

# ENSURING CONSISTENCY WITH EXISTING INTERNATIONAL LAW OF ANOTHER CLIMATE CHANGE AGREEMENT

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We in the Pacific are innocent bystanders in the greatest act of folly of any age. Unless the world acts decisively in the coming weeks, the Pacific as we know it is doomed.

Fiji Prime Minister Frank Bainimarama<sup>1</sup>

## INTRODUCTION

Climate change is perhaps the greatest threat facing humanity and the planet Earth today and it is likely to remain so until human beings take adequate action to address the adverse effects of climate change. Such action can only be taken jointly. Even if every Pacific Island State took several times the action each has capacity to take in terms of mitigation and adaptation, it would have little impact on the adverse effects of climate change for these States in the medium and long-term. Some of the most vulnerable States in the world are simply unable to protect the most fundamental human rights of their people without assistance and action by the States that have been disproportionately exploiting the atmosphere for centuries. To achieve the needed action States have entered into a legally binding treaty, the United Nations Framework Convention on Climate Change (UNFCCC),<sup>2</sup> which has been ratified by more States than the Charter of the United Nations. This treaty sets out the basic contours of the needed action and provides legal obligations to address climate change in accordance with the principle of common but differentiated responsibilities and respective capabilities (CBDRRC). However, as it lacks a mechanism for enforcement, its implementation remains dependent on the will of States.<sup>3</sup> Unlike some other processes,<sup>4</sup> time is of the essence. The global efforts to address climate change are fighting a ticking clock set in motion by nature.

After more than half a decade of discussions, negotiations began in October 2015 on a new climate change agreement to complement and replace provisions of the Kyoto Protocol<sup>5</sup> and to enhance the UNFCCC. The current text<sup>6</sup> (“Draft Agreement” or “23 October text”) of this new treaty and the accompanying decisions of the Conference of the Parties (COP) to the UNFCCC (the main one referred to here as the “Draft COP21 Decision”) will be worked on during the first week of COP21 by the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP)<sup>7</sup> before being

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<sup>1</sup> Quoted in Milman, O., “Pacific islands make last-ditch plea to world before Paris climate talks, *the guardian* newspaper (1 November 2015) accessed at <http://www.theguardian.com/environment/2015/nov/02/pacific-islands-make-last-ditch-plea-to-world-before-paris-climate-change-talks> (on 1 November 2015).

<sup>2</sup> 1771 UNTS 107 (1992).

<sup>3</sup> See below n 15en page 16.

<sup>4</sup> The drawn out negotiations of the Doha Round of international trade negotiations, for example, do not have the same urgency of timeliness, and global trade has not diminished as a result of the slow pace.

<sup>5</sup> 2303 UNTS 162 (1997).

<sup>6</sup> The Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action version adopted by Member States at the Plenary held around 18:00 hours and released by the Secretariat at 23:00 hours on 23 October 2015. On 6 November 2015 and edited and slightly revised version was released and on 15 November 2015 the edited version was re-issued.

<sup>7</sup> COP Decision 1/CP.17, UN Doc. FCCC/CP/2011/9/Add.1 (15 March 2012). The mandate of the ADP which has functioned since 2012 is to “develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.”

adopted by the COP and opened for signature and ratification by States at the same meeting in Paris, France in December 2015.

This contribution describes and analyses some of the most important parts of the Draft Agreement (part II) and three cross-cutting issues (part III). It then ends with some concluding remarks about where we may be after COP21 (part IV). It is hoped that the descriptions and analysis might contribute to better understanding of what is at stake at COP21 from the perspective of international climate change law and international human rights law.

## **THE COP21 OUTCOME (DRAFT AGREEMENT)<sup>8</sup>**

The 23 October 2015 text is the negotiating text that States take with them to Paris when the last ADP session will take place and then the COP21 will consider the text for adoption. It is a text based on the negotiations between States, from which civil society was largely excluded and in which suspicions of all State Parties were heightened. As a result, there was an atmosphere of mistrust among State Parties, observers, and even co-chairs even as the negotiating text emerged from the spin-off groups late in the evening of 23 October 2015. This text rather than being the text of a draft treaty harkens back to the Geneva Draft of February 2015. Like the Geneva Draft, the text is a compilation of the different proposals of States. The text of the Draft Agreement contains 26 articles and a preamble spread over 29 pages with more than 2500 brackets and almost 30 “no text” options. The co-chairs’ 5 October effort to streamline the text had failed and States’ efforts to do so were marginal as most of the differences remain. Nevertheless, the G77 recognised the text as “a basis and a starting point for negotiations during the next session”<sup>9</sup> and the European Union referred to it as “Party-owned with a clear structure.”<sup>10</sup> It is the 23 October text of 23:30 (Draft Agreement) that States will be studying as they prepare for COP21. It is this text that is described and evaluated below.

### **Preamble**

The preamble has been expanded from the six preambular paragraphs in the 5 October text back to 15 paragraphs. Preambular paragraphs 1-3 stress that the Draft Agreement is in “furtherance” of the UNFCCC’s objective, but a reference to its principles and provisions remains in brackets. No mention is made of the Draft Agreement being intended to implement the UNFCCC nor is there an express statement acknowledging that the Draft Agreement is under the UNFCCC.<sup>11</sup> The mandate of the ADP is recalled by a reference to four COP decisions in the preambular paragraph 3.

Preambular paragraph 4 stresses the special vulnerabilities of some States<sup>12</sup> and the potential list of especially vulnerable States is more limited and different than the list in article 4(8) of the

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<sup>8</sup> The following section reflects a preliminary evaluation of the 23 October text or the Draft Agreement done immediately after the adoption of the text at ADP2.11.

<sup>9</sup> Bose, I., “TWN Bonn Climate News Update No. 8: Balanced ‘Party-owned’ text as basis for Paris negotiations,” p. 1 Third World Network: Malaysia (23 October 2015) *accessed at* [http://www.twn.my/title2/climate/news/Bonn17/TWN\\_update8.pdf](http://www.twn.my/title2/climate/news/Bonn17/TWN_update8.pdf) (23 October 2015).

<sup>10</sup> *Ibid* at p.2.

<sup>11</sup> Art 2, Draft Agreement.

<sup>12</sup> These States refer to developing countries, least developed countries, small island developing States, small mountainous developing States, Africa States, and States of the Central American isthmus.

UNFCCC.<sup>13</sup> The States whose economies are highly dependent on fossil fuels appear no longer to be considered vulnerable.<sup>14</sup>

Preambular paragraphs 5, 10 and 11 seem to be a collection of thoughts for a diverse group of interests<sup>15</sup> and paragraphs 6 and 7 state what would seem to be obvious, which is that urgent and sustained action is needed to address the adverse consequences of climate change and that the impacts of climate change are already being felt.

In addition, the 15 preambular paragraphs in the 23 October text now contain references to the inter-sectoral nature of climate change action,<sup>16</sup> note that the “largest share of historical global emissions” occur in developed countries but the emissions of developing countries are growing,<sup>17</sup> recognise that future action should depend on economic and emissions trends,<sup>18</sup> and reaffirm the importance of education.<sup>19</sup> The importance of sinks<sup>20</sup> and land use in relation to food security is also emphasised.<sup>21</sup> Finally, carbon pricing is considered important for the cost-effective cutting of emissions.<sup>22</sup> This last is somewhat controversial realising as Frank Ackerman of the Stockholm Environment Institute and Tufts University does, that “[w]hile carbon prices will change energy costs, energy consumption and carbon emissions, relying on this mechanism alone would be both ineffective and inequitable.”<sup>23</sup>

### **Definitions (art. 1)**

The 5 October text limited definitions to the parties to the agreement and “the COP serving as the meeting of the Parties to this Agreement (CMA)”.<sup>24</sup> Although the co-chairs’ tool did not suggest that a new governing body would need to be created, the earlier 24 July 2015 text did appear to make such a suggestion. The 23 October text again introduces the CMA in Article 1, paragraph 3 as is likely legally necessary until all the Parties to the UNFCCC have ratified the Draft Agreement. While this is necessary it will likely further deplete the already dangerously weak authority of the COP under the UNFCCC.

The 23 October text also suggests a vague definition of developing and developed countries; however, reaching meaningful agreement on this definition will not be easy. Article 2, paragraph 1, clearly anchors the Charter of the United Nations in the sovereign equality of all its Member States. This equality does not mean treating countries equally in relation to matters in which they are unequal.<sup>25</sup> The UNFCCC contains two annexes, the first including both developed countries and

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<sup>13</sup> Art. 4(8), UNFCCC. A list of vulnerable States as stated in art. 4(8) includes those that are small islands; low-lying coastal; arid and semi-arid; liable to floods and forest decay; prone to natural disasters, drought and desertification; have fragile mountainous ecosystems; are landlocked, or, are highly dependent on fossil fuel.

<sup>14</sup> Compare preambular paragraph (Pp.) 20 and art. 4(8)(h), UNFCCC.

<sup>15</sup> The diverse group of interests range from poverty reduction, health, and sustainable development to ecosystem integrity and human rights, including food security and the rights of indigenous peoples, women, children and persons with disabilities.

<sup>16</sup> Pp. 5, Draft Agreement (23 October 2015).

<sup>17</sup> Ibid, pp. 8.

<sup>18</sup> Ibid, pp. 9.

<sup>19</sup> Ibid, pp. 14.

<sup>20</sup> Ibid, pp. 13.

<sup>21</sup> Ibid, pp. 13.

<sup>22</sup> Ibid, pp. 15.

<sup>23</sup> See Ackerman, F., “Carbon Markets are Not Enough (Chap. 3),” at 26 in UNCTAD, *Trade and Environment Review 2009/2010: Promoting poles of clean growth to foster the transition to a more sustainable economy* (2010).

<sup>24</sup> Art. 1(1-3), Draft Agreement.

<sup>25</sup> By way of example, as in 1992, today there are a relatively small number of countries that are high income countries having a Gross National Income (GNI) per capita of over US\$12,746. Most people in the world live on less than US\$12,746. According to the World Bank in 2008 more than 80% lived on less than US\$10 per day or less than US\$3650 per

countries in transition and the second only the former, which are given more responsibilities for cutting back their emissions as well as assisting non-Annex I States. The references to developed and developing countries in the UNFCCC are linked to Annex I. “Party included in Annex I” is defined in the UNFCCC.<sup>26</sup>

An effort is also made to define REDD+,<sup>27</sup> JMA (as an “alternative to REDD+”),<sup>28</sup> results-based payments,<sup>29</sup> climate forcers,<sup>30</sup> and emissions reductions,<sup>31</sup> which appears to assume carbon trading.<sup>32</sup> An article devoted to defining the controversial REDD+ mechanism has also been added in article 3bis in terms of COP19 decisions<sup>33</sup> and states the purpose of the REDD+ mechanism.<sup>34</sup>

Surprisingly, there is no definition of nationally determined mitigation commitments or contributions (NDMCs), which are instead defined in the options for article 3, paragraph 2. Finally, every word in Article 1 after the chapeaux and definitions of “Parties present and voting,”<sup>35</sup> “Party,”<sup>36</sup> and “CMA” has been placed in brackets.

### General (art. 2 and 2bis)

Article 2 states the purpose of the agreement. Options for the first of two paragraphs range from merely repeating the objective of the UNFCCC from its article 2<sup>37</sup> to defining that article in terms of different versions of a 2°C or 1.5°C limit on global temperature rises.<sup>38</sup> Despite calls by leading climate experts for keeping global warming under 1°C, there is no such option in the text.<sup>39</sup> A second paragraph appears to be a concession to some of the most important concerns of some States and civil society and constitutes some of the more ambitious text in the Draft Agreement.<sup>40</sup> The inclusion of “the right to health and sustainable development” is new and appears to significantly

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year. See World Bank, *World Bank Development Indicators* (2008) and Chen, S., and Ravallion, M., *The developing world is poorer than we thought, but no less successful in the fight against poverty*, World Bank Policy Research Working Paper No. 4703 (August 2008). This amount of money is woefully insufficient to access even the most basic nutrition, health, and housing services. Using the United Nations’ figures therefore would not provide a credible indicator of States’ level of development. Perhaps for that reason the UNFCCC, although speaking of developed and developing countries, does not define them.

<sup>26</sup> Art. 1(13), Draft Agreement.

<sup>27</sup> *Ibid* at para. 7. REDD+ is defined “as a mechanism aimed at reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries that is based on the Warsaw Framework for REDD+”.

<sup>28</sup> JMA is defined as the “joint mitigation and adaptation actions”.

<sup>29</sup> *Ibid*, para. 7bis.

<sup>30</sup> *Ibid*, para. 5. Climate forcers are defined as “compounds or group of compounds that contribute to climate change”.

<sup>31</sup> Emissions reductions are defined as “the sum of all reduced emissions and increased carbon stocks”.

<sup>32</sup> *Ibid*, para. 6.

<sup>33</sup> Art. 3bis(2), Draft Agreement.

<sup>34</sup> *Ibid*, para. 3.

<sup>35</sup> Art. 1(1), Draft Agreement.

<sup>36</sup> *Ibid*, para. 2.

<sup>37</sup> Art. 2(1), Draft Agreement.

<sup>38</sup> *Ibid*, para. 1(a).

<sup>39</sup> Hansen, J., Sato, M., Hearty, P., Ruedy, R., Kelley, M., Masson-Delmotte, V., Russell, G., Tselioudis, G., Cao, J., Rignot, E., Velicogna, I., Kandiano, E., Schuckmann, K. von, Kharecha P., Legrande, A.N., Bauer, M., and Lo, K.W., “Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2°C global warming is highly dangerous,” 15 *Atmos. Chem. Phys. Discuss.* 20059–20179 (2015).

<sup>40</sup> This includes references to “equity,” “science,” “the principles of equity and common but differentiated responsibilities and respective capabilities,” “the integrity and resilience of natural ecosystems,” “the integrity of Mother Earth,” the “protection of health,” “a just transition of the Workforce,” “decent work and quality jobs,” “respect, protection, promotion and fulfillment of human rights for all, including the right to health and sustainable development,” “the right of people under occupation,” “gender equality and the full and equal participation of women,” and “intergenerational equity.”

strengthen the rights language in the Draft Agreement. References to Mother Earth, indigenous rights and the rights of people living under occupation have been proposed before but usually disappear from the text. Some of the above mentioned text in article 2, paragraph 2, as well as article 2 as a whole, is in brackets. This could mean that this ambitious text could be among the first victims of political compromise. This is signaled by the “no text” option.

Article 2bis focuses on States reporting requirements of their voluntary contributions suggesting that they become legally binding, using the word “implement” in its paragraph 1.<sup>41</sup> Paragraph 2 states that nationally determined contributions “will represent a progression in light of Parties’ differentiated responsibilities and commitments”<sup>42</sup> in an effort to reach the ambition that is necessary to achieve the objectives of the UNFCCC. The paragraph complements and details the common but differentiated nature of States’ commitments.<sup>43</sup> It nevertheless represents a very weak attempt to make voluntary contributions legally binding, which may inadvertently result in locking in commitments that are inadequate to protect billions of vulnerable people. The “no text” Option 2 indicates that even this weak attempt is controversial for some States.

### **Mitigation (art. 3)**

By far the longest article in the 23 October text, article 3 runs for more than 8 pages with 19 subparagraphs.<sup>44</sup> Despite the lengthy text, the Draft Agreement currently contains no clear mitigation obligations for any State and certainly no adequate collective objective. The collective long-term goal is defined at anything between 40% and 70% reductions based on 2010 emissions levels by 2050.<sup>45</sup> Thus considering that the IPCC’s Fourth Assessment Report stressed the need for the peaking of global emissions by 2015, even the most optimistic of the above collective goals is wholly inadequate. The individual efforts seem to be based on a version of the voluntary-pledges-option proposed in Copenhagen at COP15 despite the controversy it caused at that time.<sup>46</sup> In the Draft Agreement some options require States to implement their NDMCs. If the Draft Agreement voluntary commitments are anywhere near the commitments made by States in the INDCs, they will fall far short of what is required for adequate action to address the adverse effects of climate change. Paragraphs 3 to 5 make an effort to increase the mitigation ambition of States, but without an accountability mechanism these paragraphs on differentiated efforts,<sup>47</sup> progression,<sup>48</sup> and ambition<sup>49</sup> are likely to lack enforceability. Despite these *de minimis* provisions, some Western commentators have even called for further weakening the Draft Agreement by ensuring it is not legally binding.<sup>50</sup> Such suggestions are inconsistent with the agreed mandate of the ADP to

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<sup>41</sup> Art. 2bis(1), Option 1, Draft Agreement.

<sup>42</sup> Ibid, para. 2.

<sup>43</sup> Ibid, para. 2. The paragraph states that “[t]he extent to which developing country Parties will effectively implement this Agreement will depend on the effective implementation by developed country Parties of their commitments on provision of finance, technology development and transfer and capacity-building.”

<sup>44</sup> These paragraphs are on (1) the collective long-term goal, (2) individual efforts, (3) differentiated efforts, (4) progression, (5) ambition, (6) information, (7) features, (8) timing, (9) housing, (10) accounting, (11) methods and guidance, (12) long-term strategies; (13) response measures; (14) unilateral measures, (15) REIOS, (16) cooperative approaches, (17) support, (18) framing, and (19) international transport emissions.

<sup>45</sup> Art. 3(1), Option 1, Draft Agreement.

<sup>46</sup> See, for example, Doebbler, C.F.J. and Wewerinke, M.J., “What happened in Copenhagen,” *Al-Ahram Weekly*, Issue No. 978 (24 – 30 December 2009).

<sup>47</sup> Art. 3, para. 3, Draft Agreement.

<sup>48</sup> Ibid para. 4.

<sup>49</sup> Ibid para. 5.

<sup>50</sup> See Ottinger, R., “For CoP-21 “Legally Binding” Means Bound To Fail,” 45(5) *Environmental Policy and Law* 179 (2015).

“develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.”<sup>51</sup>

In the proposed paragraph on the information States should communicate in regards to their NDMCs, the description of the information as providing “clarity, transparency and understanding” appears agreed in a rare step forward in the text.<sup>52</sup> There are two options for paragraphs on the features of the NDMCs. The first provides for obligations for all States without consideration of CBDR,<sup>53</sup> the second for a differentiated approach that is consistent with CBDR.<sup>54</sup>

The remaining paragraphs 8 through 19 deal generally with technical aspects of reporting NDMCs.<sup>55</sup> Some options for paragraphs 8 and 9 speak of an annex.<sup>56</sup> Unlike the annex B of the Kyoto Protocol that contains emissions reduction commitments as quantified percentages of a base year, a footnote indicates that commitments would be based on national determined voluntary contributions or NDMCs.<sup>57</sup> In the provision on methods and guidance, one option allows loose counting including land use and REDD+,<sup>58</sup> while another Option expressly rejects provisions on accounting and land use.<sup>59</sup> The Options for long-term strategies include a requirement that States “shall formulate low emissions development strategies with time frames for zero emissions.”<sup>60</sup> Developing countries also submitted proposals for ensuring adequate response measures<sup>61</sup> and prohibiting unilateral measures,<sup>62</sup> but these proposals were met with “no text” proposals from the developed countries. A provision allowing regional economic integration organisations to report collectively for their Member States appears in paragraph 15 in brackets as is true for most of the proposals already mentioned. However, such a provision is mirrored in the UNFCCC and the KP texts. Provisions for cooperative approaches range from “no text”<sup>63</sup> to provisions that appear aimed at ensuring that cooperative action is only counted once.<sup>64</sup> Both Options for provisions on support appear aimed at ensuring developing countries “new and additional financial resources, technology transfer and capacity building”<sup>65</sup> as is already required by article 4 of the UNFCCC. Paragraph 18 of the article 3 repeats the references to CBDR. Finally, the provisions on international transport emissions essentially repeat article 2, paragraph 2 of the Kyoto Protocol.<sup>66</sup> As a consequence aviation and maritime emissions that are growing at the rate of 300% by 2050 are left to the discretion of industry monitors who have not been willing to set clear emissions limitation targets. Moreover, the complete silence about military emissions leaves a huge amount of emissions unfairly reported and increases the potential that they could be under-reported.<sup>67</sup>

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<sup>51</sup> COP Decision 1/CP.17, UN Doc. FCCC/CP/2011/9/Add.1 (15 March 2012).

<sup>52</sup> Ibid para. 6.

<sup>53</sup> Ibid para. 7, Option 1.

<sup>54</sup> Ibid para. 7, Option 2.

<sup>55</sup> Reporting should be timely, transparent, and without double counting.

<sup>56</sup> Ibid paras. 8 and 9.

<sup>57</sup> Ibid para. 8(a), Option 1, nn. 7.

<sup>58</sup> Ibid para. 11, Option 1.

<sup>59</sup> Ibid para. 11, Option 2.

<sup>60</sup> Ibid para. 12.

<sup>61</sup> Ibid para. 13.

<sup>62</sup> Ibid para. 14.

<sup>63</sup> Ibid para. 16, Option 4.

<sup>64</sup> Ibid para. 16, Option 2.

<sup>65</sup> Ibid para. 17.

<sup>66</sup> See above n 5.

<sup>67</sup> See International Panel on Climate Change, *Revised 1996 IPCC Guidelines for National Greenhouse Gas Inventories*, IPCC: Bracknell, UK (2007), stating that military emissions can be reported in aggregate or in the country where they are actually being made, thus allowing the real source of military emissions to be obscured and controls on this reporting to be more difficult. It can also lead to the consequences that overseas military bases, even in occupied territories are counted as emissions of the occupied country.

Articles 3bis and 3ter seem to transcend the mitigation and adaptation divide. The former deals with REDD-plus (REDD+) and thus states its purpose.<sup>68</sup> It also appears from the lack of brackets around paragraph 3 in article 3bis that the definition accorded to REDD+ is agreed, although difference remains on whether to describe REDD-plus as a “[m]echanism for mitigation and adaptation”<sup>69</sup> and whether to create a “Joint Mitigation and Adaptation Mechanism.”<sup>70</sup> In contrast to article 3bis that is based on an issue that the COP began discussing in 2005,<sup>71</sup> the discussion of article 3ter seems to have been inspired by the recently adopted Sustainable Development Goals.<sup>72</sup> As such it is not without controversy and includes widely divergent options among the five options,<sup>73</sup> including a “no text”<sup>74</sup> option. The article appears to be an effort to ensure climate action achieves sustainable development, but it is vague and incomplete.<sup>75</sup>

The agreement contains alternatives that include both binding mitigation obligations and voluntary mitigation pledges. The division between mainly developing States that support the former and developed States that are stubbornly fighting to maintain the latter, which they introduced at COP15, appears to be widening.<sup>76</sup> Unless this gap can be bridged any mitigation action prompted by the Draft Agreement is likely to be inadequate. The hope that the INDCs that all countries agreed to provide might help to increase ambition seems to have dissipated as their due date was moved back to a now almost meaningless 31 October 2015. Nevertheless, the INDCs provided by many States by this date have been shown to be very inadequate to achieve even a 2°C warming limit.<sup>77</sup> At this late date it was too late for the INDCs to have a significant impact on the Draft Agreement as the UNFCCC Secretariat and States' delegations have not had adequate time to evaluate the INDCs. Nevertheless, the UNFCCC's report issued on 30 October 2015 indicates that the INDCs of States producing more than 90% of the world emissions are not ambitious enough to prevent global warming well in excess of the already dangerous 2°C limit,<sup>78</sup> not to mention the safer 1.5°C or 1°C goals. Nevertheless, it optimistically concludes that as a first step, the INDCs are valuable. The danger that this level of warming means is emphasised by seventeen of the world's leading climate scientists in their recently published study that concludes that “2°C global warming above the preindustrial level, which would spur more ice shelf melt, is highly dangerous.”<sup>79</sup> Their conclusions showed that much of the harm that had been predicted by the IPCC had become unavoidable and was already taking place at a much faster rate than had been earlier predicted.

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<sup>68</sup> The purpose of REDD+ is to “incentivize the reduction of emissions from deforestation and forest degradation and to promote conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, while enhancing the non-carbon benefits derived as a result of the multiple functions of forests, including alleviating poverty and building ecosystem resilience.”

<sup>69</sup> *Ibid* para. 1.

<sup>70</sup> *Ibid* para. 4.

<sup>71</sup> See UNFCCC COP Decisions 2/CP.13 (The Bali Action Plan) and 2/CP.13 (2007).

<sup>72</sup> “Transforming our world: the 2030 Agenda for Sustainable Development,” UNGA Res. A/RES/70/1 (21 October 2015) adopted at the 4th plenary meeting of the UNGA (25 September 2015).

<sup>73</sup> For example, Art. 3ter, Option 4 of the Draft Agreement seems to favour a differentiated approach in which assistance to developing countries is a focus, while Option 1 seems to encourage ambition in a manner by which they contributions of States are not differentiated.

<sup>74</sup> Art. 3ter, Option 5, Draft Agreement.

<sup>75</sup> For example, Option 1

<sup>76</sup> This needs more explanation. G-77 wants binding for OECD and voluntary for themselves. EU wants binding for all, but could give some voluntariness to some G-77. US+ wants voluntary for all if China does not take binding.

<sup>77</sup> NGO Coalition, “Fair Shares: A Civil Society Equity Review of INDCs (Summary)” (October 2015) accessed at [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/ib-civil-society-review-climate-indcs-191015-en\\_2.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-civil-society-review-climate-indcs-191015-en_2.pdf) (1 November 2015).

<sup>78</sup> UNFCCC, “Synthesis report on the aggregate effect of the intended nationally determined contributions,” UN Doc. FCCC/CP/2015/7 (30 October 2015).

<sup>79</sup> See above n 39.

A bright spot might have been that there is attention to zero emissions in the mitigation section of the Draft Agreement, but the vaguely worded alternatives and the lack of any specific commitments in the near term even create suspicion about the intention behind this reference. Indeed the use of the word “net” seems to indicate that these limits will be reached by wealthy industrialised countries either buying the right to pollute from poorer countries that would otherwise not produce emissions or resorting to untested or potentially dangerous technologies.<sup>80</sup> These practices are unsustainable, often dangerous, and will likely not achieve the stabilisation of greenhouse gases under dangerous levels.<sup>81</sup>

The majority of countries, represented by the 134-States G77 and China, have been pushing for legally binding quantified emission reduction commitments for developed or Annex I countries, but the majority of Annex I countries have resisted by insisting non-Annex I countries take on unconditional commitments as well. Moreover, the developed countries appear only willing to agree to act in the future if developing countries commit to action first. This tactic has been employed by the largest fossil fuel consuming countries throughout the talks and it is hard, at this time, to imagine that in the future it will change. The result is that the goal of zero emissions seems to be an illusion that is being used as leverage on other issues on which developed countries wish to gain concessions. The lack of any mention of fossil fuels in the mitigation section adds to this suspicion.

Thus although achieving adequate mitigation ambition in the Draft Agreement is essential, it is highly unlikely that it will be achieved given the slow progress to date and the distance between States positions. At the center of the slow progress is the dispute over the principle of CBDR, which States are obliged to respect according to article 3 of the UNFCCC and which some developed States still challenge as to its existence or its interpretation. While the challenges are subsiding with a narrowing number of holdout States able to defend their positions in light of the clear words of article 3, the number of States seeking to interpret the principle in their unique manner has remained stable. Developed States generally claim that the principle means that all States that can take action on climate change to an equal degree. The consequence of this interpretation is that if developing States will not accept binding legal obligations then all States should have merely ‘voluntary commitments’, which are not legal obligations at all. Developing States counter, that the UNFCCC framework was intended to create a system for addressing climate change in which developed States took the lead and were the only States that had legal obligations on mitigation. The reason for this, say developing States, is that the developed States have benefited for centuries from over exploitation of the planet’s atmosphere and they, developing States, need the chance to catch up. Behind these often articulated positions seems to be a sense of entitlement by many developed countries. Despite all the moral pronouncements by such figures as the Catholic Church’s Pope Francis<sup>82</sup> and the Geneva Interfaith Forum on Climate Change, Environment and Human Rights,<sup>83</sup> the moral message has not yet resonated with developed countries.

## **Adaptation and loss and damage (arts. 4 and 5)**

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<sup>80</sup> The achievement of mitigation obligations by carbon trading or turning to dangerous technologies is expressly supported by some developed States and by some oil rich States.

<sup>81</sup> Preventing a dangerous level of greenhouses to accumulate in the atmosphere is the objective of the UNFCCC to which all States Parties have committed as an international legal obligation.

<sup>82</sup> See, for example, “Encyclical Letter *Laudato Si’* of The Holy Father Francis on Care for Our Common Home” (24 May 2015) accessed at [http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si.html](http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html) (accessed 5 June 2015).

<sup>83</sup> This group has organised side-events that stress the moral imperative of responsibility by countries who have benefited from the historical exploitation of the atmosphere at several interim UNFCCC meetings as well as at the COPs since COP15 in 2009.



Adaptation, one of the most important aspects of climate action and the Draft Agreement for developing countries, covers about two-and-a-half pages of the Draft Agreement but appears far from agreed. There are 12 paragraphs, seven of them with more than one option and four with “no text” options. Even paragraphs 4 through 8 that have only one option and much text that is not in brackets, still contain the significantly different language options of “shall” and “should” as alternatives on which there is no agreement. Much of the key differences come down to how the principle of CBDR, to which State Parties committed in article 3<sup>84</sup> will be expressed, or sometimes whether it will even be mentioned. This matter has not been resolved and there is little to warrant optimism that it will be by COP21. For developing countries it is not only a matter of upholding the principle, but also a matter of their very ability to develop economically. Few developing States have become developed States over the past 70 years and many fear they will never be able to catch up with the developed countries in terms of development under the current climate system that would lock them into an apparent choice between their development and contributing to climate action.<sup>85</sup> This was realised already in 1992, when developed and developing States agreed that developed States must take the lead and offer assistance to developing States. However, today, many developed States are seeking to renege on this agreement. These developed States appear to fear a real realignment of the international order towards a more democratic and equitable one in which power and wealth is more evenly shared. The international climate negotiations are perhaps the forum in which this tension plays itself out most clearly in international political decision making.

As one might expect this tension is reflected in articles 4 and 5 of the Draft Agreement. Paragraph 1 contains two vague options providing for goals. Although both paragraphs appear to concern long-term goals this is not entirely clear. Only Option 1 contains a reference to concrete goals linked to temperature rise limits, using both 2°C and 1.5°C. Option 2 is a weak call that merely states that adaptation is a shared goal and may in fact run counter to the principle of CBDR. Paragraph 2 contains a catch all Option 1 and an Option 2 based on CBDR. There is also a “no text” option 3. Paragraph 3 contains two options, which both acknowledge that “adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach” and the important role of indigenous knowledge.<sup>86</sup> There still seems to be a disagreement, however, how CBDR will be incorporated. Human rights, the right to life, and the rights of people living under occupation are in brackets in the Option 1, but do not appear in Option 2. More importantly, neither health nor the right to health is mentioned in either option or in the article on adaptation despite the fact that the majority of States presenting INDCs say it is important to adaptation and many, that it is a priority.<sup>87</sup> Paragraph 4 contains agreement on the importance of adaptation, at least for the most vulnerable, although a reference to international cooperation remains in brackets. The theme of cooperation is taken up again in paragraph 5, but whether it is an obligation as in the UNFCCC<sup>88</sup> or has been weakened to a mere aspiration is unclear. Paragraph 6 describes what action States should take for adaptation planning and includes assessment, strengthening and monitoring, but exactly of what remains unclear. Paragraphs 7 and 8 further specify that States should submit some sort of communications about adaptation<sup>89</sup> as 50 Least Developed Countries already do to qualify for funding; and, there is an option for periodic submissions.<sup>90</sup> Paragraph 9 calls for a register for

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<sup>84</sup> Art.3, UNFCCC.

<sup>85</sup> Although using sustainable energy could help developing States to develop without emitting significant levels of greenhouse gases, the technology for a ‘green economy’ is being withheld from developing States through the intellectual property protections and

<sup>86</sup> Art. 4(3), Option 1, Draft Agreement.

<sup>87</sup> This is based on the author’s review of 100 of the 118 INDCs submitted.

<sup>88</sup> See, for example, art. 4(1)(e), UNFCCC.

<sup>89</sup> Art. 4, para. 7, Draft Agreement.

<sup>90</sup> Ibid Art. 4(8(b)).

adaptation communications in one option<sup>91</sup> and for “no text” on this matter in another option.<sup>92</sup> Paragraph 10 indicates that States disagree over whether there should be a special high-level stocktaking on adaptation at regular intervals<sup>93</sup> or that this responsibility should be part of the tasks of the CMA of the Draft Agreement’s bodies.<sup>94</sup> A third option refers to “no text” at all on this matter.<sup>95</sup> Paragraph 11 has two options for the involvement of the UNFCCC bodies dealing with adaptation, but it appears that there is disagreement about whether the Adaptation Committee and the Least Developed Countries Expert Group should be involved in adaptation decisions under the Draft Agreement.<sup>96</sup> Similarly, States have apparently not agreed on the conditions for eligibility for assistance in paragraph 12,<sup>97</sup> with one option calling “no text” on separate text on adaptation support and for provisions on adaptation to be distributed among article 6 through 9.<sup>98</sup>

Adaptation includes securing adequate finance, capacity-building, and access to technology that will enable vulnerable States to become more resilient to the adverse impacts of climate change. Each of these constituents is dealt with elsewhere in the Draft Agreement. This section was intended to provide the overall framework for adaptation. It has been bogged down by the continuing controversy over the principle of CBDR, which as noted in the section on mitigation, States are obliged to respect according to the UNFCCC.<sup>99</sup> It is unlikely that much progress will be made until an agreement on CBDR is reached.

Article 5 concerns loss and damage, which was previously combined with adaptation in the 5 October text and put with the undecided elements of the 24 July Tool. Loss and damage is an important issue for developing States given that much of the damage they will suffer is now unavoidable due to the failure of the international community to act in a timely manner. Article 5 contains two options. Option 1 is built on the foundation of the Warsaw International Mechanism on Loss and Damage,<sup>100</sup> defining the mechanism under the Draft Agreement.<sup>101</sup> However, exactly how the mechanism will be defined is not clear. The purpose of the mechanism, however, is stated as “to promote and support the development and implementation of approaches to address loss and damage associated with the adverse effects of climate change, *inter alia*, extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change.”<sup>102</sup> It should be noted that the whole of Option 1 is in brackets and that Option 2 is a “no text” option that states “No reference to loss and damage (no Article 5).” As a result the inclusion of loss and damage in the Draft Agreement is still very much up in the air.

The term loss and damage “refers to negative effects of climate variability and climate change that people have not been able to cope with or adapt to.”<sup>103</sup> While developing States want developed States to assist them in dealing with the damage they cannot avoid from climate change, developed States retort that they will only assist if their liability is limited. This latter view seems to ignore the fact that under general international law, developed States that have contributed to causing climate

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<sup>91</sup> Ibid Art. 4(9), Option 1.

<sup>92</sup> Ibid Art. 4(9), Option 2.

<sup>93</sup> Ibid Art. 4(10), Option 1.

<sup>94</sup> Ibid Option 2.

<sup>95</sup> Ibid Option 3.

<sup>96</sup> Ibid Art. 4(11), Option 1.

<sup>97</sup> Ibid Art. 4(12), Options 1 and 2.

<sup>98</sup> Ibid Art. 4(12), Option 3.

<sup>99</sup> See Article 3, UNFCCC.

<sup>100</sup> See Warsaw international mechanism for loss and damage associated with climate change impacts, COP Decision 2/CP.19, UN Doc. FCCC/CP/2013/10/Add.1, pp. 6-8 (31 January 2014).

<sup>101</sup> Ibid Art. 5(1), Option 1.

<sup>102</sup> Ibid Art. 5(2).

<sup>103</sup> Warner, K., and Geest, K., van der, “Loss and damage from climate change: local-level evidence from nine vulnerable countries,” 5 (4) *International Journal of Global Warming* 367, 369 (2013).

change, despite their legal obligations to cut their emissions, are likely to be liable under international law, with very few legal limits, for the damage they cause to developing States.<sup>104</sup> A provision limiting the liability of developed States will therefore be contrary to the existing legal rights of developing States. One would think that developing States would not easily cede their legal rights as it appears developed State are demanding.

## **Finance (art. 6)**

Finance is the first of a trinity of obligations that developed States have towards developing States. The other two are the obligation to transfer technology<sup>105</sup> and to help developing countries build their capacity to adapt to climate change, to contribute to mitigation, and to meet their reporting obligations under the UNFCCC and the Draft Agreement.<sup>106</sup> Perhaps the weakest provisions in the Draft Agreement are those concerning finance. This is perhaps the most troubling aspect of international climate action. Although there are two options of 4 and 21 paragraphs, respectively, neither contains any concrete financial commitments. The first Option uses phrases like “mobilize, and/or facilitate” that are unlikely to contribute to building the trust needed to achieve an ambitious Draft Agreement. Furthermore, although scaling up financing is mentioned,<sup>107</sup> no mechanism to ensure this is put in place, in fact no mechanism to ensure States meet their already existing financing obligation, appears in the Draft Agreement. This was a major issue for developing States during the negotiating session that took place between February and October 2015, but it was not resolved.

The approximately three pages of provisions on finance in the co-Chairs tool fail to provide for any meaningful obligations for developing States to provide climate finance. The need to focus on public finance is not even articulated clearly. Even though private sources of finance will be woefully inadequate to meet the cost of dealing with climate change,<sup>108</sup> even the 100 billion per year goal is proving overly optimistic given the ambiguity about how the finance will materialise. The principles that are supposed to guide finance and which are already embedded in the UNFCCC, such as the obligation for developed countries to provide new and additional finance to assist developing countries, is not clearly articulated in Option 1<sup>109</sup> and only within brackets in Option 2.<sup>110</sup> Missing from the text is also any mention of curbing fossil fuel subsidies.

The UNFCCC unambiguously states that “[t]he developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations” to report and

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<sup>104</sup> The law of State responsibility for harm caused to another State by an act that is inconsistent with an existing legal obligation towards that State, such as a legal obligation flowing from a multilateral treaty like the UNFCCC, creates the duty to, among other obligations, pay adequate compensation to the injured State. See *The Factory at Chorzow (Claim for Indemnity) (The Merits) (Germany v. Poland)*, PCIJ Reports, (Ser. A), No. 17 (13 September 1928) at para. 125, p. 48 and *Trail Smelter, UNRIAA*, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941). The reason developed States will carry this burden of State responsibility is that only they, and not developing States, have obligations to mitigate their greenhouse gas emissions that they have not met.

<sup>105</sup> Art. 7 in the Draft Agreement. See also 4(4)(concerning least developed countries), art. 4(8) read in conjunction with arts. 4(7) and 11(1), UNFCCC.

<sup>106</sup> Arts. 8 and 9 of the Draft Agreement. See also arts. 4(1)(c)-(e) and (g)-(i), 5(b) and (c), UNFCCC .

<sup>107</sup> Art. 6(8bis) (in brackets).

<sup>108</sup> See Kowalzig, J., “Climate, Poverty, and Justice: What the Poznan UN climate conference needs to deliver for a fair and effective global deal,” 124 *Oxfam Briefing Paper* p. 15 (December 2008). Although few academics or institutions have even attempted to estimate private financial flows, it is logical to understand that private finance will not be adequate because private finance is done on a profit making basis and today financial flows from North to South—as climate finance should be—result in profits being repatriated to the North

<sup>109</sup> Art. 6, Option 1.

<sup>110</sup> *Ibid*, Option 2.

take action on climate change.<sup>111</sup> The UNFCCC further obliges States to take into account “adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties” in the funds they provide.<sup>112</sup> This vision does not seem to be communicated by the current draft text concerning finance. The same vague language that plagues other parts of the Draft Argument is also present in the financing options. Options range from binding commitments, to which developed States steadfastly object, to aspirations that again threaten to render the agreement irrelevant for achieving international action.

In the negotiations developed States have been insisting on provisions that provide for a larger role for the private sector, while refusing to commit to providing adequate finance, capacity building, and technology to developing countries. Developing countries in turn demanded that developed States provide them the new and additional finance, capacity building, and technology with even more assurances of adequacy. An example is the developed countries refusal to engage fully in discussions about exceptions to the intellectual property rights, which often prevent developing States from acquiring the technology necessary to green their economies. While almost all but a handful of States have embraced market mechanisms, few are willing to rely on them without the State committing to be the ultimate provider of last resort. The controversy over market and non-market mechanisms may, however, merely be masking the larger problem that some of the wealthiest and historically most polluting States are unwilling to give up the advantages they have gained by their overexploitation of the planet's atmosphere and many of its people.

The real test of the commitment to financing will be what money is actually put forward, for example by deposit or at least signed agreement, in the Green Climate Fund. Recent moves by developed countries to double count, provide vague oral promises without any money on the table, and to generally restrict their financing obligations, could render the Draft Agreement incapable of implementation, especially at the level that existing law and science indicates is necessary.

The lack of any type of accountability mechanism to ensure that commitments will be fulfilled I likely to ensure the inadequacy of any financing. Equally concerning is that other forums where it was hoped progress would be made towards providing adequate climate finance, turned out to be failures. Perhaps most notable of these failures was the Third Financing for Development Conference held in Addis Ababa, Ethiopia in July 2015 which adopted an outcome document, which did not contain any real commitments, back-tracked on some, and appeared to perpetuate a failing business as usual, scenario.<sup>113</sup> This meeting, it had been hoped at one point, would provide the resources for the achievement of both climate change goals and the Sustainable Development Goals.<sup>114</sup> In fact no money was put on the table and there was instead backtracking by States from the pledges that they had made decades ago. As a consequence the mobilisation of 100 billion USD per year by 2020 to address climate change looks quite unrealistic, despite the fact that the amount of financing estimated to be needed globally is almost 6 trillion USD per year by 2020.<sup>115</sup>

### **Technology development and transfer (art. 7)**

Together with finance and capacity-building, technology development and transfer is one of the main consequences of CBDR and thus one of the primary responsibilities of developed States

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<sup>111</sup> Art. 4(3), UNFCCC.

<sup>112</sup> Ibid.

<sup>113</sup> Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), annexed to UN Doc. A/69/313 (27 July 2015).

<sup>114</sup> See above n 72.

<sup>115</sup> World Economic Forum, The Green Investment Report: The ways and means to unlock private finance for green growth (A Report of the Green Growth Action Alliance) p. 13 (2013). 32 See arts. 4, para. 5, 5, 6, and 9, para. 2(d) of the UNFCCC.

towards developing States.<sup>116</sup> It has also been a standing concern of the COP. As long ago as COP7 in Marrakesh, Morocco, an Expert Group on Technology Transfer was created to advise the COP through its Subsidiary Body for Scientific and Technical Advice (SBSTA).<sup>117</sup> A major obstacle to adequate transfer of technology between developed and developing countries, however, has been intellectual property rights. These rights are not even mentioned in the Draft Agreement, and only meekly mentioned in the draft COP21 decision.<sup>118</sup>

Elsewhere in the Draft Agreement seven paragraphs are concerned with technology development and transfer, but four of them include “no text” options. Paragraph 1 states a general goal of development and transfer and some vague language of encouragement.<sup>119</sup> Paragraph 1ter makes an effort to encourage the same thing by giving authority to the CMA to take action of encouragement and by requiring States to submit reports at regular, but otherwise undefined, intervals.<sup>120</sup> Paragraph 2 contains an option calling for the CMA to adopt a technology framework<sup>121</sup> and another merely referring to the framework.<sup>122</sup> Other paragraphs address developed countries’ duty to help developing countries overcome barriers to technology access and development,<sup>123</sup> strengthen existing mechanisms,<sup>124</sup> and support developing countries.<sup>125</sup>

### **Capacity-building (art. 8 and 8bis)**

Capacity building is also found in the UNFCCC across several articles that deal with strengthening the resilience of countries to withstand climate change shocks.<sup>126</sup> Although the UNFCCC only uses the phrase “capacity building” once, reference to enhancing endogenous capacity, strengthening the scientific capabilities of countries, and cooperation on education and training are all in reality references to capacity-building. Several forums have been created to discuss capacity-building. One of these, the Durban Forum on Capacity-building, held its fourth meeting during the June 2015 meeting of the UNFCCC's Subsidiary Body for Implementation. In addition, existing bodies like the Technology Executive Committee, the Climate Technology Centre and Network, the Standing Committee on Finance, and the Green Climate Fund, all play an important role in capacity building and participate in the Durban forum.

Capacity-building was first addressed explicitly at COP5 held in Bonn, Germany.<sup>127</sup> It also appeared as part of the COP7 outcome known as the Marrakesh Accords in a decision entitled “Capacity building in developing countries (non-Annex I Parties)” focusing on assistance by developed countries to developing countries.<sup>128</sup> The COP decisions emphasise that capacity

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<sup>116</sup> Art. 4(1, 3, 5, 7- 9), UNFCCC.

<sup>117</sup> COP Decision 4/CP.7 (2001), UN Doc. FCCC/CP/2001/13/Add.1 at pp. 22.

<sup>118</sup> Paras. 2bis, Options 1, and 50, Option 1(d), option (a), COP21 Decision. In both cases the mention of intellectual property is met with “no text” options.

<sup>119</sup> Art. 7, para. 1, Draft Agreement.

<sup>120</sup> Ibid 7, para. 1ter.

<sup>121</sup> Ibid 7, para. 2, Option 1.

<sup>122</sup> Such a framework would complement the “Framework for meaningful and effective actions, to enhance the implementation of Article 4, paragraph 5, of the Convention” agreed in an annex to COP Decision 4/CP.7, UN Doc. FCCC/CP/2001/13/Add.1 at p. 24 (21 January 2002).

<sup>123</sup> Art. 7(2bis), Option 1. Option two is a “no text” option.

<sup>124</sup> Ibid para. 3, on which there appears to be agreement in both Options that the Technology Mechanism established in 2010, see COP Dec., that consists of two advisory bodies, namely Technology Executive Committee and a Climate Technology Centre and Network, should be strengthened.

<sup>125</sup> Ibid paras. 4 and 5.

<sup>126</sup> See arts. 4(5), 5(a) and (b), 6, and 9(2)(d), UNFCCC.

<sup>127</sup> COP Dec. 10/CP.5, UN Doc. FCCC/CP/1999/6/Add.1 (2 February 2000) at p. 24.

<sup>128</sup> COP Dec. 2/CP.7, UN Doc. FCCC/CP/2001/13/Add.1 (21 January 2002) at p. 5. But see, COP Dec. 3/CP.7 Ibid, at 15, on capacity building in countries with economies in transition.

building should be country-driven and aimed at assisting developing countries. The BRICS ministers of environment from Brazil, Russia, India, China and South Africa reiterated this in their recent meeting.<sup>129</sup>

The Draft Agreement is not so explicit in the four options for paragraph 1 of Article 8.<sup>130</sup> In each case “countries developing” is modified, but usually in way that merely gives particular attention to specific types of developing countries such as the most vulnerable. This could be understood as merely stressing the importance of the most vulnerable developing countries, or, if there are inadequate resources to really achieve adequate capacity-building as meaning that only the special groups are assisted, which would be contrary to the intention expressed in the UNFCCC. The idea of country ownership is expressed in both the two options for paragraph 2.<sup>131</sup> Paragraph 3 contains an Option 1 calling for scaling up, but an option 2 merely calls for “All Parties” to cooperate, apparently ignoring the differentiated responsibilities of States required by the principle of CBDR. Paragraph 3bis concerns the preparation and communication of “plans, policies, actions and measures on capacity-building” by developed countries<sup>132</sup> as well as a “no text” option.<sup>133</sup> Finally, paragraph 4 concerns institutional arrangements including an option calling for enhancing the institutions and existing provisions on capacity-building<sup>134</sup> and the other for ensuring the institutional arrangements to “enhance the effectiveness of capacity building efforts.”<sup>135</sup> The latter it would appear points towards monitoring and evaluation of developing countries activities for capacity-building. The result is a weak article 8 that seems to offer little new in relation to capacity building.

Capacity-building is also the theme of article 8bis on education. The first option for this single paragraph article strongly calls for cooperation “to develop, adopt and implement policies, strategies, regulations and/or action plans on climate change education, training, public awareness, public participation and public access to information.”<sup>136</sup> The second option is limited to the very different “should” and “shall” alternatives for cooperation and enhancing the actions just mentioned.<sup>137</sup> This paragraph does little to add to that to which States have already agreed.<sup>138</sup>

### **Transparency (art. 9)**

Considering that States have legal obligations to fulfil their treaty obligations in good faith<sup>139</sup> one might wonder why an article on transparency is necessary. The answer appears to lie in the lack of trust between States. As a result a ten paragraph article 9 on Transparency has been included in the Draft Agreement. Article 9 is based on the “Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual greenhouse gas inventories” adopted at COP17.<sup>140</sup> These Guidelines explain

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<sup>129</sup> Third World Network, “Developed countries should fulfill their obligations under the Convention, says BASIC,” Third World Network: Malaysia (2 November 2015) *accessed at* <http://www.twn.my/title2/climate/info.service/2015/cc151101.htm> (2 November 2015). This has never been an unbiased source for reporting!

<sup>130</sup> See art. 8(1), options 1-4.

<sup>131</sup> Art. 8(2), Options 1 and 2, Draft Agreement.

<sup>132</sup> *Ibid* para. 3bis, Option 1.

<sup>133</sup> *Ibid* Option 3.

<sup>134</sup> *Ibid* para. 4, Option 1.

<sup>135</sup> *Ibid* para. 4, Option 2.

<sup>136</sup> Art. 8bis, Option 1.

<sup>137</sup> *Ibid* Option 2.

<sup>138</sup> Art. 4(1)(i) and article 6, UNFCCC.

<sup>139</sup> See, for example, Art. 26, Convention on the Law of Treaties (VCLT), 1155 *UNTS* 331 (1980) and *Nuclear Tests (Australia v. France)*, *ICJ Reports* p. 268, para. 46 (1974).

<sup>140</sup> COP Dec. 15/CP.17, UN Doc. FCCC/CP/2011/9/Add.2 (15 March 2012) at 24.

that “[t]ransparency means that the data sources, assumptions and methodologies used for an inventory should be clearly explained, in order to facilitate the replication and assessment of the inventory by users of the reported information.”<sup>141</sup> Article 9 goes on to encourage States to report accurately and in a comparable manner that is linked to the obligations to which the particular States have agreed. To achieve this, however, the current provisions would have to be significantly strengthened. This would especially require an accountability mechanism such as has been suggested by Bolivia in its proposal for an International Climate Justice Tribunal.<sup>142</sup>

### **Timeframes and implementation (arts. 10 and 11)**

One of the weakest parts of the Draft Agreement is its provisions on facilitating implementation and compliance. The paragraphs on timeframes are confusing and largely bracketed. On the one hand, there seems to be a push for new INDCs, but as national determined contributions or NDCs. On the other hand, most of the provisions remain in brackets. The lack of legally binding commitments make the timeframes appear illusionary. In fact, a closer reading shows that the only commitments which appear to have timeframes are commitments of intention, but not action. The provisions allowing countries to adjust their contributions only ‘upwards’ is a small, if barely perceivable, step towards increasing ambition, but it is also one based on voluntary good faith, something that has not been in abundance during the negotiations to date.

An attempt has been made to address the lack of an accountability mechanism in article 9 and 10 by creating, respectively, another body similar to the Kyoto Protocol’s Compliance Committee<sup>143</sup> and a periodic stocktaking procedure.<sup>144</sup>

To date the failure to create a strong accountability mechanism applicable to all States with the authority to make legally binding decisions, has significantly hampered the implementation of UNFCCC and the Kyoto Protocol. While both these treaties include provisions for the settlement of disputes, they rely on the acceptance by State Parties either of the International Court of Justice or of an arbitration procedure that has never been defined.<sup>145</sup> And although States have created a Compliance Committee made up of a facilitative branch and an enforcement branch for the Kyoto Protocol,<sup>146</sup> this mechanism has proved relatively toothless.<sup>147</sup> For example, when the Compliance Committee determined Canada was in breach of its obligations under the Kyoto Protocol,<sup>148</sup> Canada

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<sup>141</sup> Ibid at p. 27, para.4(a).

<sup>142</sup> See art. 11, Option II, Draft Agreement.

<sup>143</sup> Art. 11, Draft Agreement. The Kyoto Protocol Compliance Mechanism was established by COP decision 27/CMP.1,

<sup>144</sup> Art. 9, Draft Agreement.

<sup>145</sup> Art. 14(2)(a) and (b), UNFCCC, provide States the opportunity to accept either the International Court of Justice or arbitrary, but does not require them to do so. This article also requires that an annex to the UNFCCC be adopted “as soon as practicable” establishing the procedures for arbitration. These procedures have never been established.

<sup>146</sup> COP Decision 24/CP.7, UN Doc. FCCC/CP/2001/13/Add.3 at p. 64 and decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), CMP decision 27/CMP.1. (The enforcement branch for the Kyoto Protocol has the authority to determine that a State Party has exceeded its assigned emissions and to make a finding that the State Party is in non-compliance with its legal obligations under the Kyoto Protocol. When this happens the State Party is required to make-up the difference between its *de facto* emissions and its assigned emissions limits during the next commitment period with a penalty of 30%).

<sup>147</sup> See Hovi, J., Stokke, O., and Ulfstein, G., *Implementing the Climate Regime: International Compliance* 136 (2013) (pointing out that States can avoid any consequences of the Compliance Committee by merely withdrawing from the Kyoto Protocol).

<sup>148</sup> Para. 17, p. 3, Decision of the Enforcement Branch, UNFCCC Doc. CC-2008-1-6/Canada/EB (15 June 2008) (the decision also decides that “[t]here is a sufficient factual basis to avert a finding of non-compliance on the date of this decision” at para. 17(b), p. 3).

merely withdrew from the Protocol before it could be found to have failed to meet its compliance obligations.<sup>149</sup>

A call for a legally binding climate justice tribunal or court has been ardently supported in two meetings that combined actors from civil society and State representatives, including heads of States, hosted by the Bolivian government.<sup>150</sup> To make any implementation agreement effective, a legally binding mechanism is likely to be necessary. States, however, have not yet been willing to create such an effective mechanism. In some cases domestic legal action seems to have overtaken international action to ensure adequate action on climate change.<sup>151</sup> One voice clearly calling for an international legal mechanism is Bolivia, which has championed the creation of an International Tribunal on Climate Justice that would provide legally binding decisions on States' compliance with their obligations in UNFCCC. While the proposal seems to be gaining acceptance among more developing States, especially in South America, it has come under attack by European States and the United States. Nevertheless, the proposal appears in Option II for article 11 of the Draft Agreement<sup>152</sup> and again in paragraph 63 of the Draft COP21 Decision. Whether States will have the courage and integrity to reiterate their commitment to the principles they agreed in the UNFCCC and appear to reaffirm in the Draft Agreement, will be determined at COP21.

### **Procedures, institutions and decision-making (arts. 12-15 and 22)**

The procedures, institutions and decision-making procedures of the Draft agreement are among the least controversial. Article 12 deals with the Conference of the Parties serving as the meeting of the Parties to this Draft Agreement or the CMA. A new body is necessary, as there was for the Kyoto Protocol until all the State Parties to the UNFCCC also become Parties to the new Agreement. States not Party to a treaty cannot be bound by it and have no right to participate in the decision making related to that treaty.<sup>153</sup> Paragraph 4 shows there is still disagreement over the Rules of Procedure and the strength of the implementation activities of the CMA by the several Options different States have recorded.

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<sup>149</sup> Apparently to avoid a decision on non-compliance, Canada withdrew from Kyoto Protocol effective 15 December 2012. See Compliance Committee, "Note by the secretariat: Canada's withdrawal from the Kyoto Protocol and its effects on Canada's reporting obligations under the Protocol, UNFCCC Dec. No. CC/EB/25/2014/2 (20 August 2014) at para. 5, p. 1.

<sup>150</sup> From 19 to 22 April 2010 over 15,000 people and up to 70 governments from all over the world attended the World People's Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia that concluded with a 10-page People's Agreement on Climate Change and the Rights of Mother Earth, accessed at <http://readingfromtheleft.com/PDF/CochabambaDocuments.pdf>, which demands "the creation of an International Climate and Environmental Justice Tribunal that has the legal capacity to prevent, judge and penalize States, industries and people that by commission or omission contaminate and provoke climate change." Ibid at p. 11. From 10 to 12 October about 2,500 people and up to 40 governments from all over the world attended the World People's Conference on Climate Change and the Defense of Life in Tiquipaya, Bolivia, which concluded with the adoption of the Declaration of the World Peoples' Conference on Climate Change and the Defense of Life in <http://www.planificacion.gob.bo/sites/folders/2.STATEMENT%20WORLD%20PEOPLE%20TIQUIPAYA.pdf>, which in several places calls for the establishment of an international climate justice court. Ibid at pp. 6, 18 and 22. See also D'Escoto Brockmann, M., *Reinventing the U.N: A Proposal* (2011) (which contains a draft statute of a Statute of the International Tribunal for Climate Justice and Environmental Protection, at pp. 157-172).

<sup>151</sup> See, for example, *Urgenda Foundation v. Netherlands*, case number: C/09/456689/HA ZA 13-1396 (24 June 2015) (in which a Dutch Court "orders the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf" [translation from original Dutch] at para. 5.1).

<sup>152</sup> At p. 27, Draft Agreement, and, p. 50, Draft COP21 Decision.

<sup>153</sup> Art. 34, VCLT, above n 139, (stating that "[a] treaty does not create either obligations or rights for a third State without its consent.").



Articles 13 and 14 on the Secretariat and the two subsidiary bodies<sup>154</sup> both of which already existed under the UNFCCC, suggests that these bodies will continue to carry out similar responsibilities under the Draft Agreement. The texts of these two articles are agreed without brackets. Nevertheless, all the bracketed text in Article 15 indicates that States still do not agree on the role of other subsidiary bodies.

Finally, Article 22 first states some obvious rules of voting in paragraphs 1<sup>155</sup> and 2<sup>156</sup> that are not bracketed, and then in bracketed paragraph 3 provides for decision making by a vote of three-fourths of the States present and voting, by casting an affirmative or negative vote,<sup>157</sup> when consensus cannot be reached.<sup>158</sup> This indicates that the problem of decision making by voting remains an ongoing problem.<sup>159</sup>

### **Other provisions (arts. 16-21 and 23-26)**

The miscellaneous articles include surprises or controversial text and leave fewer issues unresolved than the previous articles. Only article 17 contains options which relate to the right to participate in decision-making that either make this right conditioned on having submitted NDMCs<sup>160</sup> or unconditional.<sup>161</sup> The provisions on signature,<sup>162</sup> the application of the UNFCCC dispute settlement provisions,<sup>163</sup> the UN Secretary-General as depository,<sup>164</sup> and the six UN language of the Draft Agreement,<sup>165</sup> have all apparently been agreed. The provision on withdrawal contains not only the usual one year waiting period in brackets,<sup>166</sup> but also a bracketed proposal that a withdrawal only takes effect after a State has satisfied its existing obligations under the Draft Agreement.<sup>167</sup>

In addition, States have not agreed on the provisions for entry into force. These provisions still have bracketed options concerning the necessary number of ratifications, reference year, percentage of emissions, and whether “total” or “net” emissions are counted.<sup>168</sup> As suggested above, allowing the counting of “net” emissions could introduce the possibilities that rich countries could buy the right to pollute or resort to untested and risky technologies to remove emissions from the atmosphere, thus defeating the purpose of the Draft Agreement. It also appears that agreement may not have been reached on allowing reservations,<sup>169</sup> although it is hard to see how reservations can be allowed to the Draft Agreement when States cannot make reservations to the UNFCCC.<sup>170</sup>

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<sup>154</sup> The two subsidiary bodies established by the UNFCCC are the Subsidiary Body for Implementation (art. 10) and the SBSTA Subsidiary Body for Scientific and Technological Advice (art. 9).

<sup>155</sup> Art. 22(1), Draft Agreement (stating that each States has one vote).

<sup>156</sup> *Ibid* para. 2 (stating that regional economic integration organisations, currently only the European Union, can either vote for its members or allow them to vote).

<sup>157</sup> *Ibid* para. 4.

<sup>158</sup> *Ibid* para. 3.

<sup>159</sup> The COP under the UNFCCC has never adopted its Rules of Procedure which contains provisions on decision-making by voting, despite the imperative legal obligation it had to do so at its very first session. See art. 7(3), UNFCCC.

<sup>160</sup> Art. 17, Option 1, Draft Agreement.

<sup>161</sup> *Ibid* Option 2.

<sup>162</sup> Art. 16, Draft Agreement.

<sup>163</sup> Art. 21, Draft Agreement.

<sup>164</sup> Art. 23, Draft Agreement.

<sup>165</sup> Art. 26, Draft Agreement.

<sup>166</sup> Art. 26, para. 1, Draft Agreement.

<sup>167</sup> Art. 26, para. 2, Draft Agreement.

<sup>168</sup> Art. 18, Draft Agreement.

<sup>169</sup> Art. 23, Draft Agreement.

<sup>170</sup> Art. 24, UNFCCC.

The fact that States have still not agreed on some of these formal provisions could mean that they are being left until the end as there is confidence they can be quickly resolved or that the divisions elsewhere are so substantial that States do not see the value in agreeing to formalities, when there are such significant disagreements on substance.

### **THREE CROSS-CUTTING ISSUES**

Three issues appear to cut across several of the articles in the Draft Agreement. These relate to human rights and participation, health, and sustainable development.

#### **Human rights and participation**

The impact of climate change on the enjoyment of human rights has been documented not only by successive reports of the IPCC but also by the Human Rights Council.<sup>171</sup> This realisation is also the basis of the Geneva Pledge initiated by the Mary Robinson Foundation. Nevertheless, most States have not shown the willingness or interest in addressing climate change from a human rights approach. The Geneva Pledge may even have contributed to the skepticism as it appeared to be satisfied with a limited approach to human rights that was anchored in participatory civil and political rights, instead of addressing the threats that climate change poses to the right to development and social and economic rights that are as great a concern to developing States. Moreover, the pledge was launched at an informal dinner dubbed a “Climate Justice Dialogue” on 7 February 2015 to which the majority of NGOs who had been leading the work on human rights and climate change within the Geneva-based Human Rights Council were not even invited. Instead of encouraging unity among States on human rights on which there was widespread agreement, the Geneva Pledge appears to have contributed to the division among States.

Accordingly, it appears that there are now two human rights visions dividing States. The first based on the Geneva Pledge and apparently championed by the UN Human Rights Council’s Special Rapporteur on human rights and the environment, American Law Professor John Knox, focuses on the civil and political right of participation in decision making.<sup>172</sup> This approach is anchored in the European Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,<sup>173</sup> and, as one might expect, focuses on the civil and political right to participate in decision making. Nevertheless, the Special Rapporteur did not reply to requests for his support for the rights of observers in the UNFCCC process to be able to attend the ADP meetings where negotiations were taking place.<sup>174</sup>

At the same time, at the Geneva meeting, Iran for the Non-Aligned Movement’s 120 Member States—just under two-thirds of the United Nations Member States representing approximately 55% of the world population—called for any mention of human rights to include the right to development

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<sup>171</sup> See, for example, Office of the High Commissioner for Human Rights, UN Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, UN Doc. A/HRC/10/61 (15 January 2009) as well as Human Rights Council Resolutions 7/23 (2008), 10/4 (2009), 18/22 (2011), 26/27 (2014).

<sup>172</sup> See, for example, UN Doc. A/HRC/28/61 (3 February 2015) and “Human Rights and Climate Change: the Briefing Paper drafted for the purpose of informing the Climate Justice Dialogue on 7 February 2015, co-hosted by the OHCHR and the Mary Robinson Foundation in Geneva (which emphasises participation in decision making processes).

<sup>173</sup> 2161 *UNTS* 447 (2001). This convention is ratified by 47 States exclusively from Europe and a few central Asia States that are trying to establish stronger ties to the European Union. Not a single African, Latin American or Eastern Asia State has ratified this treaty.

<sup>174</sup> At least one non-governmental organisation accredited to the United Nations’ Economic and Social Council did not receive a response to a request for assistance that was directed to the Special Rapporteur. The Communication is on file with the author.

as a crucial foundation. This was not acceptable to the several European States, the United States, and some other States, that continue to object to the right to development.<sup>175</sup> As a result the issue of human rights appears to be contributing to the widening of divergent views, instead of convergences of views among States. Unless international human rights law is seen as a tool to achieve climate justice, its utility is questionable. Even more troubling is the failure of the Draft Agreement to ensure climate change action that will prevent the violation of fundamental human rights as this will put States in conflict with their international legal obligations and allow others—both State and non-State actors—to invoke their responsibility.<sup>176</sup>

## Health

Health is a red elephant in the room that States cannot ignore, but towards which they have still tried to turn a blind eye. Its relevance to the Rio texts, of which the UNFCCC is one, goes back at least to the 1992 Rio meeting. Principle 1 of the Rio Declaration on Environment and Development<sup>177</sup> states that all human beings are “entitled to a healthy and productive life in harmony with nature.” The UNFCCC itself states expressly that harm to “human health” is one of the consequences of the adverse effects of climate change in its very first article.<sup>178</sup> Moreover, based on the figures of the World Health Organization (WHO) from 2004,<sup>179</sup> it can be estimated that in this century at least 154,400,000 (one hundred and fifty-four million and four hundred thousand) people will die globally from the adverse effects of climate change in Africa alone, and it is likely this figure is increasing because of the global failure to take action to limit emissions.<sup>180</sup>

Outside the field of health, the right to health is also reaffirmed in numerous universal and regional human rights treaties. For example, the International Covenant on Economic, Social and Cultural Rights<sup>181</sup> to which 160 states have consented as state parties, in article 12 includes the right to health. Article 5(e)(iv) of International Convention on the Elimination of All Forms of Racial Discrimination provides for “the right to public health ... [and] ... medical care” for persons of all racial and ethnic groups without discrimination.<sup>182</sup> Articles 11(1)(f), 12 and 14(2)(b) of the Convention on the Elimination of All Forms of Discrimination against Women provides for special protection of the right to health of women.<sup>183</sup> And the most widely ratified human rights treaty in the world, the Convention on the Rights of the Child provides a wide range of protection for a child's health.<sup>184</sup> In addition, the preamble to the WHO Constitution that was adopted in 1946 recognises that the “enjoyment of the highest attainable standard of health is one of the fundamental

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<sup>175</sup> This is the case despite the adoption of the Declaration of the Right to Development by the overwhelming majority of States in UN General Assembly Resolution A/RES/41/128 (1986).

<sup>176</sup> Compare Wewerinke, M., and Doebller, C.F.J., “Exploring the Legal Basis of a Human Rights Approach to Climate Change,” 10(1) *Chinese Journal of International Law* 141-160 (2011) and “Development Cooperation and Human Rights: International Climate Change Action: Saving Human Rights After Cancun,” 2 *Indian Yearbook of International Law and Policy* 119-153 (2010-2011).

<sup>177</sup> UN Doc. A/CONF.151/26 (Vol. I).

<sup>178</sup> Art. 1(1), UNFCCC.

<sup>179</sup> See World Health Organization, *Preventing disease through healthy environments* (2006) (Table A2.3: Deaths attributable to environmental factors, by disease and mortality stratum for WHO regions in 2004, updated data for 2004, listing 1,544,000 deaths per year attributable to environmental risk factors in Africa).

<sup>180</sup> The WHO calculation was based on deaths in Africa that are attributable to the adverse effects of climate change and based on conditions existing in 2004. These conditions have deteriorated as emissions continue to rise and did not peak by 2015. See also International Panel on Climate Change, “The long-term perspective: scientific and socio-economic aspects relevant to adaptation and mitigation, consistent with the objectives and provisions of the Convention, and in the context of sustainable development (Topic 5)” at 63, 67, Table 5.1 in Pachauri, R.K., Reisinger, A., and The Core Writing Team, (eds.), *Climate Change 2007: Synthesis Report (IPCC Fourth Assessment Report)* (2007).

<sup>181</sup> 993 UNTS 3.

<sup>182</sup> 660 UNTS 195 (1969).

<sup>183</sup> 1249 UNTS 13 (1981).

<sup>184</sup> 1577 UNTS 3 (1990), art. 24. This treaty is ratified by 194 States.

rights of every human being”<sup>185</sup> and the Universal Declaration of Human Rights, an instrument reflecting customary international law on this issue, states that “[e]veryone has the right to ... health and well-being of himself and his family...”<sup>186</sup> Hardly any country denies the right to health. The United States was perhaps the lone exception that had persistently objected to the right to health, but at the May 2013 World Health Assembly of the WHO, the US Secretary of Health and Human Services, Kathleen Sebelius, appeared to drop that objection.<sup>187</sup> Nevertheless, in the spring of 2015 the US allegedly stood alone among the Member States of the Organization of American States to block the adoption of a Summit of the Americas final declaration with its objection to including a reference to the right to health.<sup>188</sup> This was likely a violation of international law because the right to health is customary international law<sup>189</sup> to which the US could no longer be a persistent objector.<sup>190</sup>

Although health was mentioned in some of the many options for the COP21 decision, it has been completely ignored in the text distributed on 5 October 2015. It has come back in the Draft Agreement distributed on 23 October. Health is mentioned in preambular paragraphs and in article 2 that describe the purpose of the agreement. It is not, however, mentioned in article 4 on Adaptation despite the fact that the majority of countries submitting their INDCs included health as a concern of Adaptation, and in many cases a priority.

The main obstacle to including health as an adaptation priority appeared to be the United States. But the United States has also provided itself with good scientific reasons to be concerned with the consequences of climate change on health. Citing these adverse effects, a United States’ study on climate change and health concluded that there are three principles that should guide public health action on climate change.<sup>191</sup> First, the US study claims, effects of climate change on health should be prioritised in research, policy and programmes, and regulatory agendas.<sup>192</sup> A significant part of the rationale behind this suggestion appears to be the lack of clear evidence of the impact of climate change on health to date. In contrast to the United States’ skepticism, many of the impacts of health on developing countries, especially those in the Pacific are much clearer, and need more urgently than a better understanding of the problem, resources to deal with the adverse effects of climate change on health. Secondly, the study suggests avoiding exposure to harm as a policy strategy.<sup>193</sup> For many developing States, especially small island States, avoiding exposure to a phenomenon like sea level rise is no longer an option as they hardly contribute to causing these consequences and must rely on action by others to avoid them; action which has not been forthcoming. For many small island States to adequately protect their people from exposure to harm is an issue of

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<sup>185</sup> Constitution of the World Health Organization (1946).

<sup>186</sup> UNGA Res. 217A (III), UN Doc. A/810 at 71 (1948), art. 25.

<sup>187</sup> “U.S. Secretary for Health and Human Services Kathleen Sebelius addresses the 66th World Health Assembly” (20 May 2013) at <https://geneva.usmission.gov/2013/05/20/world-health-assembly/> (accessed 15 August 2015).

<sup>188</sup> Zuesse, E., “U.S. Blocked Declaration of a Right to Health Care, Says Bolivia's President,” Transcend Media Service, published on 20 April 2015 at <https://www.transcend.org/tms/?p=56692> (accessed on 2 September 2015).

<sup>189</sup> See Xiong, P., *An International Law Perspective on the Protection of Human Rights in the TRIPS Agreement: An Interpretation of the TRIPS Agreement in Relation to the Right to Health* 254 (2012), and Kenny, E.D., “The International Human Right to Health: What Does This Mean for Our Nation and World?” 34 *Indiana Law Review* 1457, 1475 (2001).

<sup>190</sup> International law provides that although a State may legitimately object to a rule of customary international law when it is created, a State is bound by the customary international law once it has lifted its objections. See generally, Quince, C., *The Persistent Objector and Customary International Law*, Outskirts Press: Parker, CO, USA (2010). As the right to health is arguably a rule of customary international law once the US ended its persistent objection by admitting the right, it is bound by it.

<sup>191</sup> Committee on the Effect of Climate Change on Indoor Air Quality and Public Health of the US Institute of Medicine, *Climate Change, the Indoor Environment and Health*, National Academies Press: Washington, D.C., USA (August 2011).

<sup>192</sup> *Ibid* at 244.

<sup>193</sup> *Ibid*

adaptation and often even loss and damage as the harm has become impossible to avoid. And, the final and third guiding principle in the American study is to improve the collection of data to ensure better informed decision making.<sup>194</sup> Linked to the first principle, this is an important, but conditional principle. For developing countries this is an issue of demanding that developed States fulfil their obligations to provide financing, capacity-building and technology transfer to developing countries. Thus while countries that have achieved the level of social and economic development may have the internal resources to put adequate data collections structures in place, many developing countries do not yet have adequate resources. Moreover, the resources they have must be diverted to more urgent concerns. This brief comparison of three suggested priorities for American policy makers serves as a stark reminder of the unequal manner in which climate change will adversely impact the health of especially small island States inhabitants and inhabitants from other developing States.

The failure to adequately address health in the Draft Agreement appears to follow the same logic as the American study just discussed. It is based on priorities that are apparently biased towards the interests of those States that already have the resilience to adapt to the most serious health consequences of climate change. States that do not have the resources necessary for adequate adaptation are significantly disadvantaged.

### **Sustainable development**

The relationship between resilience to the adverse effects of climate change and countries' social and economic development is the foundation of the Rio Declaration from 1992. It is also fundamental to the UNFCCC as reflected by the principle of CBDR that is imbedded through the Convention.<sup>195</sup> Ensuring their development was perhaps the major concern of developing States in 1992. Especially Small Island Developing States (SIDS) and the negotiating block of the Alliance of Small Island States (AOSIS) in the climate talks, have seen the Rio treaties as a way to fight back into the development ring from which their special circumstances were otherwise being excluded.<sup>196</sup> Today, the concerns of AOSIS remain as few island States have graduated to the level of developed States economically, island States continue to face particularly damaging adverse effects of climate change, and developed States continue to marginalise the particularities of island States in relation to the obligation of developed States to provide finance, capacity building, and adequate access to technology to these States.

In the current agreement, almost every effort by the G77 and China to ensure the preferential treatment of developing States in order to secure their development for the future, was refuted and objected to with brackets or options that include “no text”. The current state of negotiations of the Draft Agreement therefore does little to address the concerns of developing States that their development will be handicapped by the actions they are being asked to agree to take without guarantees of adequate finance, capacity building, or technology. For example, the Statement in article 2bis that “[t]he extent to which developing country Parties will effectively implement this Agreement will depend on the effective implementation by developed country Parties of their commitments on provision of finance, technology development and transfer and capacity-building”, was met with a call for “no text” at all by developed countries.

Developing countries downplayed the concerns of developing countries during ADP 2.11. For example, the Organisation of Economic Cooperation and Development, a cooperation agency for

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<sup>194</sup> Ibid

<sup>195</sup> See, for example, art. 3 and 4, UNFCCC (article 3, para. 1, expressly states the principle, while article 4 relies on the principle for the expression of the commitments of States).

<sup>196</sup> See Stoutenberg, J.G., *Disappearing Island States in International Law* 17-30 (2015).

developed countries, claimed that the climate finance goals of 100 billion would be met, as a report launched during ADP 2.11 claimed that US\$ 62 billion had already been mobilised.<sup>197</sup> The claims made in this report have since been shown to be misleading by some evaluators<sup>198</sup> and they appear contradicted by the fact that Green Climate Fund, the primary vehicle for providing climate finance under the UNFCCC, apparently has less than US\$ 5 billion in its coffers.<sup>199</sup>

If the proposal of developing States for article 2bis, paragraph 2, were adopted this would be a significant step towards building trust between the G77 and China on the one side and the United States, European Union and its allies on the other side.

## CONCLUDING REMARKS

As the comments on the several areas above indicate, not only must all States be involved at the global level to adequately address the adverse effects of climate change, but the will of States must be cultivated to a level that it will bear fruit for their people. This has not yet happened. The Draft Agreement to be agreed in Paris in December 2015 does not appear to contain language to ensure adequate action.

The main flaw of the Draft Agreement is still its repeated references to alternatives or options of “shall,” “should,” and “other” that reflect a lack of consensus on large parts of the text and almost all the crucial elements. This ambiguity or failure to agree, sometimes even to reiterate existing legal obligations, threatens to undermine any chance of achieving consensus. It is also troubling that some topics such as health, human rights, and an accountability mechanism like a climate justice court or tribunal are not mentioned. Although some of these are mentioned in the Draft COP21 Decision, their exclusion from the Draft Agreement is a disquieting sign that States do not intend to build on or strengthen the UNFCCC.

The consequences of our failure will be deadly for many of the most vulnerable people on the planet. Among these are the indigenous peoples, many of whom have lived and prospered in an entirely sustainable manner on the planet they call Mother Earth or *Pachamama*.<sup>200</sup> There are also the women and children who are vulnerable because of their youth or due to the disproportionate burden of the adverse effects of climate change they will have to bear. There are the people of Africa who could perish by the hundreds of millions without the resources to make themselves resilient. And there are the people of the Pacific region who may be the first to feel the harm of climate change if a recent publication is correct in pointing out that “[i]t is clear that the effects of climate change are expected to intensify across the Pacific region in the coming decades.”<sup>201</sup>

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<sup>197</sup> OECD, “Climate finance in 2013-14 and the USD 100 billion goal,” a report by the Organisation for Economic Co-operation and Development in collaboration with Climate Policy Initiative (2015) *accessed at* <http://www.oecd.org/environment/cc/OECD-CPI-Climate-Finance-Report.htm> (7 October 2015).

<sup>198</sup> Williams, M., “TWN Climate Info: A Preliminary Review of the OECD/CPI Report, “Climate Finance in 2013-14 and the USD 100 Billion goal,” Third World Network: Malaysia (30 October 2015) *accessed at* <http://www.twn.my/title2/climate/info.service/2015/cc151004.htm> (31 October 2015).

<sup>199</sup> This figure is arrived at based on a review of GCF Doc. GCF/B.10/08 (26 June 2015), which states that “[t]he Fund has secured US\$ 10 billion equivalent in pledges from 33 countries so far,” but that of the pledging countries only 22 have signed contribution agreements or arrangements for a total of US\$ 5.47 billion equivalent (p. 4). Although the report is silent on the matter, it can be assumed that even less money has actually been paid into the Fund..

<sup>200</sup> *Pachamama* is an indigenous god presiding over the fertility of the Earth in Inca Mythology.

<sup>201</sup> Park, C.-Y., Raitzer, D.A., Samson, J.N.G., Halili, P.R.M., “Climate Change and Adaptation Challenges in the Pacific,” at 205, 223 in Filho, W.L., (ed.), *Climate Change in the Asia-Pacific Region*, Springer: Cham, Switzerland (2015).