Covenant was prepared by the IUCN Commission on Environmental Law and the International Council of Environmental Law as a document that may be adopted by the international community as a basis for multilateral negotiations)

⁷³ Lyle Glowka, Françoise Burhenne-Guilmin, Hugh Synge, Jeffrey McNeely, and Lothar Gündling, *A Guide to the Convention on Biological Diversity* (1994) 523.

⁷⁴ Jordan and Werksman, above n 28, 185. These authors list four possible definitions.

⁷⁵ *Ibid.*

⁷⁶ Glowka, Burhenne-Guilmin, Synge, McNeely, Gündling, above n 73,102; Bodansky, above n 33, 526.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

into environmental protection. However the issue as to how to ascertain the benchmark remains controversial.⁷⁷ If the benchmark is that the amount of funding which the donor would have transferred if it had not entered into the *UNFCCC* then the definition remains open to interpretation.⁷⁸ This means that the amount of funding available for environmental protection under the *UNFCCC* has yet to be determined.

The *Programme for the Further Implementation of Agenda 21* stated that most developed countries had not committed 0.7% of their gross national product to official development assistance and in fact the percentage had reduced from 0.34% in 1992 to 0.27% in 1995.⁷⁹ Indeed much progress needed to be achieved on the part of developed countries in the future to provide finance and technology transfer.⁸⁰ The *Programme for the Further Implementation of Agenda 21* pointed out the need that the requirements of financial assistance and of new and additional resources be "urgently fulfilled" in order to ensure the implementation of *Agenda 21*⁸¹ however there needs to be clearer guidance on how to determine the amount of new and additional finances. The WSSD Plan of Implementation indicated that in order to achieve implementation of *Agenda 21* and development goals that there would need to be significant increases in the flow of financial resources to developing countries and there is also a need to take into account that funds be directed into climate change related investments and mitigation and adaptation project funding.⁸²

⁷⁷ Jordan and Werksman, above n 28, 185.

⁷⁸ Jordan and Werksman, above n 68, 250.

⁷⁹ *Programme for the Further Implementation of Agenda 21* above n 29, para 18. See also *Agenda 21* above n 28, para 33.13. See WSSD POI above n 30, para 79 (a)

⁸⁰ *Programme for the Further Implementation of Agenda 21* above n 29, paras 17,76-97.

⁸¹ *Ibid* para76.

⁸² WSSD POI above n 30, para 75. and see Fact Sheet: Investment and financial flows for a strengthened response to climate change.' United Nations Framework Convention on Climate Change http://unfccc.int/files/meetings/intersessional/awg_4_and_dialogue_4/application/pdf/070828_fin_flowfact_sheet.pdf at 10 October 2007.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

The main difficulty is how to link the funds to ensure that there is an improvement in the protection of the environment.⁸³ There needs to be a consideration of the debt burden on developing countries and a means of ensuring that the funds provided contribute to environmental protection. If the aid given is unconditional and controlled by the ruling elites then this may not improve the conditions in developing countries.⁸⁴ Malanczuk considers that it may be necessary to consider a broader view of the "structural problems of the world political economy" in order to understand how these ruling groups function and how to improve the application of aid funds.⁸⁵

B The Definition of 'Incrementality'

'Incrementality' is expressed as a general concept in both the *Biological Diversity Convention* and the *UNFCCC*. This concept is intended to determine the payment to be made to developing countries for implementing and adhering to the *UNFCCC*.⁸⁶ Once again there is substantial controversy and conflict arising over the interpretation of this term.⁸⁷ A study seeking to establish a workable definition has been conducted by the Conference of the Parties to the convention and by the GEF as the interim financial mechanism under the provisions of the respective conventions.⁸⁸ Developed countries are to meet the "agreed full incremental costs"⁸⁹ of developing countries.

The controversy arises about the method of determination of these finances. Obviously it is in the interest of the receiver of the funds to maximise the funds and in the interest of

⁸³ Peter Malanczuk, 'Sustainable Development: Some Critical Thoughts in the Light of the Rio Conference' in Konrad Ginther, Eric Denters and Paul de Waart, (eds) *Sustainable Development and Good Governance* (1995) 23, 45.

⁸⁴ Ibid 46.

⁸⁵ Ibid.

⁸⁶ Jordan and Werksman, above n 28, 188.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Jordan and Werksman, above n 68, 252. These authors state "As a last minute compromise, the two qualifiers, 'full' and 'agreed' were combined to produce the seemingly contradictory term 'agreed full incremental costs.'"

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

the donor countries to minimise the amounts transferred.⁹⁰ The two main interpretations are gross and net incremental costs which can be defined as follows:⁹¹

Gross incremental costs can be defined as the difference between the total costs of implementing a proposed project and that course of action which the developing country would have pursued had it not undertaken commitments under the Convention. Supporters of this interpretation rely on a direct reading of the text of the Convention and tend to lay stress on the word *full* in 'agreed full incremental cost'. Net incremental costs, on the other hand can be viewed as the additional cost of complying with the Convention *minus* the value of any domestic benefits thereby generated.⁹²

The problem with the concept of incremental costs is that it is very difficult to apply.⁹³ The institution responsible for the administration of these new and additional funds is the GEF which also provides an example of consolidation of financial administration under international environmental agreements. Funds available in the GEF include the Special Climate Change Fund, the Least Developed Country Fund and the Strategic Priority on Adaptation Fund.⁹⁴ Countries in the European Union and Canada, Iceland, New Zealand, Norway and Switzerland have donated about 450 million euro annually (including additional funds) to these new funding mechanisms.⁹⁵ The Stern Review has also recommended that there should be more carbon finance flows available to developing countries.⁹⁶ The latest predictions are that additional investment and financial flows of 146.3-157.3 billion euros (US \$200 billion - \$210 billion) are necessary in 2030 to reduce

⁹⁰ Jordan and Werksman, above n 28, 181.

⁹¹ Ibid 253.

⁹² Ibid 253.

⁹³ Glowka, Burhenne-Guilmin, Synge, McNeely, Gündling, above n 73, 103.

⁹⁴ http://www.gefweb.org/interior.aspx?id=192&ekmense=c57dfa7b_48_60_btnlink at 9 August 2007.

⁹⁵ Harris above n 25, 328.

⁹⁶ The Stern Review 'The Economics of Climate Change' http://www.treasury.gov.uk/media/4/3/Executive_Summary.pdf at 28 August 2007 xxiv.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

greenhouse gas emissions to meet worldwide mitigation requirements.⁹⁷ Clearly the negotiations underway in the hope to complete a new climate agreement by 2009⁹⁸ will need to drastically increase financial flows to developing countries. Other transfers are made through joint implementation projects because they enable developed countries to save money by setting up emission reduction projects in developing countries.

VII JOINT IMPLEMENTATION

There is provision for joint implementation to reduce greenhouse gas emissions under the *UNFCCC*.⁹⁹ So developed countries may invest in projects in other developed countries and gain credit for these projects towards their total greenhouse gas emission reductions. Countries participate in this scheme on a voluntary basis and both public and private organisations may be involved. The main aim of this scheme is to reduce costs so that one country may fund the reductions in another country to take advantage of the cheaper costs of the reductions.¹⁰⁰ Another advantage of this procedure is that it gives greater flexibility to states to determine how to meet their greenhouse gas limitations.¹⁰¹ This procedure enables the aims of the *UNFCCC* to be implemented with lower costs¹⁰² and it facilitates faster achievement of these goals.¹⁰³ Parties can also form an agreement to reduce emissions jointly such as on a regional basis (for example the European

⁹⁷ Yvo de Boer (UNFCCC Executive Secretary) 'Investment and Financial Flows to Address Climate Change' Presentation to Dialogue on Long-Term Cooperative Action Vienna – August 28 2007 <http://unfccc.int/files/meetings/dialogue/application/pdf/070828.de.boer.pdf> at 30 August 2007 3.

⁹⁸ Reuters AlertNet 'UN says Climate Deal in 2009 Ideal, but Complex' <http://www.alertnet.org/thenews/newsdesk/L28894063.htm> at 30 August 2007.

⁹⁹ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(2)(a) (entered into force 21 March 1994); *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 12 (entered into force 16 February 2005).

¹⁰⁰ Bodansky, above n 33, 521.

¹⁰¹ Yamin, 'Joint Implementation' above n 34, 231.

¹⁰² Bodansky, above n 33, 520.

¹⁰³ See Yamin, 'Joint Implementation' above n 34, 231.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Community).¹⁰⁴ The transfer or acquisition of emission reduction units is available to developed country parties in Annex B of the *Kyoto Protocol*.¹⁰⁵ This can be carried out through projects to reduce anthropogenic emissions or by the establishment of sinks to reduce emissions.¹⁰⁶

The *Kyoto Protocol* enables states to have the option of participating in a joint implementation scheme called a "clean development mechanism"(CDM).¹⁰⁷ The clean development mechanism can be conducted by developed states parties in Annex I of the *UNFCCC* to assist other developing states which are parties to the protocol.¹⁰⁸ Generally the *Kyoto Protocol* provides that developing country parties can choose to be involved in a project which achieves a mitigation of climate change.¹⁰⁹ So the CDM enables developed countries to carry out projects that reduce emissions in developing countries and to obtain certification of the reductions in emissions that can contribute to their overall reductions in amounts if emissions as set out in the *Kyoto Protocol*. So developed countries may meet some of their emission reductions out of their jurisdiction and they also may find new markets for their new energy efficient technologies. The advantages

¹⁰⁴ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 4 (entered into force 16 February 2005).

¹⁰⁵ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 17 (entered into force 16 February 2005).

¹⁰⁶ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 6 (entered into force 16 February 2005).

¹⁰⁷ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 12 (entered into force 16 February 2005).

¹⁰⁸ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 12 (entered into force 16 February 2005).

¹⁰⁹ *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 12(5)(entered into force 16 February 2005).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

would be that the developing country may gain the benefits from any use of new technologies involved in the project and that the CDM assists in the funding of the project.¹¹⁰ These projects have been popular as the statistics indicate that there have been more than 2800 CDM projects of which 908 are registered and presently about 49 are requesting registration.¹¹¹

There has been concern about the regulation of these projects so the Executive Board of the Clean Development Mechanism has been established¹¹² to provide guidance and approval for the projects. The aim of these projects is that emission reductions will be achieved at lower costs and that developing countries will gain the benefits of new environmentally sound technology.¹¹³ The regulation of these projects will influence whether the objectives of the *UNFCCC* and the *Kyoto Protocol* are achieved because if the quota of these projects for developed countries is not restricted, it is possible that some developed countries may take advantage of these projects to reducing emissions in developing countries whilst trying to avoid making effective reductions in their own jurisdiction.¹¹⁴ An example of encouraging the development of CDM in Africa is the *Nairobi Framework Capacity for Carbon Market Development in Sub-Saharan Africa An Inter-Agency Program Proposal*¹¹⁵ The aim of this program is to improve the level of participation of countries in Sub-Saharan Africa to participate in the CDM. So partner agencies such as the World Bank Group and the African Development Bank provide assistance to these countries to identify and develop CDM projects. The *UNFCCC* has

¹¹⁰*Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 12(6) (entered into force 16 February 2005).

¹¹¹ UNFCCC CDM Statistics <http://cdm.unfccc.int/Statistics/index.html> at 31 January 2008.

¹¹²Rosemary Lyster, Zada Lipman, Nicola Franklin, Graeme Wiffen and Linda Paerson, *Environmental and Planning Law in New South Wales* (2007) 196.

¹¹³ Martijn Wilder and Paul Curnow 'The Clean Development Mechanism' (2001) 7(2) *The University of New South Wales law Journal Forum* 30, 32.

¹¹⁴ Michael Jeffrey, 'Using Market-based Incentives to Curtail Greenhouse Gas Emissions: Factors to Consider in the Design of the Clean Development Mechanism, joint Implementation and Emissions Trading' (2001) 6(2) *Asia Pacific Journal of Environmental Law* 117, 149.

¹¹⁵ http://cdm.unfccc.int/Nairobi_Framework/NF_partner_agencies.pdf at 28 January 2008.

also set up “CDM Bazaar” a website on the internet to facilitate sharing of information by stakeholders involved in the CDM process and enables stakeholders to post information such as possible emission reduction projects that require financial investment.

The adoption of joint implementation under the *UNFCCC* can promote the transfer of environmentally sound technology.¹¹⁶ This transfer is important to prevent the continued use of outmoded polluting technologies and to encourage the introduction of environmentally sound technologies, particularly in developing countries.¹¹⁷

VIII THE TRANSFER OF ENVIRONMENTALLY SOUND TECHNOLOGY

Another issue of equity is the transfer of technology particularly to developing countries to enable them to avoid the use of out-of-date polluting techniques which can be harmful to the environment.¹¹⁸ *Agenda 21* defines environmentally sound technologies as follows:

Environmentally sound technologies protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes.¹¹⁹

Capacity building should be introduced with these technologies so that training of peoples in the use of these technologies is included in the transfer.¹²⁰ The *Rio Declaration* includes the need to strengthen capacity-building when transferring and

¹¹⁶ Gaëtan Verhoosel, ‘International Transfer of Environmentally Sound Technology: The New Dimension of an Old Stumbling Block’ (1997) 27 *Environmental Policy and Law* 470, 481.

¹¹⁷ Sands, above n 6, 1054.

¹¹⁸ *Ibid* 742.

¹¹⁹ *Agenda 21* above n 28, 252 para 34.1.

¹²⁰ *Ibid* 34.3.

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2007 Refereed Conference Papers**

adapting new technologies.¹²¹ There was considerable controversy between North and South during the negotiations of the *Climate Change* and *Biological Diversity Conventions* on the issue of technology transfer as generally developing countries were in favour of technology transfer provisions and developed countries were apprehensive, especially if they were required to ensure that the private sector transferred technology.¹²² The result of these negotiations has been the insertion in the *UNFCCC* of the recognition of the importance of the technology transfer to ensure adequate protection of the environment and for developed countries to provide financial resources to assist this transfer.¹²³

The *UNFCCC* refers to the responsibility of developed country parties to "facilitate and finance" the transfer of environmentally sound technologies particularly to developing parties.¹²⁴ In addition there is provision that "the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties."¹²⁵ Article 10 of the *Kyoto Protocol* states that parties, taking into account their common but differentiated responsibilities shall cooperate to take steps

¹²¹ *Rio Declaration* above n 9, Principle 9 states "States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technical knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies including, new and innovative technologies".

¹²² Bodansky, above n 33, 523; Glowka, Burhenne-Guilmin, Synge, McNeely, Gündling above n 73, 84. See also Verhoosel, above n 111, 471-472 who distinguishes the New International Economic Order and the negotiations at UNCTAD of an International Code of Conduct on the Transfer of Technology from the provisions on transfer of technology in international environmental agreements.

¹²³ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 arts 4(5), 12(3) (entered into force 21 March 1994).

¹²⁴ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 arts 4(5), 4(1)(h) (entered into force 21 March 1994).

¹²⁵ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(5) (entered into force 21 March 1994).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

to facilitate and finance the transfer of environmentally sound technologies in the public domain and to enable the transfer of those held in the private sector.¹²⁶

It is also important to note the link between the provision of finances and technology and the participation of developing countries in the carrying out of their commitments under this convention:

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will fully take into account that social development and poverty eradication are the first and overriding priorities of the developing country Parties.¹²⁷

The abovementioned provision provides incentive both for developed countries to fulfil their commitments and for developing countries to participate so that there can be global cooperation to try to prevent global warming.¹²⁸

IX CONCLUSION

"Common concern means common actions to achieve common goals. But the burden sharing should not be purely arithmetical."¹²⁹ So the realisation of the different

¹²⁶ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 10(c) also refers to 4(5) (entered into force 21 March 1994).; *Kyoto Protocol* opened for signature 11 December 1997, 37 ILM 22 (1998) art 10(e) (entered into force 16 February 2005).

¹²⁷ *UNFCCC* opened for signature 9 May 1992, 1771 UNTS 107 art 4(7) (entered into force 21 March 1994)..

¹²⁸ See Verhoosel, above n 116, 472.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

contributions made to the environmental threats and to the supervision, control and reduction of the threats needs to be taken into account on an equitable basis. This means that the concept of common but differentiated responsibilities plays an important role in determining the responsibilities of different states.¹³⁰ These responsibilities include the obligations on the part of developed states to provide financial assistance and technology transfers to developing states.

The participation of developing states will be crucial to achieving global reductions in greenhouse gas emissions in the future particularly because of the potential for significant rises in emissions from developing countries.¹³¹ One example is China as it is the second largest greenhouse gas emitter and may take the lead in coming decades.¹³² USA has argued that there should be immediate greenhouse gas reductions in the developing world in countries such as China and India however the USA has not taken the lead at federal government level to reduce its own greenhouse gas emissions. So these arguments are not likely to succeed as developing countries have indicated that their participation will depend upon equitable notions taking into account those countries that are most historically responsible for large amounts of emissions.¹³³ If the commitments to transfer financial resources and efficient technology to developing countries are not carried out it is unlikely that future climate change agreements will succeed.¹³⁴ One possibility is that the European Union could emerge as a leader in negotiations as it has already taken action to contribute to its fair share of the burdens of climate change and could be more willing to negotiate on equitable issues in the future.¹³⁵ The European Union has recently

¹²⁹ Alexandre Timoshenko, 'International Legal and Institutional Framework for Global Climate Change' in Toru Iwama, *Policies and Laws on Global Warming: International and Comparative Analysis* (Tokyo: Environmental Research Center, 1991) 27, 39.

¹³⁰ *Ibid* 40.

¹³¹ Wilder and Curnow above n 113, 32.

¹³² Harris above n 25, 315.

¹³³ Harris above n 25, 315.

¹³⁴ Wilder and Curnow above n 113, 32.

¹³⁵ Harris above n 25 354.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

announced a goal of reducing emissions by 20% by 2020 and has offered to reduce emissions by an additional 10% if other nations join in.¹³⁶

Greater attention must be paid to ensuring that adequate financial resources and environmentally sound technologies are made available for developing countries in order to assist them to be able to participate effectively in the *UNFCCC*.¹³⁷ If these provisions were tightened up and set out definite requirements for states then it may also be possible for individual states (that are parties to the *UNFCCC* and the *Kyoto Protocol*) to rely upon the *erga omnes* doctrine to obtain standing in the International Court of Justice.¹³⁸ These requirements would need to be negotiated by states but could set out more specific contributions to be provided by developed countries both in terms of additional funding and for facilitation of transfer of technology. In the event of a breach of obligations, then states could argue that these commitments for funding and technological transfer must be fulfilled in order to prevent threats to the environment such as climate change and that the concept of common but differentiated responsibilities is now emerging as a principle of international customary law.¹³⁹ Similarly, if some state parties fail to provide finances as required under the convention then other parties could argue that they may take action as guardians to ensure these obligations are complied with and that the goals of the convention are fulfilled. The successful implementation of the objectives of the *UNFCCC* will depend, in part upon the resolution of these issues arising over the application of intragenerational equity, particularly as between developed and developing states.¹⁴⁰ The negotiations to enter into a new phase of emission reductions will commence in Bali at the United Nations Climate Change Conference in December 2007 with the anticipation

¹³⁶ 'UN Climate Talks Seek deal on Global Warming' Guardian Unlimited Monday August 27, 2007. <http://www.guardian.co.uk/world/latest/story/0.-6878764,00.html> (at 10 October 2007)).

¹³⁷ The *Programme for the Further Implementation of Agenda 21* above n 29, paras 17, 53, 66(d)(e) indicate that the provision of finances and the transfer of technology remain priorities under the *Climate Change* and *Biological Diversity* Conventions.

¹³⁸ *Barcelona Traction Case, Light and Power Co Ltd* (Belgium-Spain) (Second Phase) ICJ Rep (1970) 3.

¹³⁹ Gerry Bates, *Environmental Law in Australia* (2nd ed, 2006) 38.

¹⁴⁰ Shelton above n 17, 639, 662.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

that these negotiations will lead to the involvement of both developed and developing countries and a completed agreement by 2009.

Postscript

The Bali Conference concluded with the adoption of the Bali Action Plan that set out a roadmap for a new negotiating process to be completed by 2009. The aim is to negotiate a post 2012 agreement that will follow the Kyoto Protocol. Unfortunately there has not been an agreement on set targets for emission reductions at this time. The action plan supports the achievement of a long term goal for emission reductions in accordance with the principles of the Convention and in particular, the principle of common but differentiated responsibilities.¹⁴¹ So, intragenerational equity will continue to be a key consideration in future negotiations. Yves de Boer (Executive Secretary *UNFCCC*) commented in his recent presentation that finance and technology are central elements of Bali Action Plan:

- Developing countries need to know what is in the tool box for them before committing to action;
- Efforts on climate friendly technology and finance have to be recognized as a way of creating investment opportunities;
- It is an area for positive debate. Finance and technology can be the glue that connects developed and developing countries, and therefore represents a constructive starting point.¹⁴²

¹⁴¹Bali Action Plan http://unfccc.int/files/meetings/cop_13/application/pdf/cp_baliaction.pdf at 28 January 2008 para 1(a)

¹⁴²Yves de Boer, "Major Economic Meeting on Energy Security and Climate Change, Honolulu 30-31 January 2008," http://unfccc.int/files/press/news_room/statements/application/pdf/080130_statement_honolulu.pdf at 31 January 2008.

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