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ARTICLE

Need For Fairness In Climate Change Negotiations: A Third World Perspective

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Abstract

This article discusses the history and the prospects of the climate change negotiations and seeks to show that they are structurally and systematically disadvantageous to the countries and the peoples of the Third World/Global South. The article uses the TWAIL approach to discuss the North-South divide and the differing approaches to climate justice. The article then discusses the history of climate change negotiations, in particular, climate finance and loss and damage, and shows that modes of these negotiations have been disadvantageous to the Third World and are unlikely to fulfil their aspirations. The article highlights the need for incorporating certain principles of fairness, not just in substantive law, but also in how negotiations are conducted. It concludes with thoughts on what these principles of fairness may look like, and the role international and domestic courts can play in evolving them.

Keywords: climate change; climate justice; climate negotiations; fairness; global south; TWAIL

International negotiations on climate change have been inextricably linked with fairness – both in terms of intergenerational equity and accounting for historical and current inequalities. At the root lies the concern of many states that they are paying more than their "fair" share to deal with climate change, as well as the need for urgent action to deal with climate change. Issues like historical contributions towards climate change, population, the lack of contemporary scientific knowledge about climate change and responsibility, who is disproportionately affected by climate change, and whether certain levels of capability imply a responsibility to act, and so on, are debated endlessly. Thus, reaching an agreement regarding the standard of "fairness" in international climate negotiations has proved almost intractable. This has led to a peculiar situation where, due to a lack of an agreement regarding fairness standards for climate action, states have only been able to agree on broader frameworks and are being forced to endlessly negotiate every piecemeal action. Every issue, such as mitigation, adaptation, climate finance, technology transfer, loss and damage, and so on, is negotiated anew in the Conference of Parties (COPs). The resulting outcome is often a case of too little and too late.

In this article, I have taken a Third World perspective in order to examine the systemic unfairness that results from any lack of a standard on fairness in climate change. In the first section, I discuss theoretical debates on climate justice and the North-South divide on the question of fairness. I specifically discuss Third World Approaches to International Law (TWAIL) and discuss climate justice using a TWAIL perspective. In the second section, I

discuss the history of climate change negotiations from a Third World perspective. In this part, I use certain watershed climate conferences to periodise the shifts in climate change negotiations. I use each of these periods to discuss how fairness concerns have been continuously put on the back burner in international negotiations until the sheer existential urgency has forced Third-World states to either abandon the issue or agree to piecemeal action on the basis of vague promises of assistance from the First World. I take the recent negotiations on "climate finance" and "loss and damage" to illustrate this disadvantage. In the third section, I highlight the need for a unified approach towards fairness in climate negotiations. Building on this, in the final section, I conclude with my thoughts on how the principles of fairness may be incorporated into climate change negotiations and what it might look like.

I. Fairness, climate "justice" and the North-South divide

In this article, I conceptualize "fairness" as including both procedural fairness, and substantive fairness in terms of climate justice. Fairness and justice are inextricably interlinked. The idea of "justice" and the extent to which law reflects justice has engaged philosophers and legal theorists for centuries.[1] Rawls conceptualises justice as fairness in the context of political, social, and economic institutions in a modern constitutional democracy.[2] Further explaining the concept of justice as fairness in his theory of justice,[3] Rawls notes that even in divided societies, justice as fairness enables the creation of just structures and background institutions that create a framework in which different conceptions of "good" can be advanced to achieve an "overlapping consensus", and achieve social unity.[4]

In international law as well, notions of fairness and justice remain ill-defined and debated. In the context of international law, Thomas Franck notes that fairness has both substantive aspects (distributive justice) and procedural aspects (right process) and both may not always go in the same direction.[5] Noting that fairness is relative and subjective, Franck conceptualises fairness in processual terms as "a process of discourse, reasoning, and negotiation leading, if successful, to an agreed formula located at a conceptual intersection between various plausible formulas for allocation".[6] In practice, he articulates two "gatekeeper" principles of fairness: the no-trumping principle (no particular conception of truth or fairness being considered above negotiation) and the maximin principle (an application of the Rawlsian difference principle that permits inequality that benefits as much, or more than proportionately those at the bottom).[7] Franck also notes the unique issues posed by environmental discourse, such as issues of intergenerational fairness,[8] and observes that in many environmental problems, approaches involving liability for damage and property

[1] This ranges from ancient philosophers like Plato, Aristotle, and Confucius to Hobbes, Bentham, and Kant in more modern times. For a useful overview, see: David MILLER, "Justice" in Edward N. ZALTA and Uri NODELMAN, eds., *The Stanford Encyclopedia of Philosophy* (Stanford, California, Fall 2023 Edition), online: Stanford University https://plato.stanford.edu/archives/fall2023/entries/justice/; David JOHNSTON, *A Brief History of Justice* (Oxford: John Wiley & Sons, Ltd, 2011).

[2] John RAWLS, "Justice as Fairness: Political Not Metaphysical" (1985) 14 Philosophy & Public Affairs 223.

[3] John RAWLS, *A Theory of Justice*, 1st ed. (Cambridge: Harvard University Press, 1971).

[4] Rawls, *supra* note 2.

[5] Thomas M. FRANCK, "Fairness and International Law: An Analytical Framework" in Thomas M. FRANCK, ed., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1998), at 7.

[6] *Ibid.*, at 14.

[7] *Ibid.*, at 21.

[8] Thomas M. FRANCK, "Law, Moral Philosophy and Economics in Environmental Discourse" in Thomas M. FRANCK, ed., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1998), 350.

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entitlement, while useful, have fallen short.[9] He recognises the need for new concepts that also reflect fairness claims and sees the negotiation of "framework agreements" as a way in which the international community is addressing this on a continuing basis.[10]

A. TWAIL and fairness in international law

Third World Approaches to International Law, commonly referred to by the acronym TWAIL, is an intellectual network of scholars sharing similar concerns about countries of the Third World that emerged in the late 1990s as an offshoot of the New Approaches to International Law (NAIL) movement in the United States.[11] It did build upon the work of many previous post-colonial scholars in the 1960s and 1970s, dubbed as "TWAIL I" or "first generation TWAIL" while identifying itself as "second generation TWAIL".[12] Described as a broad umbrella or a loose banner, while lacking a specific "programme", TWAIL is often characterised by an effort to identify and exorcise the colonial and imperialistic systemic influences from international law and transform it into a fairer system which integrates the third world and its concerns, rather than paying them marginal attention.[13] One of its central claims has been that formal political decolonisation did not lead to the end of colonial or imperial relations, and TWAIL scholars have questioned the universality and neutrality of international law and sought to expose how coloniality, hegemony, and imperialism have continued in both the epistemic discourse and the praxis of international law.[14] TWAIL scholarship has ranged from interrogating and exposing the colonial origins of international legal regime, as well as specific rules of international law, to discussing the contribution of the Third World to the making of (at least some) international law, to exposing present international law's complicity in promoting imperialistic tendencies in its rules and regimes and suggesting ways for reform.[15]

[9] Thomas M. FRANCK, "Some Instances of Fairness in Establishing Environmental Normative Systems" in Thomas M. FRANCK, ed., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1998), 380.

[10] *Ibid.*, 412.

[11] For a comprehensive account of TWAIL's origins in the 1990s, see: James Thuo GATHII, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3 Trade Law & Development 26.

[12] For a recent, rather comprehensive overview of TWAIL scholarship, see Antony ANGHIE, "Rethinking International Law: A TWAIL Retrospective" (2023) 34 European Journal of International Law 7.

[13] See: Makau MUTUA, "What Is TWAIL?" (2000) 94 Proceedings of the ASIL Annual Meeting 31; Obiora Chinedu OKAFOR, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall Law Journal 171; B.S. CHIMNI, "Third World Approaches to International Law: A Manifesto" (2006) 8 International Community Law Review 3; Obiora Chinedu OKAFOR, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 International Community Law Review 371; Gathii, *supra* note 11; Luis ESLAVA and Sundhya PAHUJA, "Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law" (2012) 45 Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America 195; Kwadwo APPIAGYEI-ATUA, "Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review" (2015) 8 African Journal of Legal Studies 209; Usha NATARAJAN, John REYNOLDS, Amar BHATIA, Sujith XAVIERl, "Introduction: TWAIL – on Praxis and the Intellectual" (2016) 37 Third World Quarterly 1946; Anghie, *supra* note 12.

[14] Anghie, *supra* note 12; Appiagyei-Atua, *supra* note 13.

[15] While a detailed discussion of broader TWAIL scholarship on history of international laws or specific international law rules is beyond the scope of this article, for some representative literature see for e.g. Antony ANGHIE, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); B.S. CHIMNI, "Customary International Law: A Third World Perspective" (2018) 112 American Journal of International Law 1; B.S. CHIMNI, "The Grotian Tradition, Grotian Moment, and Decolonization: A TWAIL Perspective" (2021) 42 Grotiana 252; B.S. CHIMNI, "The International Law of Jurisdiction: A TWAIL Perspective" (2022) 35 Leiden Journal of International Law 29; Mansour Vesali MAHMOUD and Hosna SHEIKHATTAR, "A Call for Rethinking International Arbitration: A TWAIL Perspective on Transnationality and Epistemic Community" (2023) 35 Law and Critique 405; Ntina TZOUVALA, "TWAIL and the 'Unwilling or Unable' Doctrine: Continuities and Ruptures" (2015) 109

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The term "Third World" is used in TWAIL scholarship as an open, flexible category rather than simply ascribing the identities of the coloniser and the colonised to various countries. In this sense, "Third World" is sometimes broadly described as including those peoples who, despite constituting the majority of the world's population and being the source of much of its resources, have little control over how the rest of the world arranges their economy.[16] TWAIL scholars have been clear about the heterogeneity of the Third World (as well as the Global North) and their lack of any political unity, and recognise the many diversities, differences, antagonism, hierarchies, and inequalities within them.[17] At the same time, they have been cognisant of the various discriminatory social hierarchies within the Third World and do not advocate a nativist rejection of the West.[18] As Chimni highlights, third-world states are often ruled by people who are increasingly part of a coterie of "transnational ruling elite" who sometimes may make decisions that are contrary to their peoples' interests,[19] and thus resulting in the need for focusing on the peoples of the third world, rather than merely the states.[20] Furthermore, the subjects of TWAIL analysis are not limited to simply the Third World; it is increasingly also applicable to the relatively marginalised peoples within the "First World" (like indigenous peoples and racial minorities) whose structural disadvantages are also enabled by the extant global order.

TWAIL not only exposes the "deep structures" within international law that deny a fair and level playing field to the Third World peoples but also accounts of legal resistance where international law and its doctrines (like sovereignty) are appropriated and utilised by non-western lawyers to breach the Western/non-Western gap.[21]

TWAIL's preoccupation with questions of fairness in international law is apparent. Different shades of "TWAIL-ers" may have differing conceptions of fairness. However, as Okafor notes, they all seek to "expose, reform, and retrench" the features within international law that maintain an unfair and unjust global order.[22] In this background, a TWAIL conception of fairness, while building upon the Rawlsian "justice as fairness" model, would depart from it, by insisting on a model of distributive justice that takes into account the historical injustices and present experiences of various marginalised peoples (rather than being situated behind a veil of ignorance). For instance, Appaiagyei-Atua, theorising the ethical dimension of TWAIL, articulates a theory of community emancipation, which is defined as:

AJIL Unbound 266; Chhaya BHARDWAJ and Abhinav MEHROTRA, "Crawford, TWAIL, and Sovereign Equality of States: Similarity and Differences" (2022) 40 The Australian Year Book of International Law Online 89; Upendra BAXI, "Disasters, Catastrophes and Oblivion: A TWAIL Perspective" (2021) 2 Yearbook of International Disaster Law Online 72; Endalew ENYEW, "Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea" (2022) 21(3) Chinese Journal of International Law 439; Eslava and Pahuja, *supra* note 13; Anthony ANGHIE, B.S. CHIMNI, Karin MICKELSON, and Obiora OKAFOR, eds., *The Third World and International Order: Law, Politics, and Globalization* (Leiden: Brill Martinus Nijhoff, 2003). See, also, the collected works of C.H. Alexandrowicz at: Charles Henry ALEXANDROWICZ, *The Law of Nations in Global History* (Oxford: Oxford University Press, 2017); for a thematic overview of TWAIL scholarship, see: Anghie, *supra* note 12.

[16] Usha NATARAJAN, "TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring" (2012) 14 Oregon Review of International Law 177.

[17] See for e.g. R.P. ANAND, *International Law and the Developing Countries: Confrontation or Cooperation?* (Dordrecht: Martinus Nijhoff, 1987), at 120.

[18] Anghie, *supra* note 12.

[19] Chimni, *supra* note 13.

[20] Antony ANGHIE and B.S. CHIMNI, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2(1) Chinese Journal of International Law 77.

[21] Arnulf Becker LORCA, "After TWAIL's Success, What Next? Afterword to the Foreword by Antony Anghie" (2023) 34 European Journal of International Law 779.

[22] Okafor, "Newness, Imperialism, and International Legal Reform in Our Time", *supra* note 13; Okafor, "Critical Third World Approaches to International Law (TWAIL)", *supra* note 13.

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> socio-economic and political claims and entitlements which are exercised and enjoyed by human beings qua human beings to enable the realization of potentials, the utilization of capacities and performance of duties that will lead to the meeting of needs and the attainment of development.[23]

It seeks to link the global to the local over issues of distributive justice by foregrounding the peoples' experiences and using it to evaluate the rules of international law.

It is important to note that these TWAIL notions of fairness in international law are not aimed at merely ensuring a level playing field for Third World/Global South States – it is well-recognised that there are often deep differences and lack of political unity within the Global South. TWAIL has sometimes been criticised for primarily using a Westphalian state-centric North-South divide, which overlooks the Global Souths in the geographic North and the Global Norths in the geographic South.[24] However, as noted earlier, many TWAIL scholars have understood "Third World" to include the marginalised peoples, wherever they may be located.[25] These categories have also been criticised to ignore the inter se differences in the negotiating positions of the Global South countries. However, as Mickelson notes, the idea of "Global South" or "Third World" has never been about homogeneity and uniformity; the diversity (in socio-economic, geographic, cultural, and political terms) both *within* and *among* developing countries has been well-recognised since the 1950s.[26] Indeed, in the context of climate change, sometimes major differences exist in the interests and the negotiating positions of, say, the small island states of the Alliance of Small Island States (AOSIS), the petroleum exporting countries (Organization of the Petroleum Expoerting Countries – OPEC), and the emerging market economies (like Brazil, Russia, India, China, South Africa (BRICS)). The major points of differences exist around issues like market mechanisms, fossil fuel phase-out, and the extent of mitigation burden. For instance, countries like India, Indonesia, Fiji, Papua New Guinea and so on, have supported forest carbon offsets/REDD + (Reducing Emissions from Deforestation and Forest Degradation in Developing Countries), while countries like Bolivia have opposed them and have instead promoted community forest programmes.[27] Similarly, OPEC countries have opposed fossil fuel phase-out,[28] while the AOSIS, emphasising on the 1.5 degrees mitigation target, called on all major emitters to enhance their commitments, including by fossil fuel phase-out.[29] Groupings of major emerging economies, like BRICS, have emphasised the right to development of the developing countries and the

[23] Appiagyei-Atua, *supra* note 13.

[24] Ama Ruth FRANCIS, "Global Southerners in the North, in A Gathering Wave: Emerging Legal and Policy Implications of Climate Migration: Essays" (2020) 93 Temple Law Review 689.

[25] Anghie and Chimni, *supra* note 20.

[26] Karin MICKELSON, "Beyond a Politics of the Possible: South-North Relations and Climate Justice Symposium – Climate Justice and International Environmental Law: Rethinking the North-South Divide" (2009) 10 Melbourne Journal of International Law 411.

[27] See e.g. "Community Forestry Is Central to Bolivia's Climate Plans, but Bottlenecks Remain- In Conversation with Humberto Gómez Cerveró", online: Tropenbos International www.tropenbos.org/news/community+forestry+is+central+to+bolivia%E2%80%99s+climate+plans,+but+bottlenecks+remain-+in+conversation+with+humberto+g%C3%B3mez+cerver%C3%B3; "World Bank Carbon Credits to Boost International Carbon Markets", online: World Bank www.worldbank.org/en/news/press-release/2023/12/01/world-bank-carbon-credits-to-boost-international-carbon-markets

[28] "OPEC Rallies Members against Fossil Fuels Phase out at COP 28" *Al Jazeera*, online: Al Jazeera www.aljazeera.com/news/2023/12/8/opec-rallies-members-against-fossil-fuels-phase-out-at-cop-28

[29] "AOSIS COP28 Press Conference – AOSIS Chair Statement – AOSIS", online: AOSIS https://www.aosis.org/aosis-cop28-press-conference-aosis-chair-statement/

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need for providing additional financial support and technology transfer to developing countries.[30]

This is a result of differences in their relative economic and political power, geographies and so on. Sometimes, colonial legacies and continued extractive relations between transnational corporations (usually primarily based out of Global North) and many Global South countries[31] and propagation of Western development paradigms and so on[32] contribute to the difference in climate discourses within Global South. For instance, despite the criticism of Global South countries like India for "reducing ambition" on issues like coal phase-out, developed countries like the United States, Canada, and Australia remain some of the highest per capita consumers of fossil fuel energy (apart from some OPEC countries like Qatar, UAE, etc.).[33] In some cases, to paraphrase Seck, the reality of "overlapping, interdependent sovereignties" (shared between states in the Global South and transnational corporations extracting resources from there) leads to the creation of dependency structures that are reflected in the negotiating stances of those Global South states.[34] This is seen, for instance, in cases of global trade in plastic wastes and lithium mining and so forth.[35] However, this does not negate the analytical value of the "Global South/Third World" in TWAIL analysis. This is especially because these differences within the Global South do not erase their similar positions on a range of climate issues, including the need for developed countries to take the lead, emphasis on historical responsibility, climate finance, just transition, technology transfer, adaptation support, and loss and damage finance, to name a few.[36]

[30] Axel MICHAELOWA and Katharina MICHAELOWA, "BRICS in the International Climate Negotiations", in Edward D. MANSFIELD and Nita RUDRA, eds., *The Political Economy of the BRICS Countries* (Singapore: World Scientific Publishing, 2020), 289, online: World Scientific https://worldscientific.com/doi/10.1142/9789811202308_0012; "Joint Statement Issued at the BRICS High-Level Meeting on Climate Change", *BRICS Information Centre* (30 December 2022), online: University of Toronto www.brics.utoronto.ca/docs/2022/220513-climate.html

[31] Tara Nair VAN RYNEVELD and Mine ISLAR, "Coloniality as a Barrier to Climate Action: Hierarchies of Power in a Coal-Based Economy" (2023) 55 Antipode 958; Sara L. SECK, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rights & Development Law Journal 177; Sara L. SECK, "Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty" (2016) 26 Transnational Law and Contemporary Problems 383.

[32] Elizabeth CHATTERJEE, "The Asian Anthropocene: Electricity and Fossil Developmentalism" (2020) 79 Journal of Asian Studies 3.

[33] "Fossil Fuel per Capita Consumption by Country 2022", online: Statista www.statista.com/statistics/1302684/per-capita-fossil-fuel-consumption-in-selected-countries/

[34] Seck, "Revisiting Transnational Corporations and Extractive Industries", *supra* note 31.

[35] Peter DAUVERGNE, "The Necessity of Justice for a Fair, Legitimate, and Effective Treaty on Plastic Pollution" (2023) 155 Marine Policy 105785; Tiwonge MZUMARA-GAWA, "Plastic Treaty Talks Must Protect African Countries from Pollution", *Context* (29 April 2024) online: Context www.context.news/climate-justice/opinion/plastic-treaty-talks-must-protect-african-countries-from-pollution; Elena GIGLIO, "Extractivism and Its Socio-Environmental Impact in South America. Overview of the 'Lithium Triangle'" (2021) 5 América Crítica 47; Bárbara JEREZ, Ingrid GARCÉS and Robinson TORRES, "Lithium Extractivism and Water Injustices in the Salar de Atacama, Chile: The Colonial Shadow of Green Electromobility" (2021) 87 Political Geography 102382.

[36] For the common position of G77 states and their relevance, see for e.g. "Statement on Behalf of the Group of 77 and China by Mr Ahmadou Sebory Touré, Lead Negotiator, Director, Ministry of Environment, Water and Forests of the Republic Of Guinea, at the Joint Opening Plenary of the COP, CMA, SBSTA and SBI COP26, CMP16, CMA3, SBSTA52-55, SBI52-55", online: The Group of 77 at the United Nations www.g77.org/statement/getstatement.php?id=211031; María del PILAR BUENO, "Identity-Based Cooperation in the Multilateral Negotiations on Climate Change: The Group of 77 and China" in Cristian LORENZO, ed., *Latin America in Times of Global Environmental Change* (Cham: Springer International Publishing, 2020), online: https://doi.org/10.1007/978-3-030-24254-1_5; Antto VIHMA, Yacob MULUGETTA and Sylvia KARLSSON-VINKHUYZEN, "Negotiating Solidarity? The G77 through the Prism of Climate Change Negotiations" (2011) 23 Global Change, Peace & Security 315; Sjur KASA, Anne T. GULLBERG and Gørild HEGGELUND, "The Group of 77 in the International Climate Negotiations: Recent Developments and Future Directions" (2008) 8 (2) International Environmental Agreements: Politics, Law and Economics 113.

As Mickelson argues, while these categories have limitations, there is a need to rethink and "re-embrace" the category of "North-South" by acknowledging that the demands for climate justice are not merely abstract but rather concrete and quantifiable, based on historical disparities and inequalities in present-day per capita emissions.[37] A nuanced understanding of the Third World/Global South is needed while articulating a TWAIL vision for fairness in climate change negotiations that does not treat these categories as monoliths. A detailed reframing of the "North-South" categories is beyond the limited scope of this article; however, I have used these categories to focus on the broader trends in international climate negotiations, which I argue structurally disadvantage the Global South (irrespective of their differences inter se). As the subsequent sections show, the North-South divide continues to play out, not just in terms of the outcomes of climate change negotiations but also structurally in the negotiations themselves. This operates to the disadvantage of the Third World (broadly understood, as discussed above) by sidelining and delaying issues of interest to the Third World peoples (as opposed to simply the states).

Further, the relative size, population, and economies may lead some developing countries to be seen as indispensable to arriving at any climate agreement (e.g. China in Copenhagen COP, 2009), while others may be seen as marginal players. In fact, the differences in the relative power within and among the Global South and their negotiating position on climate issues further illustrate the need for having "fairness" in international climate change negotiations. However, this does not remove the relevance of the categories of Global North and South.

TWAIL emphasises promoting a global order that enhances everyone's human dignity, irrespective of their geographical or socio-economic location. This is sought to be achieved by acknowledging historical injustices and their continued embedded structural effects and actively seeking to ameliorate them. A TWAIL version of the Rawlsian difference principle would, therefore, also include those who were historically disadvantaged and who continued to be structurally disadvantaged, within "least advantaged". It would not allow certain forms of inequalities that would perpetuate the historical dependency and disadvantage of the Third World (like food insecurity, etc.), even if they were sought to be justified as benefiting the "least advantaged" through doctrines like trickle-down or comparative advantage. In this respect, it would also depart from the no-trumping principle articulated by Franck, as it would see any negotiations that do not acknowledge and are removed from historical and present realities as likely to reproduce those injustices. It would also seek to adopt a bottom-up approach towards distributive justice, learning from the experiences of the "least advantaged", instead of necessarily subscribing to models like "trickle-down" distributive justice that may not work in many Third World contexts.

B. Climate justice and TWAIL

Justice in the context of climate change is a deeply contested idea. Climate change is perhaps the single biggest problem internationally, having serious consequences for all areas of human activity, as well as for the non-human inhabitants of the planet, altering the geological record sufficiently to be arguably classified as an "epoch".[38] In economic terms, the natural environment was seen as an "externality" in the human search for development, for example as a source of resources or a means of waste disposal, though

[37] Mickelson, *supra* note 26.

[38] Jan ZALASIEWICZ, Mark WILLIAMS, Alan HAYWOOD and Michael ELLIS, "The Anthropocene: A New Epoch of Geological Time?" (2011) 369(1938) Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences 835, online: https://doi.org/10.1098/rsta.2010.0339; Colin N. WATERS and Simon D. TURNER, "Defining the Onset of the Anthropocene" (2022) 378(6621) Science 706, online: https://doi.org/10.1126/science.ade2310

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recently "sustainability economics" has started to change this approach.[39] Climate change has serious implications for the global ecosystem,[40] causing a sixth mass extinction event,[41] and even affecting the evolution of various species.[42] It also has a comprehensive impact on human society, affecting the survival of states,[43] human rights,[44] demographics,[45] international politics and security,[46] economy,[47] geographies,[48] race,[49] and gender,[50] to

[39] Anthony C. FISHER and Frederick M. PETERSON, "The Environment in Economics: A Survey" (1976) 14 Journal of Economic Literature 1; Stefan BAUMGÄRTNER and Martin QUAAS, "What is Sustainability Economics?" (2010) 69 Ecological Economics 445.

[40] See for e.g. Gordon J. MACDONALD and Luigi SERTORIO, eds., *Global Climate and Ecosystem Change*, vol. 240, NATO ASI Series (Boston: Springer US, 1990), online: https://doi.org/10.1007/978-1-4899-2483-4; Lindsey E. RUSTAD, "The Response of Terrestrial Ecosystems to Global Climate Change: Towards an Integrated Approach" (2008) 404(2) Science of The Total Environment 222, online: https://doi.org/10.1016/j.scitotenv.2008.04.050; Yadvinder MALHI, Janet FRANKLIN, Nathalie SEDDON, Martin SOLAN, Monica G TURNER, Christopher B FIELD, and Nancy KNOWLTON, "Climate Change and Ecosystems: Threats, Opportunities and Solutions" (2020) 375(1794) Philosophical Transactions of the Royal Society B: Biological Sciences 1, online: https://doi.org/10.1098/rstb.2019.0104

[41] See generally: Thomas J. CROWLEY and Gerald R. NORTH, "Abrupt Climate Change and Extinction Events in Earth History" (1988) 240(4855) Science 996, online: https://doi.org/10.1126/science.240.4855.996; John HARTE, Annette OSTLING, Jessica L. GREEN, and Ann KINZIG, "Climate Change and Extinction Risk" (2004) 430(6995) Nature 34, online: https://doi.org/10.1038/nature02718; Telmo PIEVANI, "The Sixth Mass Extinction: Anthropocene and the Human Impact on Biodiversity" (2014) 25(1) Rendiconti Lincei 85, online: https://doi.org/10.1007/s12210-013-0258-9

[42] Robert D. HOLT, "The Microevolutionary Consequences of Climate Change" (1990) 5(9) Trends in Ecology & Evolution 311, online: https://doi.org/10.1016/0169-5347(90)90088-U

[43] Ori SHARON, "To Be or Not to Be: State Extinction Through Climate Change" (2021) 51(4) Environmental Law 1041.

[44] For various resolutions of the Human Rights Council, "Human Rights Council Resolutions on Human Rights and Climate Change", online: United Nations www.ohchr.org/en/climate-change/human-rights-council-resolutions-human-rights-and-climate-change. See also: "General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change", *UN Press* (29 March 2023), online: United Nations https://press.un.org/en/2023/ga12497.doc.htm

[45] See for e.g. Katherine J. CURTIS and Annemarie SCHNEIDER, "Understanding the Demographic Implications of Climate Change: Estimates of Localized Population Predictions under Future Scenarios of Sea-Level Rise" (2011) 33(1) Population and Environment 28, online: https://doi.org/10.1007/s11111-011-0136-2

[46] See for e.g. Alan DUPONT, "The Strategic Implications of Climate Change" (2008) 50(3) Survival 29, online: https://doi.org/10.1080/00396330802173107; John C. PERNETTA, "Impacts of Climate Change and Sea-Level Rise on Small Island States: National and International Responses" (1992) 2(1) Global Environmental Change 19, online: https://doi.org/10.1016/0959-3780(92)90033-4; Sanjay CHATURVEDI and Timothy DOYLE, *Climate Terror* (London: Palgrave Macmillan UK, 2015), online: https://doi.org/10.1057/9781137318954

[47] Francesco BOSELLO, Robert J. NICHOLLS, Julie RICHARDS, Roberto ROSON, and Richard S. J. TOL, "Economic Impacts of Climate Change in Europe: Sea-Level Rise" (2012) 112(1) Climatic Change 63, online: https://doi.org/10.1007/s10584-011-0340-1; Benjamin H. STRAUSS, Philip M. ORTON, Klaus BITTERMANN, Maya K. BUCHANAN, Daniel M. GILFORD, Robert E. KOPP, Scott KULP, Chris MASSEY, Hans de MOEL, and Sergey VINOGRADOV, "Economic Damages from Hurricane Sandy Attributable to Sea Level Rise Caused by Anthropogenic Climate Change" (2021) 12(1) Nature Communications 2720, online: https://doi.org/10.1038/s41467-021-22838-1; Richard S.J. TOL, "The Economic Impacts of Climate Change" (2018) 12(1) Review of Environmental Economics and Policy 4, online: https://doi.org/10.1093/reep/rex027

[48] Morey BURNHAM, Claudia RADEL, Zhao MA, and Ann LAUDATI, "Extending a Geographic Lens Towards Climate Justice, Part 1: Climate Change Characterization and Impacts" (2013) 7(3) Geography Compass 239, online: https://doi.org/10.1111/gec3.12034.; J. SAMSON, D. BERTEAUX, B. J. MCGILL, and M. M. HUMPHRIES, "Geographic Disparities and Moral Hazards in the Predicted Impacts of Climate Change on Human Populations" (2011) 20(4) Global Ecology and Biogeography 532, online: https://doi.org/10.1111/j.1466-8238.2010.00632.x

[49] Nancy TUANA, "Climate Apartheid: The Forgetting of Race in the Anthropocene" (2019) 7(1) Critical Philosophy of Race 1, online: https://doi.org/10.5325/critphilrace.7.1.0001

[50] Irene DANKELMAN, *Gender and Climate Change: An Introduction* (London: Routledge, 2010); Sherilyn MACGREGOR, "'Gender and Climate Change': From Impacts to Discourses" (2010) 6(2) Journal of the Indian

name but a few. It is also clear that climate change does not affect everyone equally and often has a disproportionate impact on countries of the Global South and the marginalised, poorer, and disadvantaged peoples. Climate change, if not tackled properly, perpetuates and deepens the existing inequalities and oppressions. This gives rise to serious justice and fairness implications, leading to several attempts at theorising "climate justice".[51]

As global warming and problems of climate change started becoming evident, it was realised that nature does not have an endless capacity to pay for human growth. As the true costs of development started being calculated, the problem of allocation of this "cost" arose. Many scholars have approached climate change from the lenses of distributive justice,[52] historical justice,[53] earth justice (or multi-species justice),[54] and ethics,[55] leading to various theoretical frameworks for fairness and climate justice.[56] Articulations of environmental justice and climate justice often attempt to engage with the four commonly used "pillars" of justice (distributive, procedural, corrective, and social justice).[57] The complexities of climate change lead to these different "justices" leading to different outcomes, and

Ocean Region 223, online: https://doi.org/10.1080/19480881.2010.536669.; Farhana SULTANA, "Gendering Climate Change: Geographical Insights" (2014) 66(3) The Professional Geographer 372, online: https://doi.org/10.1080/00330124.2013.821730

[51] See for e.g. Upendra BAXI, "Towards a Climate Change Justice Theory?" (2016) 7(1) Journal of Human Rights and the Environment 7, online: https://doi.org/10.4337/jhre.2016.01.01; Sam ADELMAN and Louis KOTZÉ, "Introduction: Climate Justice in the Anthropocene" (2021) 11(1) Oñati Socio-Legal Series 30.

[52] Benito MÜLLER, "Varieties of Distributive Justice in Climate Change" (2001) 48(2) Climatic Change 273, online: https://doi.org/10.1023/A:1010775501271; Lukas H. MEYER and Dominic ROSER, "Distributive Justice and Climate Change. The Allocation of Emission Rights" (2006) 28(2) Analyse & Kritik 223, online: https://doi.org/10.1515/auk-2006-0207; Elkanah O. BABATUNDE, "Distributive Justice in the Age of Climate Change" (2020) 33(2) Canadian Journal of Law & Jurisprudence 263, online: https://doi.org/10.1017/cjlj.2020.13

[53] See generally: Derek BELL, "Global Climate Justice, Historic Emissions, and Excusable Ignorance" (2011) 94(3) The Monist 391; Lukas H. MEYER and Roserb DOMINIC, "Climate Justice and Historical Emissions" in Lukas H. MEYER ed., *Intergenerational Justice* (London: Routledge, 2012), 26; Janna THOMPSON, "Historical Responsibility and Climate Change" in Lukas H. MEYER and Pranay SANKLECHA, eds., *Climate Justice and Historical Emissions* (Cambridge: Cambridge University Press, 2017), 46, online: https://doi.org/10.1017/9781107706835.003

[54] Petra TSCHAKERT, David SCHLOSBERG, Danielle CELERMAJER, Lauren RICKARDS, Christine WINTER, Mathias THALER, Makere STEWART-HARAWIRA, and Blanche VERLIE, "Multispecies Justice: Climate-Just Futures with, for and beyond Humans" (2021) 12(2) WIREs Climate Change 1, online: https://doi.org/10.1002/wcc.699; Danielle CELERMAJER, Winter David SCHLOSBERG, Lauren RICKARDS, Makere STEWART-HARAWIRA, Mathias THALER, Petra TSCHAKERT, Blanche VERLIE and Christine J. WINTER, "Multispecies Justice: Theories, Challenges, and a Research Agenda for Environmental Politics" in Graeme HAYES, Sikina JINNAH, Prakash KASHWAN, David M. KONISKY, Sherilyn MACGREGOR, John M. MEYER, and Anthony R. ZITO (eds.), *Trajectories in Environmental Politics* (London: Routledge, 2022), 119, online: https://doi.org/10.1080/09644016.2020.1827608; Helen KOPNINA, "Anthropocentrism and Post-Humanism" in Hilary CALLAN, ed., *The International Encyclopedia of Anthropology*, 1st ed. (Hoboken, NJ: Wiley-Blackwell, 2019), 1, online: https://doi.org/10.1002/9781118924396.wbiea2387; Ximena SIERRA-CAMARGO, "The Ecocentric Turn of Environmental Justice in Colombia" (2019) 30(2) King's Law Journal 224, online: https://doi.org/10.1080/09615768.2019.1645433

[55] Stephen M. GARDINER, "Ethics and Climate Change: An Introduction" (2010) 1(1) WIREs Climate Change 54, online: https://doi.org/10.1002/wcc.16.; David HEYD, "Climate Ethics, Affirmative Action, and Unjust Enrichment", in Lukas H. MEYER and Pranay SANKLECHA, eds., *Climate Justice and Historical Emissions* (Cambridge: Cambridge University Press, 2017), 22, online: https://doi.org/10.1017/9781107706835.002

[56] Darrell MOELLENDORF, "Climate Change and Global Justice" (2012) 3(2) WIREs Climate Change 131, https://doi.org/10.1002/wcc.158; Baxi, *supra* note 51; Paul CLEMENTS, "Rawlsian Ethics of Climate Change" (2015) 23(4) Critical Criminology 461, online: https://doi.org/10.1007/s10612-015-9293-4; Tahseen JAFRY, *Routledge Handbook of Climate Justice* (London: Routledge, 2018).

[57] "Climate Equity or Climate Justice? More than a Question of Terminology" *International Union for Conservation of Nature* (19 March 2021), online: IUCN www.iucn.org/news/world-commission-environmental-law/202103/climate-equity-or-climate-justice-more-a-question-terminology; Robert R. KUEHN, "A Taxonomy of Environmental Justice", (2000) 30(9) Environmental Law Reporter 10681; Lauren GIFFORD and Chris KNUDSON, "Climate Finance Justice: International Perspectives on Climate Policy, Social Justice, and Capital" (2020) 161 Climatic Change 243.

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complicates theorising a standard approach to climate justice. While most approaches to climate justice would allow "differentiation" in favour of the Global South, there are disagreements on the extent of this differentiation, extent to which obligations should be allowed, reciprocity in performance of these obligations, to name a few. The scholarly disagreements on the most appropriate form of climate justice are only a small reflection of the practically intractable political disagreements among states while negotiating the climate change regime, and has led to an identifiable "North-South" divide.

The problem of distributive justice in allocating the cost of climate change has long been politically recognised. For instance, the Founex Conference report (1971) recognised that while developed countries and developing countries both faced environmental problems, their causes and solutions were different.[58] For the developed countries, these problems arose due to their high level of development, consumption patterns, and so on. However, in case of the developing countries, their environmental problems reflected their poverty and lack of development and endangered the lives of their citizens, which can only be overcome through development itself. The report noted that, for the greater part, unlike developed countries, where development is seen as a cause for environmental problems, developing countries must take a different perspective.[59]

In the Stockholm Conference, India's Prime Minister, Indira Gandhi, criticised the approach of blaming an increasing population for everything. She highlighted that many advanced economies had reached their position through domination over others, supported by the resources and labour of the colonised countries.[60] She also described poverty as the greatest polluter and emphasised the priority of developing countries to tackle it. This issue of "historical responsibility" thereafter became an important point in any debate or negotiation on fairness and differentiation in climate change.

Many scholars, from the Global South and otherwise, also started highlighting the unfairness in imposing same standards on the developing countries, when they were at a much lower stage of development compared to developed countries, and unlike developed countries, had historically little contribution towards environmental degradation. Professor R.P. Anand,[61] for instance, recognised that environmental pollution and degradation was a global problem and developing countries cannot ignore it. However, at the same time, he noted that there is a difference between "pollution of affluence" and "pollution of poverty" and to those in the third world, bound between their poverty and the "shackles of affluence" in the developed countries, the future seems to be a prison.[62]

Anil Agarwal and Sunita Narain, writing in 1991, exposed the unstated assumptions and biases in scientific studies and approaches which sought to share blame for climate change with developing countries, on basis of their population and their aspirations for development.[63] They note that such studies and their rhetoric that the growth in developing countries is responsible for environmental degradation today and destroying our "common future", are typical of "environmental colonialism" and would deepen the north-south divide, and whitewash the role and responsibility of the western countries. While they

[58] "Founex Report on Development and Environment Submitted by a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment 4–12 June 1971, Founex, Switzerland" (1970) 39 International Conciliation 7.

[59] *Ibid.*, at 10.

[60] Malavika RAO, "A TWAIL Perspective on Loss and Damage from Climate Change: Reflections from Indira Gandhi's Speech at Stockholm" (2022) 12 Asian Journal of International Law 63.

[61] Julia DEHM, "Indigenous Peoples and REDD + Safeguards: Rights as Resistance or as Disciplinary Inclusion in the Green Economy" (2016) 7 Journal of Human Rights and the Environment 170.

[62] R.P. ANAND, "Valedictory Address" in R.P. ANAND, Rahmatullah KHAN and S. BHATT, eds., *Law, Science and Environment*, 1st ed. (New Delhi: Lancers Books, 1987), 266.

[63] Anil AGARWAL and Sunita NARAIN, *Global Warming in an Unequal World: A Case of Environmental Colonialism* (New Delhi: Centre for Science and Environment, 1991).

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endorse the need for developing countries to take steps to prevent environmental degradation and climate change, they insist that it must not be on the terms and constraints imposed by developed countries. Noting that safeguarding the "common future" should not only mean ensuring equity for the developed countries' future generations, they propose that global commons such as carbon emissions and carbon sinks should be shared equally on a per capita basis.[64]

Similarly, Vandana Shiva critiqued "Western solutions" to environmental problems, and noted that it was the first wave of "globalism", in form of colonisation which initiated such environmental degradation in the first place.[65]

Henry Shue, writing immediately after the adoption of the United Nations Framework Convention on Climate Change (UNFCCC),[66] arguing against a homogenised and undifferentiated emission allowance market, noted that it was inequitable to require that the poor should surrender necessities or be made to pay more for them, so that others retain their luxuries. He argued that the developing countries should have an "inalienable" emission allowance to be used as per their priorities. In this context, he made an important observation that four questions regarding "fair allocation" need to answered for every potential climate action, which can be paraphrased as: (1) allocation of mitigation costs; (2) allocation of adaptation costs; (3) background allocation of resources and fair bargaining; and (4) allocation of transitional emissions.[67] These questions on fairness remain relevant even today.

The lack of consensus on the above questions of fairness has led to many criticisms of the kind of climate action promoted by the UNFCCC and Kyoto Protocol regimes. For instance, the carbon trading mechanism and flexibility mechanisms of the Kyoto Protocol allow the Annex I State to acquire emission reduction units or carbon offset credits from projects in other Annex I countries or non-Annex countries respectively.[68] These have been variously criticised for causing harm to communities where these projects have been implemented, or being a masquerade for "green grabbing" or carbon colonialism.[69]

In light of the above a few points may be noted about the TWAIL perspective on climate justice. In my understanding, compared to many other "lenses" towards climate justice, a TWAIL "lens" would focus on seeing climate change actions as a part of the global political economy on development, including a historical perspective as well. As noted by the historian Ramchandra Guha, environmentalists and environmental movements in the Global South have often focused as much (if not more) on issues of human rights, ethnicity, and distributive justice, as issues of ecology, compared to their Global

[64] *Ibid*., at 9.

[65] Vandana SHIVA, "Globalism, Biodiversity and The Third World" in Edward GOLDSMITH, Martin Khor, Helena Norberg-Hodge, and Vandana Shiva (eds.), *The Future of Progress: Reflections on Environment and Development*, 1st ed. (Totnes: Green Books, 1992), 50.

[66] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107 (entered into force 21 March 1994) [*UNFCCC*].

[67] Henry SHUE, "Subsistence Emissions and Luxury Emissions" (1993) 15 Law & Policy 39.

[68] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 162 (entered into force 16 February 2005) [*Kyoto Protocol*]; see Arts. 6 and 17.

[69] James FAIRHEAD, Melissa LEACH and Ian SCOONES, "Green Grabbing: A New Appropriation of Nature?" (2012) 39 The Journal of Peasant Studies 237; Heidi BACHRAM, "Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse" (2004) 15 Capitalism Nature Socialism 5; Arnim SCHEIDEL and Courtney WORK, "Forest Plantations and Climate Change Discourses: New Powers of 'Green' Grabbing in Cambodia" (2018) 77 Land Use Policy 9; Larry LOHMANN, *Carbon Trading: A Critical Conversation on Climate Change, Privatization and Power* (Uppsala: Dag Hammarskjöld Foundation, 2006); Steffen BÖHM and Siddhartha DABHI, *Upsetting the Offset: The Political Economy of Carbon Markets* (London: MayFly Books, 2009).

North counterparts.[70] Chhatrapati Singh, writing in the context of India's forests, notes that while justice regarding managing forests has many stakeholders (namely, the people, forest dwellers, as well as non-dwellers; future generations; and nature itself), legal reforms concerning the forests must aim at doing justice to the people first, and subsequently to nature and future generations.[71] While he acknowledges that the obligations towards nature and future generations is no less important, but seeks to prioritise "the more immediate obligation" towards to the people.[72] Climate justice, from a TWAIL perspective, would not necessarily reflect the position of many Global South states, who maybe engaged in their own forms of hegemony, or have other national priorities and interests. As noted earlier, a TWAIL approach to climate justice would include a nuanced understanding of "Global South/North", and the push for a climate agenda would be just for the "Third World Peoples" regardless of where they are located.

While the increased urgency of climate change and the need to mitigate it would likely temper the above formulations, the key point would remain – that climate justice, social justice, development, and amelioration of poverty cannot be seen separately in different silos. A TWAIL perspective towards climate justice would see it interconnected with the right to development and pursuit of a fairer global economic order. Specifically, in the context of climate actions, it would integrate various forms of climate action; emphasise "fair allocation" of mitigation and adaptation burdens (accounting for per-capita and historically unequal emissions, as far as practicable); ensure the quick delivery of climate finance that is real, additional and adequate and that reaches the peoples most adversely affected by climate change instead of being accounting exercises; and ensure that climate actions do not become a new form of "civilising mission".

II. Climate justice in international negotiations: a TWAIL perspective

In the context of environment and climate change, TWAIL scholars, while highlighting the continued North-South divide, have also discussed the complex intersections of different factors (like geography, race, gender, economic status, etc.) which compound the vulnerabilities of the peoples affected by climate change.[73] Natarajan, for instance, notes that despite the international negotiations often leading developed and developing countries to take opposing sides, the North-South divide is more porous than it appears.[74] Echoing Baxi,[75] she notes that interests of resource production, extraction, and consumption are linked across the North and the South in complex ways, which need to be understood to better respond to the ecological problems as well as equity concerns.

[70] Ramachandra GUHA, "The Environmentalism of the Poor" in Ramachandra GUHA and Joan Martínez ALIER, eds., *Varieties of Environmentalism: Essays North and South*, 1st ed. (London: Routledge, 1997), 3. Guha ends this chapter with an interesting observation about the difference between environmentalism in Global North and South: "'No Humanity without Nature!', the epitaph of the Northern environmentalist, is here answered by the equally compelling slogan 'No Nature without Social Justice!'".

[71] Chhatrapati SINGH, *Common Property and Common Poverty: India's Forests, Forest Dwellers and the Law* (Oxford: Oxford University Press, 1986).

[72] *Ibid.*, at 7.

[73] For an overview, see: Sumudu ATAPATTU and Carmen G. GONZALEZ, "The North–South Divide in International Environmental Law: Framing the Issues" in Carmen G. GONZALEZ and others, eds., *International Environmental Law and the Global South* (Cambridge: Cambridge University Press, 2015), 1, online: https://doi.org/10.1017/CBO9781107295414.002; Carmen G. GONZALEZ and Sumudu ATAPATTU, "International Environmental Law, Environmental Justice, and the Global South" (2016) 26 Transnational Law and Contemporary Problems 229.

[74] Natarajan, *supra* note 16.

[75] Upendra BAXI, "What May the 'Third World' Expect from International Law?" (2006) 27 Third World Quarterly 713.

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Mickelson notes that International Environmental Law as a discipline failed to integrate third-world concerns meaningfully, and has rather "accommodated" them in the margins.[76] There is a tendency to portray the Third World as a begrudging participant in environmental law and the need to "respond" to their concerns, rather than treating them as an equal active partner. The calls for "integrating" the Third World rather than merely "accommodating" them,[77] and building fairer environmental and climate regimes have often been deemed as politically unrealistic.[78] Natarajan has also noted that the Third World had long been wary of the international environmental law project, as it was perceived as a way to mitigate the effects of the mistakes of Western development at the expense of the development of the Third World; however, it has continued to engage with the project.[79] However, despite the engagement of the Third World with environmental and climate action, there is a narrative that seeks to portray the Third World as uninterested in environmental protection and only focused on poverty alleviation and taking an obstructionist role.[80] Keeping this in mind, I will seek to challenge this narrative and show that despite the continuous participation of the Third World in climate negotiations, promises made to them have been continuously diluted.

There are many ways of framing the history of the climate change negotiations. For instance, despite the negotiations which led to the making of the UNFCCC being very heavily documented and publicised, the background and standpoint of the observers may lead to very different conclusions about the outcome that was achieved at Rio De Janeiro.[81]

From a regime-building perspective, Bodansky, Brunnée, and Rajamani have classified the evolution of the UN climate change regime into four phases, depending on the predominant type of negotiations happening during the specified period: (i) the Agenda-Setting Phase (1985–90); (ii) the Constitutional Phase (1990–95); (iii) the Regulatory Phase (mid 1990s–2005); and (iv) the Second Constitutional Phase (2005–16).[82] While this classification gives an accurate functional overview of the larger historical trends, it is important to recognise that this does not imply that only one kind of activity occurred in a particular phase, to the exclusion of others.[83]

Keeping this caveat in mind, I will instead classify global climate action negotiations using certain watershed conferences as markers. These are (i) The Stockholm Era (1970s–1990); (ii) The Rio Era (1990–2009); (iii) The Copenhagen Era (2009–16) and (iv) the Paris Era

[76] Karin MICKELSON, "South, North, International Environmental Law, and International Environmental Lawyers" (2000) 11 Yearbook of International Environmental Law 52.

[77] *Ibid.*, at 77.

[78] See for e.g. Usha NATARAJAN, "Environmental Justice in the Global South" in Carmen G. GONZALEZ, Sara L. SECK and Sumudu A. ATAPATTU, eds., *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2021); Usha NATARAJAN, "Climate Justice" in Mariana Valverde, Kamari M. Clarke, Eve Darian Smith, and Prabha Kotiswaran (eds.), *The Routledge Handbook of Law and Society* (Routledge, 2021).

[79] Usha NATARAJAN, "Third World Approaches to International Law (TWAIL) and the Environment", in Andreas PHILIPPOPOULOS-MIHALOPOULOS and Victoria BROOKS eds.), *Research Methods in Environmental Law* (Edward Elgar Publishing, 2017), 207 at 227, online: https://doi.org/10.4337/9781784712570.00016

[80] Natarajan, *supra* note 16, at 189.

[81] See for e.g. Irving M. MINTZER and J. Amber LEONARD, eds., *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge: Cambridge University Press, 1994). The book provides several "insider" accounts of the negotiations, with interesting, nuanced, and differing perspectives by each contributor.

[82] Daniel BODANSKY, Jutta BRUNNÉE and Lavanya RAJAMANI, "Evolution of the United Nations Climate Regime", in *International Climate Change Law*, 1st ed. (Oxford: Oxford University Press, 2017).

[83] The end of the agenda-setting phase or the constitutional phase does not mean that the international climate regime has been finalised or all relevant structures created. In fact, continuing negotiations on various issues of climate change such as mitigation, adaptation, loss and damage, climate finance, etc., often mean that simultaneous negotiations may be going on which may be at different stages, depending upon the issue concerned.

(post-2016). I have chosen these conferences in particular as they have led to important shifts in the nature of global climate action and have influenced the agenda of negotiation in the following years. I will show that at each phase of climate change negotiations, the Third World countries have been structurally disadvantaged. I will be specifically focusing on the history of international climate finance to exemplify this structural disadvantage of the Third World in climate negotiations.

A. The Stockholm era: the inception of international climate negotiations

Traditionally, the history of International Environmental Law is divided into pre-1972 and post-1972, with the Stockholm Conference leading to the emergence of modern international environmental law.[84] The Stockholm Conference catalysed the rapid development of environmental treaties; Edith Brown Weiss estimates that within two decades of the Stockholm Conference, around 1100 treaties dealing with the environment or having environmental provisions were made.[85] Most of these were structured as separate treaty regimes (either as standalone treaties or framework agreements with optional protocols) for separate problems.

Debate on fairness and differential treatment has been at the heart of these multilateral environmental negotiations since their inception. The apparent dichotomy between environment and development was of particular concern to the Third World countries and they were unwilling to participate in any environmental regime which fettered their developmental policies or delinked the issue of development from the environment. To some extent, there are parallel histories of the lead-up to the Stockholm Conference. The traditional account, popular among developed countries, focuses on the chronological development of various environmental agreements (especially among the Western countries) since the 1950s,[86] and the emergence of principles such as the prevention of transboundary harm in cases such as Trail Smelter Arbitration and the Lac Lanoux Arbitration.[87] This account focuses on the environmental conferences (mostly held in Europe and North America) and inclusion of an environmental agenda in international organisations. For instance, in 1968, the resolutions 1346 (XLV) of the Economic and Social Council suggested an international conference on human environment. This was accepted by the UN General Assembly in resolution 2398 (XXIII) of 1968, decided to convene the meeting which would be known as the Stockholm Conference.

The history from the perspective of the Third World countries rather focuses on the process of decolonisation, the struggle of the Third World countries to preserve their economic and political autonomy during the Cold War (the non-aligned movement (NAM) and the New International Economic Order), and the emergence of principles like the permanent sovereignty over natural resources. From the perspective of the Third World, the development of international environmental law can be situated within the larger debate on poverty alleviation and the right to development and limitations thereon.

In the 1960s and 1970s, the developing countries, many of them recently decolonised, demanded a fairer system of international law that promotes their development, as they

[84] See generally: Edith Brown WEISS, "International Environmental Law: Contemporary Issues and the Emergence of a New World Order Symposium: International Law for a New World Order" (1992) 81 Georgetown Law Journal 675; Edith Brown WEISS, "The Evolution of International Environmental Law" (2011) 54 Japanese Yearbook of International Law 1; Peter SAND, *The History and Origin of International Environmental Law* (Cheltenham: Edward Elgar Publishing Ltd, 2015).

[85] Weiss, "The Evolution of International Environmental Law", *supra* note 84.

[86] Alexandre KISS and Dinah SHELTON, "Origin and Evolution of International Environmental Law", in *International Environmental Law* (Leiden: Brill Nijhoff, 2004). For a critique of the traditional account, see: Mickelson, *supra* note 76 at 55.

[87] Weiss, "The Evolution of International Environmental Law", *supra* note 84.

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realised that despite decolonisation, the "rules of the game" of international trade and investment, which they had no role in shaping, continued to disadvantage them.[88] In academic circles, "*Droit International du développement*" or "International Law for Development", was conceived as a new approach to international law, departing from the idea of international law being based on "reciprocity", and consisting of a set of value-neutral "impartial" rules.[89] Rather, it was emphasised that international law should be based on solidarity and goal-oriented and focus on reducing substantive inequality between sovereign states.[90] Politically, the Third-World states led a movement to establish a fairer "New International Economic Order" (NIEO). The General Assembly Declaration on the Establishment of a New International Economic Order (Resolution 3201) of 1974 stated:

> It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.[91]

One of the key principles of NIEO was stated to be the "[p]referential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible".[92] This was also reflected in the Programme of Action Resolution, which emphasised that multilateral trade negotiations should be guided by principles of non-reciprocity and preferential treatment of developing countries.[93] Although the NIEO did not come to fruition as a formal binding instrument, one of its important contributions was to establish the idea of preferential treatment or "differentiation" for the benefit of the Global South.

It is in this context that international negotiations around environmental treaties took place. As Mickelson notes, the Founex Report on Environment and Development (1971) was as much about expanding the First World idea of environmentalism (to emphasise poverty alleviation) as it was about expanding the Third World idea of development (to include social and environmental aspects).[94]

The Stockholm conference brought the sharp difference in the approaches of the Global North and the Global South into light. The developed countries wished to focus primarily on simply managing environmental problems while the Global South highlighted their limitations and the necessity of focusing on development to ensure basic human rights

[88] See for e.g. *Towards a New Trade Policy for Development*, Report by the Secretary-General of the United Nations Conference on Trade and Development (UNCTAD), finalized by Raul PREBISCH, UN Doc. E/CONF.46/3 (1964); Georg SCHWARZENBERGER, "The Principles and Standards of International Economic Law (Volume 117)" in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 1966); Andre Gunder FRANK, "The Development of Underdevelopment" (1966) 18(4) Monthly Review 17, online: https://doi.org/10.14452/MR-018-04-1966-08_3; Samir AMIN, "Self-Reliance and the New International Economic Order" (1977) 1 Monthly Review 1; Samir AMIN, "New International Economic Order and Strategy for the Use of Financial Surpluses of Developing Countries" (1979) 4 Alternatives 477.

[89] Maurice FLORY, "Adapting International Law to the Development of the Third World" (1982) 26 Journal of African Law 12; Lavanya RAJAMANI, "Differential Treatment in International Law" in Lavanya RAJAMANI ed., *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006), 13.

[90] Flory, *ibid.*; Rajamani, *ibid.*; Mohammed BEDJAOUI, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979).

[91] United Nations General Assembly (6th Special Session), "Declaration on the Establishment of a New International Economic Order" (1974) A/RES/3201(S-VI).

[92] *Ibid.*

[93] UN General Assembly (6th Special Session), "Programme of Action on the Establishment of a New International Economic Order" (1974) A/RES/3202(S-VI).

[94] Mickelson, *supra* note 76.

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and food security in their countries.[95] Ultimately a compromise was made, led by developing countries like India, who recognised that environmental protection and economic development need not be mutually exclusive, with Indira Gandhi noting that the choice was not between ecological values and progress per se, rather, it was between conservation and overexploitation.[96] Accordingly, the principles adopted at the Stockholm Conference reflected this compromise and laid the seeds of the principle of differential treatment. Principles 11 and 12, in particular, recognised that environmental policies should not hamper the future development potential of developing countries and resources should be made available to developing countries to enable them to preserve and improve the environment.

To some extent, this emphasis on development was seen as a concession made to the Third World. The Cocoyoc Declaration, adopted at a United Nations Environment Programme (UNEP)/United Nations Conference on Trade and Development (UNCTAD) symposium in 1974, explicitly noted that historical consequences of centuries of colonial control were still visible in the great concentration of economic power in a small group of nations, and these unequal economic relationships directly contributed to environmental pressures.[97] Accordingly, it can be understood that the acknowledgement of the need for differentiation in favour of developing countries and necessity of providing them climate finance and other resources was the original promise made to the Third World by developed states, based on which the developing countries participated in the negotiations for climate action.

By the mid-1980s, scientific research by scientists, primarily based out of developed countries, showed an unmistakable increase in greenhouse gases and consequent human-made global warming.[98] Scientific institutions such as the Scripps Institution of Oceanography at UC San Diego, which maintained a daily record of global atmospheric concentration of carbon dioxide (CO_2) since the 1960s, show a sharp and continuous uptick in CO_2 concentration (dubbed the "Keeling curve").[99] It was recognised that in addition to taking concerted action to deal with pollution and specific consequences of climate change (such as the Montreal Protocol to deal with Ozone Layer depletion) there was a need to address the underlying problems of anthropogenic emissions. Increasingly, countries realised that the global climate and the earth's ecosystems were deeply interlinked and dealing with their problems required concerted efforts globally. Proliferation of issue-specific environmental treaties also caused logistical and practical problems, such as simultaneous and uncoordinated negotiations, overlapping provisions, duplication of implementation efforts, and so on. This treaty congestion, as Weiss calls it, was especially a challenge for Third World countries which simply did not have the resources and staff needed to effectively participate in so many negotiations.[100]

Several workshops and conferences on climate change, such as those in Villach (1985), Toronto (1988), the Hague (1989), and Noordwijk (1990), were organised. Bodansky notes that until about 1990, the governments interested in dealing with climate change were mostly developed countries, and most of the scientific research on climate change were

[95] Lavanya RAJAMANI, "The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law" (2012) 88 International Affairs 605, online: https://doi.org/10.1111/j.1468-2346.2012.01091.x

[96] Mahesh RANGARAJAN, "Striving for a Balance: Nature, Power, Science and India's Indira Gandhi, 1917–1984" (2009) 7 Conservation and Society 299; Rajamani, *supra* note 95 at 607.

[97] *Ibid.*; "The Cocoyoc Declaration" (1975) 29 International Organization 893.

[98] See: Spencer R. WEART, *The Discovery of Global Warming: Revised and Expanded Edition* (Cambridge: Harvard University Press, 2008).

[99] Scripps Institution of Oceanography, "The Keeling Curve", *UC San Diego*, online: UC San Diego https://keelingcurve.ucsd.edu

[100] Weiss, "International Environmental Law", *supra* note 84.

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from these countries.[101] This is evidenced from the fact that the initial climate conferences were largely held in developed countries, and most of their participants were interested scientists, academics, and officials from developed countries. For instance, the Villach Conference, organised jointly by UNEP, the World Meteorological Organization (WMO), and International Council for Science (ICSU), was attended by scientists from 29 countries, and of around 80 participants, only seven or so were from developing countries of Africa, Asia, and South America, the rest largely being from developed countries, particularly from North America and Europe.[102] Similarly, the proceedings of the Toronto Conference (1988) show that only three of the 13 papers represented a perspective from the developing countries.[103] There were no participants from small island countries in either conferences. This observation is not to detract from the rigour or the correctness of this research but to highlight the difficulty of participation faced by members of the Third World.

However, in the meanwhile, the developing countries continued to insist upon differentiation and climate finance. For instance, the Hague Declaration on the Environment noted that:

> [t]he international community and especially the industrialized nations have special obligations to assist developing countries which will be very negatively affected by changes in the atmosphere although the responsibility of many of them for the process may only be marginal today.[104]

The declaration also noted that for countries for whom fulfilling the decisions taken to protect the environment prove to be a "special burden" (essentially developing countries) would receive "fair and equitable" assistance in view of their level of development and "actual responsibility for the deterioration of the atmosphere". This can be seen as an early formulation of the principle of common but differentiated responsibility, based on historical responsibilities and current capabilities, which would ultimately be a point of fierce contention during the UNFCCC negotiations.

In the run-up to the negotiations on UNFCCC, a Ministerial Conference on Atmospheric Pollution and Climatic Change was held in Noordwijk, Netherlands in November 1989, where 67 countries participated. Among other principles, the declaration also included the principle of common but differentiated responsibilities (though not referred to as such). The declaration noted that in view of their contribution and capabilities, the developed countries should initiate domestic action, financially support countries for whom climate action would be an excessive burden and reduce greenhouse gas emissions, considering the developing countries' need for sustainable development.

[101] Daniel BODANSKY, "The History of the Global Climate Change Regime", in Urs LUTERBACHER and Detlef F. SPRINZ, eds., *Global Climate Policy: Actors, Concepts, and Enduring Challenges*, 1st ed. (MIT Press, 2001), 23.

[102] World Meteorological Organization (WMO) and others, *Report of the International Conference of the Assessment of the Role of Carbon Dioxide and of Other Greenhouse Gases in Climate Variations and Associated Impacts* (Geneva: WMO, 1986).

[103] WMO Secretariat, Environment Canada, United Nations Environment Programme, "Proceedings, World Conference, Toronto, Canada June 27–30, 1988: The Changing Atmosphere: Implications for Global Security = Actes, Conférence Mondiale, Toronto, Canada, 27–30 Juin 1988 : L'atmosphère En Évolution: Implications Pour La Sécurité Du Globe." *Secretariat of the World Meteorological Organization* (1989), online: United Nations https://digitallibrary.un.org/record/106359

[104] "Hague Declaration on the Environment" (1989) 28 International Legal Materials 1308. This Conference was initiated by France, the Netherlands, and Norway and the declaration was signed by 24 states: Australia, Brazil, Canada, Cote d'Ivoire, Egypt, France, Federal Republic of Germany, Hungary, India, Indonesia, Italy, Japan, Jordan, Kenya, Malta, Norway, New Zealand, the Netherlands, Senegal, Spain, Sweden, Tunisia, Venezuela, and Zimbabwe.

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It can be concluded from the above discussion that during this period, as the climate change agenda was being shaped, the Third World countries were consciously able to include the key conditions of differentiation (and ensuring their right to sustainably develop) and climate finance, which were seen as their core interest.

B. The Rio Era (1990–2009): UNFCCC and the Kyoto Protocol Regime

The Rio Era negotiations, which were formalised in the UNFCCC, did include the key Third World demands of differential treatment and climate finance; however, the formulations were watered down to achieve agreement with the developed countries. For instance, certain principles such as common but differentiated responsibility (CBDR), inter and intra-generational equity, sustainable development and precautionary principle that were included in the UNFCCC (Article 3). Atapattu notes that most Global South states were in favour of inclusion of these principles (along with others), while the United States and some of the other Global North states were wary of including them, as they did not know where these principles would lead.[105] She also highlights that not only did the developing countries have to compromise on the substance of these principles, but many other principles proposed by them were not included, such as the right to development; liability and compensation for loss and damage; the equal right to ocean sinks; non-imposition of environmental conditions through aid and so on.[106] It is especially important to note that the emphasis on the right of development during the Stockholm Era, which was seen as a major achievement of the Global South, was removed entirely from the conversation during this era.

The contemporary Third World observers did not consider the UNFCCC as a great achievement.[107] As Sokona, Najam, and Huq have noted, the damage to the Third World interests largely resulted from neglect and inattention to the promises made to the Third World.[108] As noted earlier, differentiation and climate finance were negotiated as key pillars of the UN climate regime, as noted by some developed countries themselves in the Bergen Conference (1990). Due to opposition by the United States and considering the nature of UNFCCC as a framework convention, the detailed mechanism for providing climate finance and improving the adaptation and climate resilience of Third World countries was left for future negotiations. However, as the negotiations for the Kyoto Protocol showed, much of the negotiating agenda focused on developing a carbon market.[109] The priority of the COPs shifted towards making rules and regulations to implement mitigation targets and operationalise market mechanism, while issues such as adaptation and building climate resilient infrastructure in Third World countries by providing adequate climate

[105] Sumudu ATAPATTU, "Climate Change, International Environmental Law Principles, and the North-South Divide" (2016) 26 Transnational Law and Contemporary Problems 247.

[106] *Ibid*., at 251.

[107] Chandrashekhar DASGUPTA, "The Climate Change Negotiations", in Irving M. MINTZER and J. Amber LEONARD, eds., *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge: Cambridge University Press, 1994), online: www.cambridge.org/core/books/negotiating-climate-change/climate-change-negotiations/42C4013E8E035932BBCF6114ADFA24A1; Atiq RAHMAN and Annie RONCEREL, "A View from the Ground Up", in Irving M MINTZER and J. Amber LEONARD, eds., *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge: Cambridge University Press, 1994), 239s, online: www.cambridge.org/core/books/negotiating-climate-change/view-from-the-ground-up/DC3232716D99A7C6DA6D8F9AE1D2B3D3

[108] Youba SOKONA, Adil NAJAM and Saleemul HUQ, "Climate Change and Sustainable Development: Views from the South" *World Summit on Sustainable Development Opinion Papers*, online: International Institute for Environment and Development www.iied.org/sites/default/files/pdfs/migrate/11002IIED.pdf

[109] Adil NAJAM, Saleemul HUQ and Youba SOKONA, "Climate Negotiations Beyond Kyoto: Developing Countries Concerns and Interests" (2003) 3 Climate Policy 221.

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finance took a backburner. This era saw the ethical concerns over climate justice and discussions over "ecological debt" being dismissed as "impractical", focusing on what the Global North and transnational ruling elites saw as practical market-based solutions, resulting in a dissonance among the marginalised peoples and a deepening North-South divide.[110]

As feared by many observers, the development of the carbon markets did little to help the Third World or its peoples. In fact, in many cases it enabled "climate fraud", whereby large polluting corporations were able to obtain millions of dollars in "incentives" and carbon credits without making any major changes in their operations.[111] At a grassroots level, carbon trading policies often led to "carbon colonialism" – rapid extraction of fossil fuels, which were sought to be "compensated" through offset policies, like afforestation, were done at the expense of traditional communities and local biodiversity.[112]

Similarly, the apparently progressive attempts to link human rights and the environment may have led to the replication of the colonial dynamics of power within human rights institutions and caused worse outcomes for the people, where it was imposed as a top-down solution.[113] Gonzalez, in this context, emphasises developing a non-Eurocentric account of the human rights project with respect to the environment and recommends local, grassroots-led approaches, which can better realise the emancipatory potential of human rights.[114]

The history of negotiation of climate finance further illustrates the disadvantage of the Third World. The need for ensuring availability of financing for building the capacity of developing countries to adapt to climate change and transition to low carbon-footprint economies was felt since the inception of climate negotiations. The Ministerial Declaration at the Second World Climate Conference (1990) in the run to negotiating UNFCCC noted that "[a]dditional financial resources will have to be channelled to developing countries for those activities which contribute both to limiting greenhouse gas emissions and/or adapting to any adverse effects of climate change, and promoting economic development".[115]

Initially, climate finance was seen as an extension of the official development assistance being provided by some developed countries to Third World countries. However, the purpose of development assistance was different from climate finance, which is aimed to help developing countries mitigate and adapt to the effects of climate change. Counting development assistance as climate finance was therefore seen as "double counting" and the need for "new and additional" finance (as opposed to repacking existing sources of finance) specifically for climate action was recognised.[116]

The UNFCCC, which introduced differentiated obligations between developed countries and developing countries (included in Annex I and II), provides that:

[110] Karin MICKELSON, "Leading towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation" (2005) 43 Osgoode Hall Law Journal 137.

[111] Bachram, *supra* note 69.

[112] Lohmann, *supra* note 69.

[113] Carmen GONZALEZ, "Environmental Justice, Human Rights, and the Global South" (2015) 13 Santa Clara Journal of International Law 151.

[114] *Ibid.*

[115] World Meteorological Organization (WMO) , *Second World Climate Conference: Conference Statement* (Geneva: WMO, 1990), para 2.8.

[116] Katharina MICHAELOWA and Chandreyee NAMHATA, "Climate Finance as Development Aid", in Axel MICHAELOWA and Anne-Kathrin SACHERER (eds.), *Handbook of International Climate Finance* (Chetenham: Edward Elgar Publishing, 2022), 62, online: www.elgaronline.com/edcollchap/book/9781784715656/book-part-9781784715656-9.xml

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> the developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of or access to environmentally sound technologies and knowhow to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.[117]

It also sought to create a financial mechanism to ensure "provision of financial resources on a grant or a concessional basis", and was required to have a balanced and equitable representation of parties and a transparent system of governance.[118] The Global Environment Facility (GEF) was entrusted with the operation of the financial mechanism in the interim until specific rules were made by the first conference of parties.

In essence, the UNFCCC did little more than recognise the need for climate finance, and put in place a financial mechanism framework without actually defining such "climate finance", requiring any binding obligations on individual developing states, or creating a detailed institutional procedure regarding climate finance. Decisions on it were postponed, to be subjected to further negotiations at the various COPs. In the first COP, held at Bonn, Germany in 1995, the parties were only able to agree to formalise the role of GEF in operating the financial mechanism.[119] No progress was made on negotiating any further targets or commitments for climate finance.

In the meantime, the Kyoto Protocol had established international carbon markets through the "flexibility mechanisms" of Joint Implementation, Clean Development Mechanism (CDM), and International Emissions Trading.[120] These were seen as an important way of incentivising climate finance flows towards developing countries through market-based methods. Joint Implementation allowed for North-North cooperation, allowing an Annex I party to acquire "emission reduction units" resulting from certain mitigation projects located in another Annex I state.[121] CDM allowed developed countries to obtain "carbon offset credits" from their funded projects in developing countries (non-Annex I countries) if the emission reductions from such project show "real, measurable and long-term benefits related to the mitigation of climate change" which was "additional to any that would occur in the absence of the certified project activity".[122] In essence, the Kyoto Protocol system introduced binding emission reduction targets for developed countries, fulfilment of which could be partially "outsourced" to developing countries (which do not have emission reduction obligations) by funding and implementing projects which mitigate climate change in those countries. It is also important to note that while the Kyoto Protocol introduced binding emission cuts for developed countries, it kept climate financing through the aforesaid mechanisms entirely voluntary. It sought to nudge developed countries through the market rather than legally requiring the provisioning of climate finance. It further failed to raise climate finance in any concerted, systematic, or measurable manner.

The introduction of voluntary market-based mechanisms for climate finance was seen by many scholars as a detraction from the developed countries' responsibility and a backdoor for carbon colonialism.[123] Julia Dehm, for instance, highlights the criticism that these

[117] UNFCCC, *supra* note 66, Art. 4.5.

[118] *Ibid*., Art. 11.

[119] "Summary Report 28 March–7 April 1995", *International Institute for Sustainable Development – Earth Negotiations Bulletin*, online: IISD http://enb.iisd.org/events/unfccc-cop-1/summary-report-28-march-7-april-1995

[120] Kyoto Protocol, *supra* note 68, Arts. 6 (Joint Implementation), 12 (Clean Development Mechanism), and 17 (emissions trading).

[121] *Ibid.*, Art. 6.

[122] *Ibid.*, Art. 12.

[123] Heidi BACHRAM, "Climate Fraud and Carbon Colonialism: The New Trade in Greenhouse Gases" (2004) 15(4) Capitalism Nature Socialism 5, online: https://doi.org/10.1080/1045575042000287299; Julia DEHM, "Carbon

market mechanisms could further marginalise those who are already most vulnerable to the adverse effects of climate change.[124] There have been fears that such CDM projects (like afforestation or renewable energy projects) could in practice mean land grabbing and "green grabbing" at the expense of indigenous people and accelerate the destruction of local ecosystems, and increase poverty.[125]

Subsequent COP decisions continued to incrementally make rules to improve the reporting and transparency regarding climate finance. For instance, the parties in the COP 4 (1998) decided to review the financial mechanism every four years.[126] COP 7 at Marrakech (2001) created a separate Special Climate Change Fund (SCCF) and Least Developed Countries Fund (LDCF) to finance project adaptation, technology transfer, and capacity building, and to assist least developed countries prepare and implement their national adaptation programmes of action, respectively.[127] It also created an Adaptation Fund under the Kyoto Protocol to "finance concrete adaptation projects and programmes in developing country Parties".[128] However, none of these decisions actually delivered on the promise of delivering the necessary "new and additional" climate finance to the Global South.

C. The Copenhagen era (2009–15): dilutions and compromises

The Copenhagen conference was rather infamous for the perceived unfairness of the negotiating process and the consequent walkout by several developing countries.[129] It also saw the negotiation for the Paris Agreement gather steam, and many principles of the UNFCCC which were seen as fundamental, and not just by the developing countries, were considerably diluted.[130] As Rajamani notes, the principle of differentiation, in the form of CBDR, was introduced to introduce a "balance of commitments" between the Global North and the Global South.[131] It was hoped that the application of differentiation would meaningfully integrate developing countries within the climate regime, while achieving necessary cooperation from developed countries to meet the climate action goals effectively. However, this principle has been greatly diluted through "self-differentiation" in the post-Copenhagen era.

COP15 at Copenhagen (2009) is often called a watershed, as for the first time the developed countries pledged a specific (non-binding) numerical target of raising a minimum of US$100 billion annually as climate finance for developing countries by 2020 through the

Colonialism or Climate Justice: Interrogating the International Climate Regime from a TWAIL Perspective" (2016) 33(3) Windsor Yearbook of Access to Justice 129, online: https://doi.org/10.22329/wyaj.v33i3.4893

[124] *Ibid.*

[125] See for e.g. Dehm, *supra* note 61, at 170–217; Marie BLÉVIN, "The Clean Development Mechanism and the Poverty Issue" (2011) 41(3) Environmental Law 777.

[126] Decision 3/CP.4: Review of the Financial Mechanism, Report of the Conference of the Parties on its fourth session, held at Buenos Aires from 2 to 14 November 1998. Addendum. Part two: Action taken by the Conference of the Parties at its fourth session, FCCC/CP/1998/16/Add.1.

[127] See Decision 7/CP. 7: Funding under the Convention, Report of the Conference of the Parties on its seventh session, held at Marrakesh from 29 October to 10 November 2001. Addendum. Part Two: Action taken by the Conference of the Parties, Volume I, FCCC/CP/2001/13/Add.1.

[128] *Ibid.*

[129] Navroz K. DUBASH, "Copenhagen: Climate of Mistrust" (2009) 44 Economic and Political Weekly 8.

[130] Daniel BODANSKY, "The Copenhagen Climate Change Conference: A Post-Mortem" (2010) 104(2) American Journal of International Law 230, online: https://doi.org/10.5305/amerjintelaw.104.2.0230; Dehm, *supra* note 123.

[131] Lavanya RAJAMANI, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime" (2000) 9 Review of European Community & International Environmental Law 120.

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"Copenhagen Accord".[132] However, it is interesting to note that the Copenhagen Accord (adopted by 29 countries) was seen as a face-saving measure. This is because for the first time, the COP (which takes decisions as per consensus between all parties) could not come to any agreement, and merely "took note" of the Accord, rather than approving it.[133] While it was billed as the conference to "seal the deal" and provide definitive clarity on the status of climate change regime after 2012 (when the emission reduction targets under the Kyoto Protocol were due to expire), it failed to achieve those goals,[134] and only exposed the continuing fault lines that divided the Global North and the Global South. Compared to the negotiations prior to the UNFCCC and Kyoto Protocol, developed countries seemed determined to reverse the Kyoto Protocol position of binding emission cuts on them, and the Annex-based differentiation model of the UNFCCC.[135] Developing countries saw this as a major dilution of the principle of CBDR and a reversal of the hard-earned progress achieved under UNFCCC and Kyoto Protocol.[136] The Copenhagen Accord was presented as a *fait accompli* to the developing countries, most of whom had no role in drafting it, and were told to accept it or else they would not receive the promised financing.[137] Some developing countries walked out of the conference, dissatisfied with the procedural irregularities in negotiations, and the perceived high-handedness of the Chair in not taking the developing countries into confidence. The "outcome" in the form of the Copenhagen Accord was therefore incomplete, and despite the promises made concerning climate finance, there were no methods to implement those promises.[138]

The "Copenhagen turn" in climate governance moved away from the previous model of "redistributive multilateralism", as noted by McGee and Steffek, and instead towards a model of voluntary pledges, achieved through weakening the previously agreed UNFCCC model of differentiation.[139] Despite the general dissatisfaction with the Copenhagen COP, it has had a lasting impact. The dilution done to principles of differentiation and CBDR has proven enduring, leading to an approach of "self-differentiation" in the Paris Agreement.[140] This led to essentially re-setting the climate change framework in the run-up to the Paris Agreement negotiations.[141]

[132] Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009. Addendum. Part Two: Action taken by the Conference of the Parties at its fifteenth session. FCCC/CP/2009/11/Add.1.

[133] See generally: Bodansky, *supra* note 130; Ian M. MCGREGOR, "Disenfranchisement of Countries and Civil Society at COP-15 in Copenhagen" (2011) 11(1) Global Environmental Politics 1, online: https://doi.org/10.1162/GLEP_a_00039; Peter CHRISTOFF, "Cold Climate in Copenhagen: China and the United States at COP15" (2010) 19(4) Environmental Politics 637, online: https://doi.org/10.1080/09644016.2010.489718

[134] Bodansky, *supra* note 130.

[135] Kushal Pal SINGH YADAV, Pradip SAHA, Jaisel VADAGAMA, Arnab Pratim DUTTA, and Chandra BHUSHAN, "Copenhagen According to USA", *Down to Earth* (15 January 2010) online: Down to Earth www.downtoearth.org.in/coverage/copenhagen-according-to-usa-696

[136] See for a commentary on the changes in the principle of differentiation after Copenhagen: Rajamani, *supra* note 95.

[137] Singh Yadav, Saha, Vadagama, Dutta, and Bhushan, *supra* note 135.

[138] Lavanya RAJAMANI, "Copenhagen Accord: Neither Fish nor Fowl", *Centre for Policy Research* (8 February 2010) online: CPR https://cprindia.org/journalarticles/copenhagen-accord-neither-fish-nor-fowl/

[139] Jeffrey MCGEE and Jens STEFFEK, "The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law" (2016) 28(1) Journal of Environmental Law 37.

[140] See Lavanya RAJAMANI, "Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics" (2016) 65(2) International & Comparative Law Quarterly 493, online: https://doi.org/10.1017/S0020589316000130; Christina VOIGT and Felipe FERREIRA, "Differentiation in the Paris Agreement" (2016) 6(1–2) Climate Law 58, online: https://doi.org/10.1163/18786561-00601004

[141] For a discussion on evolution of climate change negotiations, see generally: Bodansky, Brunnée and Rajamani, *supra* note 82 at 96.

In a way, the developing countries were presented with a choice between sticking to the previous model of binding emission targets on developed countries (through the application of CBDR) or accepting genuine offers (rather what were said to be genuine offers) of climate finance from the developed countries. Developing countries, most of whom were disproportionately adversely impacted by climate change and needed immense funding to even be able to adapt to (let alone mitigate) climate change,[142] had little real choice but to accept the latter.

Implications of this approach on Climate Finance since the Copenhagen COP have also been immense. Developments in COPs following Copenhagen initially showed some promise, for instance, the establishment of the Green Climate Fund at COP 16 (Cancun, 2010).[143] However, as developments later showed, these promises did not materialise into reality.[144]

The Copenhagen Era also saw increased involvement of non-state actors in the COPs. The Copenhagen COP, for instance, was attended by over 40,000 delegates from various non-governmental organisations (NGOs), international governmental organisations (IGOs), media, and UN agencies.[145] Although this was seen as a positive move, allowing for greater scrutiny by civil society and engagement by climate-oriented groups, in practice, it also permitted legitimisation of corporate capture of negotiations, fossil fuel lobbies, and in some cases co-option of environmental NGOs by corporate lobbies.[146] Both in states of the Global North and the Global South, business lobbies have been able to influence climate policies.[147] The prominent role of the "transnational ruling elite" in climate negotiations has grown increasingly prominent over successive COPs. This has posed dilemmas for grassroots climate movements, who are interested in urgently addressing climate concerns but at the same time are wary of certain forms of climate action that could further "global extractivism" and carbon colonialism.[148] They have been particularly wary of the "corporate capture" of climate negotiations, particularly the influence of fossil fuel companies and predominance of neoliberal market-based solutions, which have in many cases been detrimental to the local communities.[149]

[142] Regarding the gross shortfall of adaptation finance and the urgent need of the developing countries, see: UNEP, "Adaptation Gap Report 2021," *UNEP* (31 October 2021), online: UNEP www.unep.org/resources/adaptation-gap-report-2021; Mohamed BAKARR, "Climate Finance and the Urgency for Adaptation in the Developing World", *Global Environment Facility* (12 May 2021), online: Global Environment Facility www.thegef.org/newsroom/blog/climate-finance-and-urgency-adaptation-developing-world

[143] Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, Part Two: Action taken by the Conference of the Parties at its sixteenth session, Decisions adopted by the Conference of the Parties, FCCC/CP/2010/7/Add.1.

[144] Jocelyn TIMPERLEY, "The Broken $100-Billion Promise of Climate Finance – and How to Fix It" (2021) 598(7881) Nature 400–2, online: https://doi.org/10.1038/d41586-021-02846-3

[145] Dehm, *supra* note 123.

[146] Carola BETZOLD, "Business Insiders and Environmental Outsiders? Advocacy Strategies in International Climate Change Negotiations" (2013) 2 Interest Groups & Advocacy 302; John C.V. PEZZEY, "The Influence of Lobbying on Climate Policies; or, Why the World Might Fail" (2014) 19 Environment and Development Economics 329; Alicia PAWLUK and Isobel BRAITHWAITE, "Corporate Influence on Climate Negotiations" (2014) 348 British Medical Journal g2616; Leslie SKLAIR, "The Corporate Capture of Sustainable Development and Its Transformation into a 'Good Anthropocene' Historical Bloc" (2019) 19 Civitas – Revista de Ciências Sociais 296.

[147] See for e.g. Adam LUCAS, "Investigating Networks of Corporate Influence on Government Decision-Making: The Case of Australia's Climate Change and Energy Policies" (2021) 81 Energy Research & Social Science 102271; Himangana GUPTA, Ravinder Kumar KOHLI and Amrik Singh AHLUWALIA, "Mapping 'Consistency' in India's Climate Change Position: Dynamics and Dilemmas of Science Diplomacy" (2015) 44 Ambio 592.

[148] Dehm, *supra* note 123, at 154, 158.

[149] *Ibid.*, at 151–2.

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D. The Paris Era (2016–): facilitation and soft-push

After the coming into force of the Paris Agreement,[150] there has been some attention given to issues of concern to the Global South, such as climate finance, adaptation, and, more recently, loss and damage. However, the negotiations have proved remarkably slow where Third World interests are concerned.

The Paris Agreement formalised the dilution of the CBDR principle, allowing for a bottom-up "self-differentiation" approach,[151] undoing the effect of the hard-fought inclusion of CBDR as a legal principle in the UNFCCC. The self-differentiation and voluntary approach is supposed to better facilitate compliance and induce climate action on a range of issues such as adaptation, transfer of technology, climate finance, and loss and damage. As we arrive at the first Global Stocktake,[152] it is clear that the world is not on a trajectory to meet the Paris Agreement climate goals.[153] Especially on issues like adaptation, climate finance, climate mobility, which are of importance to the Global South, particularly the least developed countries and the small island states, progress has been slow.

Contrary to what was once hoped, the Paris Agreement has not conclusively settled the key debates around climate action, and been a semi-colon rather than a full-stop in the series of endless negotiations around key issues of climate change.[154] More than three decades of climate change negotiations have only shown that these differences between the Global North and the Global South have not been meaningfully resolved.[155] Rather, the Paris Agreement has only papered over these differences, through deliberately ambiguous formulations which could potentially be interpreted by states differently, continuously deferring actual workable agreement.[156]

The issues of loss and damage, as well as climate finance illustrate this continuous deferral of agreement and actual action.

1. Loss and damage in the Paris Era

Many developing countries, particularly those in AOSIS, demanded compensation for 'loss and damage'[157] caused due to climate change, in addition to mitigation andadaptation, by

[150] *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, T.I.A.S. No. 16-1104, (entered into force 4 November 2016) [*Paris Agreement*].

[151] Rajamani, *supra* note 140 at 493.

[152] Decision 19/CMA.1: Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018, FCCC/PA/CMA/2018/3/Add.2.

[153] *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Report of the Intergovernmental Panel on Climate Change, Geneva, 2023, online: https://doi.org/10.59327/IPCC/AR6-9789291691647

[154] Daniel BODANSKY, "The Forever Negotiations", *EJIL: Talk!* (19 December 2022), online: EJIL www.ejiltalk.org/the-forever-negotiations/; Daniel BODANSKY and Lavanya RAJAMANI, "The Issues That Never Die" (2018) 12 Carbon & Climate Law Review 184.

[155] Daniel BODANSKY, Jutta BRUNNÉE, and Lavanya RAJAMANI, *International Climate Change Law* (Oxford: Oxford University Press, 2017).

[156] Bodansky and Rajamani, *supra* note 154, at 184–90.

[157] This concept refers to the harm (usually irreversible) caused by anthropogenic climate change (through sudden extreme disasters or slow-onset events) which could not be mitigated or adapted to, such as loss of islands due to rise in sea levels. See Sam ADELMAN, "Human Rights in the Paris Agreement: Too Little, Too Late?" (2018) 7 Transnational Environmental Law 17; Rachel JAMES, Friederike OTTO, Hannah PARKER, Emily BOYD, Rosalind CORNFORTH, Daniel MITCHELL, and Myles ALLEN, "Characterizing Loss and Damage from Climate Change" (2014) 4 Nature Climate Change 938; Erin ROBERTS and Mark PELLING, "Climate Change-Related Loss and Damage: Translating the Global Policy Agenda for National Policy Processes" (2018) 10 Climate and Development 4.

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the developing countries and small island developing states.[158] Pursuant to the decision at COP 18 at Doha to negotiate a loss and damage framework, the Warsaw International Mechanism for Loss and Damage (WIM) was established at COP 19 at Warsaw in 2013.[159] It was intended as a voluntary mechanism, operated under the supervision of the COP, to "promote the implementation of approaches to address loss and damage".[160]

During the negotiation of the Paris Agreement, many developing countries demanded to institutionalise WIM into a permanent body and provide for liability for the developed countries to compensate developing countries for loss and damage. However, a detailed chapter on loss and damage, which sought to create a legal liability on developed states for loss and damage (including for climate migrants), was seen as unacceptable to many developed countries, including the United States. As a compromise, a single article on loss and damage was adopted (Article 8), which continued the voluntary approach of the WIM.[161] In fact, the COP decision accompanying the Paris Agreement clarified that Article 8 did not involve or provide a basis for any liability or compensation.[162] This has led to the article being described as a "pyrrhic victory", essentially relegating these issues to the level of risk management and adaptation.[163]

COP 27 (Sharm El Sheikh, 2022), was hailed as a breakthrough, as Parties agreed to create a separate Loss and Damage Fund, separate from adaptation finance, for countries hit particularly hard by climate disasters.[164] However, there is little clarity on how this fund will be financed (since there is no obligation on developed states to address loss and damage).[165] This has led developing countries to remain cautious, warning against the expansion of the donor base to include developing countries, or fearing that the pledges for loss and damage will also remain unfulfilled, much like the $100 billion pledge of climate finance.[166] There are fears that the fund may simply be palliative, just another in the long list of climate funds that have been set up in the last few decades and whose effectiveness has been questionable.

[158] Lisa VANHALA and Cecilie HESTBAEK, "Framing Climate Change Loss and Damage in UNFCCC Negotiations" (2016) 16 Global Environmental Politics 111; Sam ADELMAN, "Climate Justice, Loss and Damage and Compensation for Small Island Developing States" (2016) 7 Journal of Human Rights and the Environment 32; Erin ROBERTS and Saleemul HUQ, "Coming Full Circle: The History of Loss and Damage under the UNFCCC" (2015) 8 International Journal of Global Warming 141.

[159] Decision 2/CP.19, Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, Addendum Part two: Action taken by the Conference of the Parties at its nineteenth session, FCCC/CP/2013/10/Add.1.

[160] *Ibid.*

[161] Emma LEES, "Responsibility and Liability for Climate Loss and Damage after Paris", in Joanna DEPLEDGE, Jorge E. VIÑUALES, Emma LEES, David REINER (eds.), *Climate Policy after the 2015 Paris Climate Conference* (London: Routledge, 2021).

[162] Decision 1/CP.21 Adoption of the Paris Agreement, para. 7, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session, FCCC/CP/2015/10/Add.1.

[163] Adelman, *supra* note 157.

[164] "Summary Report 6–20 November 2022", online: IISD Earth Negotiations Bulletin http://enb.iisd.org/sharm-el-sheikh-climate-change-conference-cop27-summary

[165] Arthur WYNS, "COP27 Establishes Loss and Damage Fund to Respond to Human Cost of Climate Change" (2023) 7 The Lancet Planetary Health e21; Angus William NAYLOR and James FORD, "Vulnerability and Loss and Damage Following the COP27 of the UN Framework Convention on Climate Change" (2023) 23 Regional Environmental Change 38.

[166] *Ibid.*

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2. Climate finance in the Paris Era

The Paris Agreement included several references to climate finance.[167] The preamble referred to the special need of least developed countries for "funding and transfer of technology".[168] Article 9 stipulated that developed countries "shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention".[169] A review of climate finance efforts was also included in the global stocktake.[170] Article 11 also required capacity building of developing countries to inter alia facilitate access to climate finance.[171]

However, a deeper analysis of the Paris Agreement reveals that these promises of climate finance do not necessarily include binding obligations. Only Article 9(1) herein creates a hard obligation on conduct on part of the developed states.[172] Even then, the reference to "in continuation of existing obligations under the Convention" makes this obligation ambiguous and diluted since under the UNFCCC there is no binding obligation on each country to provide a specific amount of climate finance; it is a general obligation, moderated by qualifiers like "as appropriate".[173] The words such as "Parties are encouraged" in the second paragraph and "Parties should continue" in the third paragraph, are essentially "soft-obligations", which merely recommend or encourage a particular action without having a binding force.[174] As noted by Rossati and Zahar, these provisions are in the nature of political statements signalling intent, rather than cognisable legal provisions.[175]

The COPs conducted after the Paris Agreement came into force have continued to build upon the existing framework of climate finance. COP 26 at Glasgow (2021) for instance, reaffirmed the pledge of developed countries providing $100 billion annually and included specific financial pledges to the Adaptation Fund and the Least Developed Countries Fund.[176] It also agreed to earmark a share of proceeds from market-based mechanisms under the Paris Agreement, specifically to help climate adaptation in developing countries that are particularly vulnerable to the adverse effects.

However, the developments in Climate Finance in the Paris Era has been disappointing for the Global South.

First, there is no binding obligation on individual developed states to contribute to the various climate finance funds. Treaty-based international law (in terms of specific binding obligations on states) on climate finance is almost non-existent.[177] It makes any accountability for failure to provide climate finance (individually or at a collective level) unlikely.[178]

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[167] *Paris Agreement, supra* note 150.

[168] *Ibid*., Preamble.

[169] *Ibid*., Art. 9.

[170] *Ibid*., Art. 9(6).

[171] *Ibid*., Art. 11.

[172] Lavanya RAJAMANI, "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations" (2016) 28(2) Journal of Environmental Law 337, online: https://doi.org/10.1093/jel/eqw015

[173] UNFCCC, *supra* note 66 Art. 11.

[174] Rajamani, *supra* note 172.

[175] David ROSSATI and Alexander ZAHAR, "Governing International Climate Finance and Investment: The Role of Law" in Alexander ZAHAR, ed., *Research Handbook on the Law of the Paris Agreement* (Massachusetts: Edward Elgar Publishing, Inc, 2024) 296 online: https://doi.org/10.4337/9781800886742.00020

[176] Report of the Conference of the Parties on its twenty-sixth session, held in Glasgow from 31 October to 13 November 2021. Addendum Part two: Action taken by the Conference of the Parties at its twenty-sixth session, FCCC/CP/2021/12/Add.1.

[177] Rossati and Zahar, *supra* note 175; Alexander ZAHAR, "Legal Obligations of States Relating to Climate Finance", in *Climate Change Finance and International Law* (London: Routledge, 2016).

[178] *Ibid*.

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The new model of "pledge-and-review" is not just arguably inconsistent with CBDR,[179] but also distracts from the effort to secure finance from developed countries, by also focusing on non-state actors and the expanded donor pool. The gross inadequacy of climate finance for mitigation and adaptation in developing countries is well known.[180] The promise of annual $100 billion climate finance funding has never been fully met. As noted in an Organisation for Economic Co-operation and Development (OECD) report on the aggregate trends in climate finance, US$83.3 billion was provided in 2020 (and even that was accused to be inflated by some developing countries).[181]

Second, while there seems to be a broad conception of what climate finance means, there is no agreed definition of climate finance in the international climate regime. This has led to problems of double counting, creative accounting, using recycled pledges, and poor transparency.[182] There are also controversies on whether many of the climate funding are truly "new and additional" instead of being reallocation of official development assistance, thereby making developing countries lose the aid they would otherwise receive for poverty alleviation, education, health, and other human development priorities.[183] These problems remain despite continuous improvements in the reporting and transparency frameworks through successive COPs. The lack of definitional clarity also allows for loans and debt instruments being passed-off as climate finance. As per the OECD figures, US$83.3 billion was provided in 2020, of which only 58 percent constituted public climate finance. Within the public climate finance, around 70 percent of it was in the form of loans (concessional and non-concessional).[184]

Third, voluntariness of climate finance is coupled with lack of a single streamlined and transparent framework for climate finance. This has resulted in a maze of different funds, institutions, and regulations that the developing countries wishing to obtain climate finance must navigate. For instance, Philippe Le Houérou notes that in the last thirty years at least ninety-four different green climate funds (not to be confused with the Green Climate Fund (GCF) have been created to finance climate-related projects in emerging and developing countries, of whom as many as eighty-one were active in 2022.[185] This makes it very difficult to have any common standards of evaluating the climate finance flows in a transparent manner or to ensure accountability of these funds on the basis

[179] Steven VANDERHEIDEN, "Justice and Climate Finance: Differentiating Responsibility in the Green Climate Fund" (2015) 50(1) The International Spectator 31, online: https://doi.org/10.1080/03932729.2015.985523

[180] "Biennial Assessment and Overview of Climate Finance Flows", *UNFCCC* online: UNFCCC https://unfccc.int/topics/climate-finance/resources/biennial-assessment-and-overview-of-climate-finance-flows

[181] OECD, *Aggregate Trends of Climate Finance Provided and Mobilised by Developed Countries in 2013–2020* (Paris: Organization for Economic Co-operation and Development, 2022), online: www.oecd-ilibrary.org/finance-and-investment/aggregate-trends-of-climate-finance-provided-and-mobilised-by-developed-countries-in-2013-2020_d28f963c-en; Amitabh SINHA, "Let us clearly define climate finance, says India at COP28 meet" *Indian Express* (9 December 2023), online: Indian Express https://indianexpress.com/article/world/climate-change/let-us-clearly-define-climate-finance-says-india-at-cop28-meet-9060555/; See also: Dipak DASGUPTA, Rajasree RAY, Shweta, and Salam Shyamsunder SINGH, "Climate Change Finance, Analysis of a Recent OECD Report: Some Credible Facts Needed", Climate Change Finance Unit, Department of Economic Affairs, Ministry of Finance, Government of India, Discussion Paper, 27 November 2015, online: https://dea.gov.in/sites/default/files/ClimateChangeOEFDReport%20%281%29.pdf; Vanderheiden, *supra* note 179.

[182] Anis CHOWDHURY and Kwame Sundaram JOMO, "The Climate Finance Conundrum" (2022) 65(1) Development 29, online: https://doi.org/10.1057/s41301-022-00329-0

[183] *Ibid.*

[184] OECD, *supra* note 181.

[185] Philippe LE HOUÉROU, "Climate Funds: Time to Clean Up" (Clermont-Ferrand: Fondation pour les études et recherches sur le développement international (FERDI), 2023), online: https://ferdi.fr/en/publications/climate-funds-time-to-clean-up

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of any principles of international climate and environment governance. Beyond the climate funds created under the climate treaties (like the GCF, the Least Developed Countries Fund (LDCF), etc.) and supervised by the mechanism created under COPs, an increasingly large amount of money going into climate-related projects is being provided from private sources, large pension funds, and multilateral development banks.[186] Such climate funding, due to the lack of proper oversight, has not always resulted in a better outcome for the most vulnerable peoples. There have been many documented instances of displacement of indigenous peoples, land-grabbing, resource extraction, and so on, under the name of climate projects.[187] This exacerbates the fears of climate finance being just another expression of carbon colonialism which only serves the interests of a transnational ruling elite.[188]

III. Need for incorporating fairness in climate negotiations

It is important to acknowledge that the commonly identified Global South states no longer (if they ever had) a common position or approach towards climate actions, and sometimes their interests and positions may be contradictory. For instance, some of the more emerging economies may seek to benefit from various market mechanisms, climate finance and may prefer pathways that temporarily "overshoot" the Paris Agreement targets. Other states, including many small island states, may be more interested in urgent and stringent mitigation actions, compensation for their ongoing loss and damage, and would be opposed to the marketisation of climate action. As noted earlier, this article does not argue that a common position exists among the Global South states. Instead, it argues that regardless of the relative positions of individual states, the climate change negotiations have structurally disadvantaged the Third World. As the history of the climate change negotiations shows, major climate treaties do very little to bridge the North-South divide, and merely paper over them using deliberately ambiguous language, setting up open-ended treaties, and endless negotiations over each proposed action. As noted earlier, a TWAIL approach to climate justice would seek to integrate different forms of climate action like mitigation, adaptation, and climate finance, rather than a siloed approach where agreements on certain issues (usually those important to the Third World) keep getting postponed.

Incorporation of fairness considerations is essential to building a durable institutional regime; a regime built purely on hard-headed considerations of power-based bargains is likely to crumble as soon as the relative power of the stakeholders shift.[189] This incorporation may happen in two ways – first is to build an institution/regime, and later introduce

[186] OECD, *supra* note 181.

[187] See for e.g. Saturnino M. BORRAS, Jennifer C. FRANCO, Sergio GÓMEZ, Cristóbal KAY, and Max SPOOR, "Land Grabbing in Latin America and the Caribbean" (2012) 39(3–4) The Journal of Peasant Studies 845, online: https://doi.org/10.1080/03066150.2012.679931; Arnim SCHEIDEL and Courtney WORK, *supra* note 69; Diana OJEDA, "Green Pretexts: Ecotourism, Neoliberal Conservation and Land Grabbing in Tayrona National Natural Park, Colombia" in James FAIRHEAD, Melissa LEACH, and Ian SCOONES (eds.), *Green Grabbing: A New Appropriation of Nature* (London: Routledge, 2013); Esteve CORBERA, Carol HUNSBERGER, and Chayan VADDHANAPHUTI, "Climate Change Policies, Land Grabbing and Conflict: Perspectives from Southeast Asia" (2017) 38(3) Canadian Journal of Development Studies / Revue Canadienne d'études Du Développement 297, online: https://doi.org/10.1080/02255189.2017.1343413

[188] See generally: Bachram, *supra* note 69; Dehm, *supra* note 61; Dehm, *supra* note 123; Rebecca NAVARRO, "Climate Finance and Neo-Colonialism: Exposing Hidden Dynamics" in Corrine CASH and Larry A. SWATUK, eds., *The Political Economy of Climate Finance: Lessons from International Development*, International Political Economy Series (Cham: Springer International Publishing, 2022), 179, online: https://doi.org/10.1007/978-3-031-12619-2_8

[189] Ethan B. KAPSTEIN, "Fairness Considerations in World Politics: Lessons from International Trade Negotiations" (2008) 123 Political Science Quarterly 229.

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"fairness" through subsequent reforms, or second, agreeing on the principles of fairness first and using it to build the regime on that basis. I argue that in case of climate change, the second approach is preferable, and the first approach is likely to forever marginalise Third World interests. Comparisons may be made with international trade negotiations resulting in a "full single-package treaty" in the case of the WTO. Subsequent attempts to reform the WTO regime through the Doha Development Round of negotiations have proved deadlocked and fruitless, despite two decades of negotiations. If anything, the key issues that are of interest to the Global South have gradually been sidelined, and the erosion of their collective bargaining power has resulted in developing countries accepting "best endeavour promises [made to them] in exchange for a legally binding agreement on trade facilitation".[190] The imbalances within the WTO have led to a situation where the few provisions which are meant to safeguard the interests of the Global South (such as the Special and Differential Treatment) have led to competition within themselves, further weakening their political unity and their chances at achieving substantive reforms.[191] Without incorporating fairness considerations, even if an agreement is achieved, it may prove ephemeral and may not provide a lasting solution.

In the case of climate governance, similar patterns may be noticed. A clear principle of differentiation has been eroded, fragmenting the Global South. The current "building blocks" approach to climate change, which incrementally develops different elements of climate governance and incorporates them into a larger framework,[192] is less likely to focus on issues that are urgent for the Global South, such as climate finance or loss and damage. For instance, without consensus on the basic principles of fairness on how to allocate the cost of mitigation, adaptation, and loss and damage, and without any binding obligations on the Global North to financially contribute, creating many climate funds (such as the Loss and Damage Fund, the LDCF, the GCF and so on) with meagre funding is only likely to lead to competition within various least developing countries and small island states, shifting focus away from the larger issues of fairness of the climate regime. Once the climate governance regime is fully established, the "regime resistance" will complicate subsequent attempts at reforms. Thus, if fairness concerns, which are central to all issues concerning climate action, are not addressed at the outset, later attempts to redress the inequities are likely to fail.

IV. Concluding thoughts: what fairness in climate change negotiations may look like?

In the context of structural problems such as the lack of fairness in climate change negotiations discussed earlier, there are different types of reforms that may be advocated, each with its own limitations. The most effective reforms may be long-term structural reforms, but achieving these would require fundamental changes in the extant global order, and capitalist power relations. In the long-run, systemic reforms would require support from outside of formal diplomatic arenas, courts, legal fora, and, indeed, outside international law. Social movements on climate change may help create popular support for climate justice through what Gorz called a strategy of "non-reformist reforms",[193] such that it becomes difficult for countries to take negotiating positions that ignore issues of

[190] Rorden WILKINSON, Erin HANNAH and James SCOTT, "The WTO in Bali: What MC9 Means for the Doha Development Agenda and Why It Matters" (2014) 35 Third World Quarterly 1032.

[191] For application of the Special and Differential Treatment principles, see: Clara WEINHARDT and Till SCHÖFER, "Differential Treatment for Developing Countries in the WTO: The Unmaking of the North–South Distinction in a Multipolar World" (2022) 43 Third World Quarterly 74.

[192] Robert FALKNER, Hannes STEPHAN and John VOGLER, "International Climate Policy after Copenhagen: Towards a 'Building Blocks' Approach" (2010) 1 Global Policy 252.

[193] André GORZ, *Strategy for Labor: A Radical Proposal* (Boston: Beacon Press, 1967). Gorz identifies three features of non-reformist reforms: first, it pushes for systemic changes, beyond the existing system and the "balance of

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climate justice. Movements like calls for fossil fuel divestment have been identified as using such strategies.[194] While many differences exist between environmental movements in the Global North and Global South,[195] there are increased commonalities in the struggles of the oppressed and marginalised globally that necessitate linkages between them.[196] Linking development and climate actions and climate justice are no longer only found in movements located in the Global South, but are also realised in the Global North (e.g. post-Sandy housing crisis in New York and proposals for the "Green New Deal" in the US).[197] These structural "non-reformist" reforms may also require a gradual transformation of the consumption-led capitalist international order, which would make both intra- and inter-state climate justice possible. However, by their very nature such "non-reformist reforms" would require a global groundswell of popular support, and could help bridge the North-South divide on climate issues only in the long-term.

However, the nature of the climate emergency necessitates more immediate action. The second type of reform is more of the medium-term substantive reforms that can guide the direction in which climate negotiations are conducted within the present international legal order. These types of reforms may involve ensuring substantive fairness in the negotiating process. From a TWAIL perspective, ensuring this fairness needs to go beyond processual fairness by ensuring that climate negotiations respect certain "red lines" of substantive fairness. This would depart from some of the assumptions in Franck's "gatekeeping principles" (like no-trumping) in ensuring fairness. As noted in the previous sections, in determining these "red lines" the TWAIL approach would build upon the Rawlsian difference principle but also would also insist upon accounting for historical and consequently present structural disadvantages. This approach discourages forms of climate action that would create a permanent divide between global have and have-nots, or perpetuate colonially created dependencies.[198]

The nature of the climate change problem effectively gives greater negotiating power to the biggest emitters. No effective solution is possible if even one of the top emitters does not join it. Considering the near-universal participation in the UNFCCC and the Paris Agreement and recognition of the global nature of climate change, it could be argued that all states have a duty under customary international law to, inter alia, participate in good faith in negotiating for international climate action. This would include the obligation to negotiate courses of action that ensure the continued survival of all states and minimise the violation of human rights of the people adversely affected by climate change. This obligation, in practice, would preclude the States' withdrawal from the negotiating process

profit", second, it seeks to decentralise power away from economic elites, and third, it is undertaken in dynamic phases within a process of struggle.

[194] Emilia BELLIVEAU, James ROWE and Jessica DEMPSEY, "Fossil Fuel Divestment, Non-Reformist Reforms, and Anti-Capitalist Strategy" in William K. Carroll, ed., *Regime of Obstruction: How Corporate Power Blocks Energy Democracy* (Edmonton, Alberta, Canada: Athabasca University Press, 2021) 453.

[195] Guha, *supra* note 70.

[196] For a discussion on global social movements linking the "transnational oppressed classes" in the Global North and South, see generally: B.S. CHIMNI, "International Institutions Today: An Imperial Global State in the Making" (2004) 15 European Journal of International Law 1; B.S. CHIMNI, "Crisis and International Law: A Third World Approaches to International Law Perspective", in Makane Moïse MBENGUE and Jean d'ASPREMONT, eds., *Crisis Narratives in International Law* (Leiden: Brill Nijhoff, 2022), 40.

[197] Amna A. AKBAR, "Non-Reformist Reforms and Struggles over Life, Death, and Democracy" (2022) 132 Yale Law Journal 2497.

[198] As noted in previous sections, TWAIL would not regard climate change as fundamentally separate from discourses on development, human rights etc. and would consider the climate negotiations as a part of an overall effort to reform extant global order (including negotiations in areas of global health, human rights, law of the seas, and international economic law). However, considering these linkages are beyond the limited scope of this chapter.

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and would shape the direction of the negotiations to the benefit of the subaltern and the most disadvantaged peoples. For instance, it would preclude those mitigation pathways, which would lead to a sharp rise in emissions and consequent loss and damage in low-lying countries or certain countries of the Global South.[199] It could also mean that proposals that continuously renegotiate principles such as that of CBDR would not be allowed.

Even as many countries are reluctant to link climate change with human rights in climate treaties, or entertain notions of having a binding and "fair" mitigation obligation, a plethora of national, regional, and international climate litigation pushed by many climate NGOs seek to raise climate ambitions and the "soft-law" of Paris Agreement and other climate treaties into binding obligations (and have successfully done so, in some cases).[200] Domestic and regional climate litigation, being jurisdictionally circumscribed, may be of limited help in ensuring fairness in international climate negotiations (including fair allocation issues), though successes in the historically biggest emitter countries is likely to help. Further, issues like jurisdiction, standing, and other constitutional limitations like the division of power may prevent Third World concerns like climate finance from being litigated. These issues may be something that the international courts, like the International Court of Justice, may like to consider in the ongoing climate change advisory opinion.[201] On the question of the obligation of states with respect to climate change and legal consequences thereof, a finding to the effect that requires states to observe principles of fairness and good faith in their climate negotiations could help in this regard. Further, findings of positive obligations regarding climate change on states, by national courts, regional courts, and international courts (for e.g. the recent International Tribunal for the Law of the Sea (ITLOS) Advisory opinion)[202] could also help in this direction by precluding endless delays on negotiating certain agendas.[203] However, to make these substantive reforms possible, it

[199] Joeri ROGELJ, Drew SHINDELL, and Kejun JIANG, "Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development", in Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: IPCC Special Report on Impacts of Global Warming of 1.5°C above Pre-industrial Levels in Context of Strengthening Response to Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Cambridge: Cambridge University Press, 2022) 93.

[200] See for e.g. Christina VOIGT, "The Power of the Paris Agreement in International Climate Litigation" (2023) 32 Review of European, Comparative & International Environmental Law 237; Lavanya RAJAMANI, Louise JEFFERY, Niklas HÖHNE, Frederic HANS, Alyssa GLASS, Gaurav GANTI, and Andreas GEIGES, "National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law" (2021) 21 Climate Policy 983; Maria Antonia TIGRE, "The 'Fair Share' of Climate Mitigation: Can Litigation Increase National Ambition for Brazil?" (2023) 16(1) Journal of Human Rights Practice 32.

[201] *Request for Advisory Opinion transmitted to the Court pursuant to General Assembly Resolution 77/276 of 29 March 2023, Obligations of States with respect to Climate Change*, Letter by the Secretary General of the United Nations to the President of the International Court of Justice, 12 April 2023, 2023 General List No. 187, online: ICJ www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf

[202] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, [2024] International Tribunal on the Law of the Seas, Case No. 31.

[203] *Ibid*., at 82. The findings of ITLOS that are most relevant to developing countries include paragraph 229:

> The Tribunal considers that while the obligation under article 194, paragraph 1, of the Convention does not refer to the principle of common but differentiated responsibilities and respective capabilities as such, it contains some elements common to this principle. Thus, the scope of the measures under this provision, in particular those measures to reduce anthropogenic GHG emissions causing marine pollution, may differ between developed States and developing States. At the same time, it is not only for developed States to take action, even if they should "continue taking the lead". All States must make mitigation efforts.

In paragraph 339, the Tribunal also notes that "articles 202 and 203 of the Convention set out specific obligations to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions".

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may require favourable judgments, recognition of limited negotiations on climate change, and a substantive notion of fairness, which may not be achieved within a short time frame.

The third type of reform that can be helpful from a Third World perspective, is short-term incremental, procedural reforms. These reforms, by themselves, may not lead to fairness in climate change negotiations, but may gradually add up and make more substantive and structural reforms possible.

From a procedural perspective, climate negotiations have prioritised achieving consensus over adopting decisions through fractious voting. Theoretically, it provides equal voice to each State in the negotiating process. However, the Global North can marshal much more resources which it may invest in the negotiating process such as having a much bigger diplomatic corps, or better scientific or technical expertise. A study has suggested that the level of a states' vulnerability to climate change may be one of the determinants of the success of their negotiating position.[204] However, many Third World states do not have the technical expertise or the resources to accurately show how they would be affected by climate change, beyond just relying on common Intergovernmental Panel of Climate Change (IPCC) reports or other studies generated in the Global North. For instance, recently in its submission before the ITLOS, in the ongoing case relating to climate change, Timor-Leste noted that "there is very limited data as to the effects of climate change on Timor-Leste. As such, it is difficult to comprehensively report and monitor the impacts of climate change on its marine environment".[205] It also highlighted that it needed technical support and financing to develop accurate reporting abilities on emissions and climate change impacts.[206]

This lack of resources often works to the disadvantage of the delegations from the Global South countries in climate negotiations as well. Despite the relative increase in the size of their official delegations in recent years, the size of delegations of Global South states, particularly small island states, remain smaller than their Global North counterparts.[207] Further, sometimes many of their delegates are NGO and industry representatives, rather than technical experts or diplomats. Although there is no clear empirical evidence linking the size of state's delegations with negotiation outcomes,[208] the lack of parity in the negotiation resources points just adds to the structural disadvantage that the Global South faces. This needs to be mitigated by providing greater support to the countries of the Global South, particularly the least developed countries and the small island states. The UNFCCC Secretariat could provide trained personnel to work with diplomats from these countries, to help them make their case more effectively. The negotiating process also could be made fairer by maintaining transparency on the representatives of NGOs, corporations, industry lobbies, and so on. As non-state entities have started playing an important role in climate negotiations,[209] there is a need to ensure that the voices representing the subaltern are not

[204] Florian WEILER, "Determinants of Bargaining Success in the Climate Change Negotiations" (2012) 12 Climate Policy 552.

[205] *Oral submissions of Timor-Leste*, in Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Public sitting held on Wednesday, 20 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, Verbatim Record, ITLOS/PV.23/C31/14 (20 September 2023), at 5, online: www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_14_E.pdf

[206] *Ibid.*, at 19.

[207] Gerardo S. MARTINEZ, *Jacob Ipsen HANSEN, Karen Holm OLSEN, Emmanuel Kofi ACKOM, James Arthur HASELIP, Olivier Bois von KURSK, and Maria Bekker-Nielsen DUNBAR*, "Delegation Size and Equity in Climate Negotiations: An Exploration of Key Issues" (2019) 10 Carbon Management 431.

[208] *Ibid.*

[209] See for e.g. Jonathan W. KUYPER, Björn-Ola LINNÉR and Heike SCHROEDER, "Non-State Actors in Hybrid Global Climate Governance: Justice, Legitimacy, and Effectiveness in a Post-Paris Era" (2018) 9 WIREs Climate Change e497; Karin BÄCKSTRAND and Jonathan W. KUYPER, "The Democratic Legitimacy of Orchestration: The UNFCCC, Non-State Actors, and Transnational Climate Governance" (2017) 26 Environmental Politics 764; Karin

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drowned out by the lobbies representing the transnational ruling elites. The slogan "no taxation without representation" had become popular among the founders of the United States.[210] It is now high time to say "no emissions without representation". That would, at least procedurally, ensure that the Global South, representing the majority of the world's population and the biggest victims of climate change, are given a correspondingly higher voice. It could also shift the negotiating agenda from the Global North issues such as development of carbon market, to urgent Third World issues of adaptation, climate mobility, and loss and damage.

It is not my case that climate change negotiations should be put on standby till the North-South divide is bridged or some absolute fair standards are agreed. That is not feasible considering the urgency of the climate issue. However, I argue simply that the price of this urgency should not be paid mostly by the Third World (including the Third World within the First World), as has been the case so far. Inverting the negotiating structure to allow the Third World to help set the agenda for the climate change may change the narrative and lead to fairer and quicker outcomes. That would also create a more lasting and effective climate governance regime. These relatively modest suggestions, while being limited, could make climate change negotiations fairer, within the existing legal framework. While being limited, these incremental reforms may cumulatively add up to make medium-term substantive reforms and long-term structural reforms possible.

Ultimately, all these three types of reforms have their own limitations, but considering the nature of climate emergency, each of them is important, particularly to ensure that climate transition is fair towards to the Third World.

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BÄCKSTRAND, Jonathan W. KUYPER, Björn-Ola LINNÉR, and Eva LÖVBRAND, "Non-State Actors in Global Climate Governance: From Copenhagen to Paris and Beyond" (2017) 26 Environmental Politics 561.

[210] "On This Day: 'No Taxation without Representation!'", National Constitution Center, online: "On This Day: 'No Taxation without Representation!'", National Constitution Center https://constitutioncenter.org/blog/no-taxation-without-representation

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