

# Bridging the North-South Divide in International Environmental Law

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“The Earth is one but the world is not. We all depend on one biosphere for sustaining our lives. Yet each community, each country, strives for survival and prosperity with little regard for its impacts on others. Some consume the Earth’s resources at a rate that would leave little for future generations. Others, many more in number, consume far too little and live with the prospect of hunger, squalor, disease, and early death.”<sup>1</sup>

## I. Introduction

Unfortunately, almost twenty years after the publication of the report “Our Common Future”, our planet’s overall predicament can still be assessed in almost the same terms.

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<sup>1</sup> World Commission on Environment and Development, *Our Common Future*, 1987, at 27.

Worldwide processes of degradation of nature, over-exploitation of natural resources and climate change continue to destabilize the Earth's ecosystem. The need to ward off these threats is a challenge which can only be met by the international state society as a whole. However, people living on Earth are still organized in political, cultural and (in particular) social entities which differ from each other to such a degree that they are far from making up "one world". Humankind is still divided into prosperous societies in the Western hemisphere, on one side, and underdeveloped and marginalized societies in Asia, Africa and Latin America, on the other. Thus, our world continues to severely suffer from what is called the "North-South divide".<sup>2</sup>

The 1972 UN Conference on the Human Environment in Stockholm is said to mark the beginning of modern international environmental law, which is characterized by a shift in the interests of states from transboundary environmental matters to global environmental concerns. At the same time the states' awareness of the close interdependency of development and the environment increased.<sup>3</sup> Twenty years later, the UN Conference on Environment and Development in Rio de Janeiro raised the concept of "sustainable development" that embodies this interdependency as the leitmotif of all subsequent international environmental activities.<sup>4</sup>

During the last three decades international environmental protection evolved to a matter of fundamental concern for the state community as a whole. Consequently, inter-state environmental cooperation at the global level was considerably intensified and expanded. In order to meet the immense global environmental challenges of today, all states, both the industrial and the developing world, must cooperate with each other as closely as possible. However, as yet all endeavors to develop a sound environmental and developmental partnership between the North and South have been hampered seriously by a number of disparities. Examples of such gaps are the highly differing affectedness by, and capacities to ward off, global environmental threats, the differing attitude towards development and the environment, the notorious indebtedness of the South to the North and the latter's su-

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<sup>2</sup> The notion of "North-South divide", as well as that of "Third World" may be blamed for being mere catchwords that are simplifying today's inter-state relations in an undue manner. However, they still truly sketch the phenomenon of a highly disrupted world whose solution still stands out. See in particular D. Nohlen/F. Nuscheler, "Ende der Dritten Welt"?, in: D. Nohlen/F. Nuscheler (eds.), *Handbuch der Dritten Welt*, vol. 1, 3<sup>rd</sup> ed., 1992, at 14 et seq. with further references. Compare also N. Harris, *The End of the Third World*, 1986; K. Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, *Wisconsin International Law Journal* 16 (1998), 353, at 355 et seq., and B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, in: A. Anghie/B. Chimni/K. Mickelson/O. Okafor (eds.), *The Third World and International Order: Law, Politics and Globalization*, 2003, 47, at 48 et seq.

<sup>3</sup> See for the impact of the Stockholm Conference on the further development of international environmental law more in detail e.g. P. Sands, *Principles of International Environmental Law*, 2<sup>nd</sup> ed., 2003, at 35 et seq.; P.W. Birnie/A.E. Boyle, *International Law and the Environment*, 2<sup>nd</sup> ed., 2002, at 38 et seq.; U. Beyerlin, *Umweltvölkerrecht*, 2000, at 10 et seq.

<sup>4</sup> For a survey of the outcome of the Rio Conference and the post-Rio process see again Sands (note 3), at 52 et seq.; Birnie/Boyle (note 3), at 41 et seq.; Beyerlin (note 3), at 15 et seq.

periority in environmental treaty negotiation.<sup>5</sup> Therefore, bridging the North-South divide appears to be a prerequisite for any successful global environmental cooperation. This gives reason enough to seek for conceptual approaches of international environmental law to overcome its still existing shortcomings in establishing a more sound environmental and developmental North-South relationship. In other words: How can it be achieved that in the future industrialized and developing countries become equal partners acting in concert towards solving the most pressing global environmental problems?

This question will be approached in four steps: Section II offers an outline of the development of international environmental law in the relations between North and South. Section III aims at showing that the attitudes of both groups of states towards the environment, particularly the phenomena of climate change and loss of biological diversity, currently diverge from each other. Furthermore, it points to a number of reasons why the North-South cooperation in global environmental matters is still deficient. Section IV discusses the fundamental conceptions of international solidarity and international justice in view of the question whether they might provide a constitutive basis for some more concrete concepts for bridging the North-South divide. Those are the concepts of “sustainable development”, “common but differentiated responsibilities”, “equitable participation in international decision-making”, and “equitable benefit-sharing”. The study closes by drawing some conclusions in Section V.

## II. Development of International Environmental Law in Its North-South Dimension

Prior to the UN Stockholm Conference in 1972 international environmental treaty-making had been clearly dominated by the industrialized states. At that time, the Third World had not been able to considerably influence international environmental treaty-making. Accordingly, most of the treaties concluded in that period show traces of the close inter-connection between natural conservationism and colonialism; almost none of them really addressed the economic and social needs of underdeveloped countries and their societies.<sup>6</sup>

In the late 1960s, the international state society began to become aware of the fact that there is a close interdependence between development and environmental protection. This change in states' attitude is clearly reflected in two important documents of the early 1970s. First, the so-called Founex Report on Development and Environment of 1971 emphasized the need to incorporate environmental con-

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<sup>5</sup> See for more details below in section III.

<sup>6</sup> See for a more intensive discussion on international environmental treaties made in that period K. Mickelson, *South, North, International Environmental Law, and International Environmental Lawyers*, in: *Yearbook of International Environmental Law* 11 (2000), 52 et seq.

cerns into an expanded understanding of development.<sup>7</sup> Second, the UN Conference on the Human Environment in Stockholm of 1972, in Principle 11 of its Declaration,<sup>8</sup> acknowledged that

“the environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by states and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures”.

However, it should be stressed that on the part of many Third World countries there was considerable resistance to this new conceptual approach of the Stockholm Conference. In their view, pollution of the environment was the result of industrialization and did therefore not represent an immediate concern for them. Consequently, in the post-Stockholm era the economic and social concerns of developing countries became predominant in inter-state relations.

In the mid-1970s the North-South conflict considerably intensified. In 1974 the developing states, organized in the Group of 77, succeeded in their efforts to make the UN General Assembly adopt the Declaration on the Establishment of a New International Economic Order,<sup>9</sup> as well as the Charter of Economic Rights and Duties of States.<sup>10</sup> These instruments, both legally non-binding in nature, were inspired by the idea of overcoming injustices in the then existing international law system. Accordingly, they called upon the industrialized states to take action towards reaching the following seven objectives: opening their markets for the products of developing countries; acknowledging the developing countries' full and permanent sovereignty over natural resources; increasing the official development aid of industrialized states to 0.7 % of the GNP; increasing the developing countries' share in the worldwide process of manufacturing industrial products; facilitating their access to modern technology and enhancing their infrastructure; solving the debt crisis of developing countries; and increasing their participation in relevant decision-making processes of international financial institutions.

The adoption of the 1974 Declaration on the Establishment of a New International Economic Order may be seen as an increase in prestige of the Third World states. However, their optimism “that ways of life and social systems can be evolved that are more just, less arrogant in their material demands, and more respectful of the whole planetary environment”<sup>11</sup> was to dissipate all too quickly in

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<sup>7</sup> The Report was elaborated by a Panel of Experts who convened in June 1971 to set the agenda for the then upcoming Stockholm Conference. See its text in: *International Conciliation* No. 586, at 7.

<sup>8</sup> See the text of the Stockholm Declaration in: *ILM* 11 (1972), 1416.

<sup>9</sup> UN General Assembly's Resolution 3201 (S-XV) of 1 May 1974; *ILM* 13 (1974), 715.

<sup>10</sup> UN General Assembly's Resolution 3281 (XXIX) of 12 December 1974; *ILM* 14 (1975), 251.

<sup>11</sup> The Cocoyoc Declaration was adopted at the UNEP/UNCTAD Symposium on Resource Use, Environment, and Development Strategies in October 1974; see its text in: *The International Law of Development: Basic Documents*, 1753, at 1776.

the 1980s – a decade that was marked by the super powers' cold war attitudes and a dramatic increase of the poor countries' debt burden.<sup>12</sup>

In 1992 the United Nations convoked the state community to the Conference on Environment and Development in Rio de Janeiro. Inspired by the innovative concept of sustainable development, the Rio Conference adopted a number of important documents, such as the Rio Declaration and Agenda 21, designed to open up concrete ways for bridging the still existing dichotomy between North and South. On the other hand, the discussions held during the Rio Conference showed that there are still deep clashes between the two groups of states in weighing environmental interests against developmental needs.<sup>13</sup> Accordingly, the post-Rio process of cooperation between North and South was not as successful as originally hoped. Thus, at the end of the 20<sup>th</sup> century, the core demands of the New International Economic Order were still unfulfilled. As the industrialized states' official development aid still clearly kept below the threshold of 0.7 % of their respective GNP, they could not reasonably claim to have pursued a meaningful policy of eradicating poverty, as promised 25 years before.

This is why in 2000 the UN General Assembly adopted its Millennium Declaration that called upon Member States to take actions at all levels in order to halve the proportion of the world's people whose income is less than 1 dollar per day, who suffer from hunger, and who are without access to safe drinking water and basic sanitation, by the year 2015.<sup>14</sup> In 2002 the Johannesburg World Summit on Sustainable Development, in its "Plan of Implementation", reaffirmed this urgent appeal.<sup>15</sup> Although this plan advanced the Third World's developmental concerns more clearly than its predecessors in Stockholm and Rio, it has not brought about any substantial progress in bridging the North-South divide.<sup>16</sup>

Today, the developing states continue to insist on making the industrialized states primarily responsible for solving the most crucial global environmental problems, particularly in respect to two issues. The first subject is climate change for which, at least for the past, the industrialized states are mainly responsible. Furthermore, developing states still blame the North for pursuing a policy of eco-imperialism by restraining their sovereignty over natural resources, preventing them from becoming industrialized, and keeping their products away from the world markets. Thus, today the North-South divide hampers international environmental and developmental cooperation almost as seriously as it did in the 1970s and 1980s.

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<sup>12</sup> Compare Mickelson (note 6), at 64.

<sup>13</sup> Compare e.g. Beyerlin (note 3), at 15 et seq.

<sup>14</sup> See UN Doc. 55/2 of 8 September 2000, para. 19.

<sup>15</sup> Plan of Implementation, para. 7 (a). See its text in: Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002, UN Doc. A/CONF.199/20.

<sup>16</sup> For a survey of the Johannesburg World Summit's outcome see U. Beyerlin/M. Reichard, The Johannesburg Summit: Outcome and Overall Assessment, ZaöRV 63 (2003), 213 et seq.

### III. The North-South Divide in Current Practice of International Environmental Law

#### 1. Political Dissonances in Environmental North-South Relations

At the Stockholm Conference in 1972, the then acting Indian Prime Minister Indira Gandhi stated:

“... We do not want to impoverish environment any further, (but) we cannot forget the grim poverty of large numbers of people. When they themselves feel deprived how can we urge the preservation of animals? How can we speak to those who live ... in slums about keeping our oceans, rivers and the air clean when their own lives are contaminated at the source? Environment cannot be improved in conditions of poverty ...”<sup>17</sup>

Having a look at the current attitude of developing countries towards environmental protection, it appears that it does not essentially differ from this statement of the early 1970s.

One might assume that states most seriously affected by environmental problems would be the most willing to participate in all efforts to solve these problems at the international level. However, current practice shows that there is no such correlation.

Taking climate change and loss of biological diversity as examples, it is clear enough that the share of North and South in causing these environmental threats and likewise the responsibility for managing these threats differ considerably.

There is evidence enough for arguing that, at least in the past, the industrialized states contributed primarily to the process of global warming with its seriously detrimental impacts on the ecosystem as a whole. It is also clear that the South suffers from climate change much more directly than the North. Most telling in this respect is the undisputed prediction that, at least in the long run, the low-lying Pacific island states will vanish if the sea levels continue to rise.

The industrialized states imagine that they possess the economic and technological means for mastering the worst effects of climate change. Perhaps this is why they keep on pursuing policies aimed at furthering their own economic growth and welfare. Thereby they neglect the urgent need of altering their lifestyles and desisting from accustomed unsustainable patterns of production and consumption that are at the root of global warming and other global environmental problems.<sup>18</sup>

<sup>17</sup> Quoted in R.P. Anand, *Development and Environment: The Case of the Developing Countries*, *Indian Journal of International Law* 20 (1980), 1, at 10.

<sup>18</sup> The call upon states, especially those coming from the industrialized North, to change their unsustainable production schemes and consumption patterns traces back to the Brundtland Commission's Report of 1987 (note 1), at 44 and 89. Since then it has been reiterated several times, e.g. in the Bergen Ministerial Declaration on Sustainable Development of 15 May 1990 (see its text in: H. Hohmann, *Basic Documents of International Environmental Law*, vol. 1, 1992, at 558) and more recently in the Plan of Implementation of the Johannesburg Summit of 2002 (note 11), paras. 14 et seq. Com-

As regards the loss of biological diversity, the situation is different. Due to their richness in valuable species of flora and fauna, it is primarily the developing states that should feel responsible for preserving them, thereby acting as trustees on behalf of the state community. However, realities are different.

It may be true that in former times the local and indigenous communities in developing countries used the species of flora and fauna in their habitat in a sustainable manner, thereby preserving them from extinction. However, meanwhile, these traditional practices have been widely lost. Today, the Third World states show broad patterns of over-exploitation of natural resources, such as land, soil, water and wildlife.

This is all the more alarming because, for instance in Africa, natural resources are the backbone of the economy as well as the life-support system for most of its people. Selective harvesting of medicinal plants, as well as the exotic pet trade and the demand for animal products such as ivory, rhino horn, and tiger bones, have been taking their toll on species diversity and abundance in many developing countries.<sup>19</sup> Their governments are tempted to foster such practices of over-using natural resources: Thereby they are risking their irretrievable loss, as in their view alternative means to meet the basic needs of their populations are lacking.

There is probably only one way out of this dilemma: The developing states should turn to policies that are simultaneously directed to sustainable use and conservation of natural resources. The industrialized states in turn should feel prompted to support the developing countries in this endeavour by means of capacity-building, transfer of technology, and financing. However, any support from outside will miss its target, unless the developing states become aware of the need to make environmental protection a constituent part of their own policies. Instead of considering it as a kind of “de luxe” undertaking, which only the industrialized states can afford,<sup>20</sup> they must understand that it is primarily up to them to develop policies towards a more sustainable use of natural resources. Such policies are the key to combat poverty.<sup>21</sup>

Both the North and South still tend to give their own interests and needs, which are often diametrically opposed to each other, predominance over the fundamental interest of the state community in caring and maintaining the Earth’s ecosystem. Every state, from the North and the South, should feel commissioned to make, individually and in cooperation with other states, all efforts towards preserving the natural heritage, thereby feeling as a trustee acting on behalf of the state community. As current practice shows, states are still far from living up to this ideal. This

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pare to the whole A. Gillespie, *The Illusion of Progress. Unsustainable Development in International Law and Policy* (2001), at 30 et seq., with further references.

<sup>19</sup> See for more details: *Africa Environment Outlook. Past, Present and Future Perspectives*, UNEP (ed.), 2002, at 53 et seq.

<sup>20</sup> Compare V.P. Nanda/G. Pring, *International Environmental Law & Policy for the 21<sup>st</sup> Century*, 2003, at 38.

<sup>21</sup> Compare U. Beyerlin, *Sustainable Use of Natural Resources – A Key to Combating Poverty?*, *ZaöRV* 63 (2003), 417.

is all the more so as the inter-relationship between the North and South is still more determined by feelings of distrust and rivalry than by respect for each other as equal partners committed to the common end of preserving the global environment – also for the sake of future generations.

What the North and South have in common is that accustomed selfish interests hamper them from becoming proactive in environmental affairs. What divides both state groups is firstly that they are unequally susceptible to global environmental degradation, secondly that they differ considerably in weighing environmental interests against competing developmental interests, and thirdly that the extent to which both state groups can afford meaningful environmental action still strongly differs.

## 2. Predominance of the North over the South in Global Environmental Cooperation

A cursory glance at current international environmental cooperation reveals that the developing states are still far from being on par with the industrialized states.

A number of international environmental agreements at the outset preclude the Southern states from membership. Among them are particularly a number of agreements that have been made by European states within the framework of the UN Economic Commission for Europe (ECE). They range from the 1979 Geneva Convention on Long-Range Transboundary Air Pollution and the thereto related Protocols<sup>22</sup> to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.<sup>23</sup> However, none of them essentially deals with global environmental issues.

In the pre-Stockholm era a number of international environmental agreements, especially those made in the field of nature protection, show clear traces of the legacy of colonialism and still reflect the European origins of international law.<sup>24</sup> This applies also to some nature conservation agreements of the 1970s, which up to date pursue the ideal of strict conservationism, thereby widely neglecting the interests and needs of the developing countries' local and indigenous communities living in the habitats of wildlife.<sup>25</sup>

As far as today's global environmental agreements are concerned, the situation is different. The countries of the developing world are parties to those agreements in even greater numbers than the industrialized states. However, the South, although

<sup>22</sup> See the text of the Geneva Convention in: ILM 18 (1979), 1442. For a survey of the Protocols to the Geneva Convention see Beyerlin (note 3), 156 et seq.

<sup>23</sup> ILM 38 (1999), 517.

<sup>24</sup> See only Mickelson (note 6), at 58 et seq. with references to relevant treaty practice.

<sup>25</sup> See for the whole U. Beyerlin, Perspectives on Wildlife Conservation: A Critical Assessment of the Relevant International Treaties and EC Instruments, in: T. Zhenghua/R. Wolfrum (eds.), Implementing International Environmental Law in Germany and China (2001), 41 et seq., particularly at 51.



it may be equal to the North in a formal sense, still does not feel respected by the latter as a substantively equal treaty partner.

To date, global environmental issues that hold “the greatest potential for confrontation between the wealthy countries of the North, with their energy-intensive industry and consumer demand, and the poorer South, with huge and rapidly growing populations that aspire to the same life-styles”<sup>26</sup> generally have been addressed through multilateral negotiation processes. Many of these processes are not shaped in such a way that their final outcomes strike a sound balance between the competing interests of both state groups involved. Most developing countries do not naturally possess the appropriate and adequate capabilities and resources to pursue their interests in international negotiation in a sufficient manner.<sup>27</sup> Consequently, they are hardly able to ensure the full integration of their specific concerns into the agreements finally reached. What aggravates the situation of developing countries is the fact that the more negotiation processes are running at the same time, the less developing countries are adequately represented therein because they lack sufficient numbers of officials and experts who are skilled enough to keep up with their Northern counterparts.<sup>28</sup>

Consequently, in the last twenty years many multilateral environmental negotiation processes have been dominated by states of the North. Due to their abundant human resources they mostly play a leadership role in these processes. Consequently, broad segments of the Southern negotiating parties, particularly those which are notoriously subject to an immense burden of foreign debts and therefore are highly dependent on the North, generally have less bargaining power than the latter. However, part of the multilateral environmental negotiations in the 1980s and 1990s show that due to the emergence of state coalitions of interests cutting across traditional North-South lines it has become increasingly difficult for any state group to dominate the proceedings. Actually, participating in such fluid alliances offers even weak developing countries the chance to become constructive participants in these negotiations.<sup>29</sup>

After all, today’s multilateral environmental negotiation processes are still determined by broad patterns of procedural inequality to the detriment of the developing countries. Accordingly, they often result in agreements that do not sufficiently integrate the specific substantive concerns of the developing world. As it is clear that treaties essentially determine the character of international environmental

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<sup>26</sup> R.E. Benedick, Perspectives of a Negotiation Practitioner, in: G. Sjöstedt (ed.), *International Environmental Negotiation*, 1993, 219, at 221.

<sup>27</sup> Compare G. Sjöstedt/B.I. Spector, Conclusion, in: Sjöstedt (note 26), 291, at 297.

<sup>28</sup> See Benedick (note 26), at 223, 231.

<sup>29</sup> For a detailed analysis of relevant negotiation processes see again Benedick, *ibid.*, at 235 et seq., and F.O. Hampson/M. Hart, *Multilateral Negotiations: Lessons from Arms Control, Trade and the Environment*, 1995, at 345 et seq., particularly at 352 et seq. For an elaborate account of the North-South relationship in the climate protection regime see A. Misbach, *Das Klima zwischen Nord und Süd. Eine regulationstheoretische Untersuchung des Nord-Süd-Konflikts in der Klimapolitik der Vereinten Nationen*, 1999, particularly at 124 et seq.

law as a whole, the still existing predominance of the North over the South in relevant treaty-making is particularly precarious.

K. Mickelson has argued for good reasons that also “international environmental law as a discipline has failed to respond to Third World concerns in a meaningful fashion”.<sup>30</sup> In her view the South is portrayed “as a grudging participant in environmental regimes rather than as an active partner in an ongoing discussion regarding what the fundamental nature of environmental problems is and what the appropriate responses should be”.<sup>31</sup> She has pleaded in favor of an “‘integrationist’ approach – one that brings the concerns of the South into the mainstream of the discipline”.<sup>32</sup> In her opinion, “(a)n essential starting point is that scholars, activists and practitioners within the discipline ask the types of questions that the Southern approach to international environmental law demands”.<sup>33</sup>

In an attempt to comply with Mickelson’s pleading we will now search for some conceptual approaches that might help bridge the still existing North-South dichotomy in international environmental law.

## IV. Theoretical Approaches to Bridge the North-South Divide and Concepts for Their Implementation in Practice

### 1. Basic Ideas: International Solidarity and International Justice

#### a) International Solidarity

R.St.J. Macdonald advocates “solidarity” to be “both a fundamental and fundamentally sound principle of international law”.<sup>34</sup> In his attempt to clarify what solidarity means in the context of international law, he states that the debates held at the sixth special session of the UN General Assembly in 1974 that was dedicated to the New International Economic Order (NIEO) “evidenced an expressed will to establish a new cooperative international order of economic relations informed by the principle of solidarity”.<sup>35</sup> The Declaration on the NIEO and the Charter on Economic Rights and Duties of States, both adopted by the General Assembly in 1994, impose the duty on the developed States to actively assist the less developed countries (LDCs). Thus, within the framework of the NIEO, the principle of soli-

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<sup>30</sup> Mickelson (note 6), at 54.

<sup>31</sup> Ibid., at 60.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid., at 81.

<sup>34</sup> R.St.J. Macdonald, *The Principle of Solidarity in Public International Law*, in: *Etudes de droit international en l’honneur de Pierre Lalive*, 1993, 275. Compare also *id.*, *Solidarity in the Practice and Discourse of Public International Law*, *Pace International Law Review* 7 (1995), 259.

<sup>35</sup> Macdonald (note 34, *The Principle*), at 291, referring to M. Bedjaoui, *Droit au Développement et jus cogens*, *Annuaire de l’AAA*. 54/55/56 (1984/85/86), 275.

solidarity was apparently understood as a concept that imposes an obligation to render assistance on the part of the developed states towards the LDCs. Macdonald raises serious doubts against this understanding of solidarity. He rightly stresses that “by definition, solidarity cannot impose a one-sided obligation”.<sup>36</sup> In his view, the decades that followed the NIEO “have witnessed the essential error of that conception”.<sup>37</sup>

Thus, solidarity is not tantamount to “charity” in the sense that e.g. rich states must support the poorer ones by granting development aid,<sup>38</sup> but rather a qualified form of inter-state cooperation. It even reaches beyond “normal” inter-state partnership that is determined by mutual respect and give-and-take. It requires that states become affiliated to a particular community of interest that is committed to achieve some common ends. States taking part in such a community must be prepared to defer their sovereign interests whenever a state-community interest is at stake. Accordingly, Macdonald conceives solidarity as “an understanding among formal equals that they will refrain from actions that would significantly interfere with the realization and maintenance of common goals or interests”.<sup>39</sup> However, it appears to be too narrow to derive from solidarity only an obligation of non-interference. There is rather much in favor of arguing that each member of the community of interest must be prepared to become pro-active and act in concert for achieving the community’s aim. It should be strongly induced to do so by the acknowledgement that “(a)s a member of a community that benefits from the protection of the community, a state acting in a manner that preserves the good of the community also preserves its own individual good”.<sup>40</sup>

Such considerations of solidarity, which states are hardly predestined to show in international relations, appear to emerge especially from situations where states become aware of “a specific convergence of interests”.<sup>41</sup> Thus, solidarity is expected to arise amongst states which become aware of their common responsibility for having inflicted severe harm on the global environment. They form a group that should feel impelled to meet their common responsibility by taking joint remedial action. This is in line with P. Cullet’s observation that “(s)olidarity is strongly present in actions against a number of environmental problems, where states which

<sup>36</sup> Ibid., 292. Compare Macdonald (note 34, Solidarity), at 265.

<sup>37</sup> Macdonald (note 34, The Principle), at 297.

<sup>38</sup> As yet such an obligation of States does not exist in customary international law.

<sup>39</sup> Macdonald (note 34, Solidarity), at 290. In the same sense P. Cullet, *Differential Treatment in International Environmental Law*, 2003, at 18, 42.

<sup>40</sup> Macdonald (note 34, Solidarity), at 301. R. Wolfrum (Solidarity amongst States: An Emerging Structural Principle of International Law, in: P.-M. Dupuy/B. Fassbender/M.N. Shaw QC/K.-P. Sommermann [eds.], *Völkerrecht als Wertordnung – Common Values in International Law*, Festschrift für C. Tomuschat, 2006 [forthcoming]) holds the view that international environmental law is based upon the “structural principle of solidarity” that combines two aspects, namely the “achievement of a common objective and amelioration of deficits of certain States”. Compare also C. Riemer, *Staatengemeinschaftliche Solidarität in der Völkerrechtsordnung*, 2003, particularly at 43; as well as R. Schütz, *Solidarität im Wirtschaftsvölkerrecht*, 1994, at 105 et seq., particularly at 109 et seq.

<sup>41</sup> Cullet (note 39), at 173.

have contributed more to the creation of the concerned problem end up partially bearing the costs incurred by states which have contributed comparatively less and lack the capacity to tackle the problem".<sup>42</sup> Even more predestined to be moved by solidarity appears to be a group of states, which has become, or is going to become, a victim of global environmental harm. As common vulnerability entails a commonality of interests, states which are e.g. immediately threatened by climate change may be inclined to comprehend themselves as a community bound together by common destiny that is willing to develop joint remedial strategies. However, solidarity can hardly grow when the states' group is oversized and the interests of its members are too heterogeneous.

Today, a number of multilateral agreements, in their preambles or even in their operative parts, declare certain categories of environmental issues to be a "common interest" or a "common concern of mankind". Such agreements seem to bear testimony to the will of their parties to establish a solidarity-driven community for the purpose of pursuing the common welfare on a worldwide scale.<sup>43</sup> This nourishes hopes that international solidarity will also determine the future endeavors of states towards bridging the North-South-divide in global environmental affairs. The North should feel induced to win the South as an equal partner of a worldwide community that is fully committed to achieving some goals of common welfare, such as climate protection and the preservation of biological diversity.

However, it should not be ignored that international solidarity, because of its abstractness and vagueness in content, is – contrary to Macdonald's suggestion – still far from becoming a principle of international law.<sup>44</sup> It is nothing more than an extra-legal maxim that is, on its own, hardly able to steer states' behavior in a meaningful way. However, it may prove to be a source from which some more concrete concepts for bridging the North-South divide in environmental and developmental affairs possibly flow (see below section 2.).

## b) International Justice

Both in the national and international arena, "justice" is a vague and iridescent concept, whose contents and contours are far from clear. Having a look at relevant international legal writings, it appears that "justice" comes very close to the concepts of "fairness" and "equity". T. Franck comprehends "distributive justice" as an aspect of "fairness", pleads for an equation of fairness with equality, and brings "equity" together with "justice".<sup>45</sup> E. Brown Weiss, in her book on problems

<sup>42</sup> Ibid.

<sup>43</sup> Compare Macdonald's understanding of solidarity as "the common ascription to a common good" (Macdonald [note 34, Solidarity], at 301).

<sup>44</sup> Macdonald summarizes the opinions on international solidarity by stating that it "does exist in some nascent form at the level of international law". He concedes "that solidarity is less a solid, single statement within international law than a principle that seems to be beginning to inform international law" (Macdonald [note 34, The Principle], at 285). Compare *id.* (note 34, Solidarity), at 301.

<sup>45</sup> T.M. Franck, *Fairness in International Law and Institutions*, 1995, at 8, 19, and 47.

of equity between generations, speaks one time of “justice among generations”, another time of “fairness to future generations”, and eventually of “inter-generational equity”.<sup>46</sup> R. Anand, in her study on “International Environmental Justice”, also uses “fairness” and “equity” as synonymous notions of “justice”.<sup>47</sup> Thus, much speaks in favor of the assumption that all three concepts are to a greater or lesser extent tantamount to each other. However, as fairness and equity also cannot be exactly defined, this finding alone does not help so much to clarify the meaning of justice in the context of international environmental and developmental relations.

According to Franck the question whether international law is fair (or just) has to be judged “first by the degree to which rules satisfy the participants’ expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process”.<sup>48</sup> What follows from this finding is that in Franck’s view fairness discourse should not solely be about process but also about outcomes since “outcomes are cardinal indicators of fairness”.<sup>49</sup>

Anand, who specifically deals with “international environmental justice”, speaks of justice as a concept that “may mean different things to different people, groups, countries and theorists”.<sup>50</sup> She shows that at the national level environmental justice combines some elements of conflicting theories,<sup>51</sup> namely “its concern for environmental protection as a way to maximize goods for society as a whole; its concern with distributive justice to create a society which is fair for all populations, rich or poor, and its concern with minimizing inequalities”.<sup>52</sup> Many of the issues of environmental justice at the national level run parallel to international environmental politics between North and South. This is why Anand stresses that an analysis of the inequities at the international level leads to “questions and concerns of procedural justice implying fairness of decision-making processes, and

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<sup>46</sup> E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, 1989, at 17 et seq. “Equity” is first a concept that is used by international courts “as a form of individualization of justice” that “serves to temper gross unfairness which sometimes results from the strict application of the law” (Cullet [note 39], at 27). Thus, judicial equity enables international courts to bring all decisions they take in line with substantive equality. While “judicial equity” is confined to the realm of law-enforcement, “inter-generational equity” entails “a broad duty of solidarity of the present generations with unborn ones”, including e.g. the obligation “to conserve the diversity of natural resources to avoid restricting options available to future generations” (ibid., at 43). This much broader concept of equity deserves respect in international environmental and developmental relations. In this respect it is widely accepted today.

<sup>47</sup> See R. Anand, *International Environmental Justice. A North-South Dimension*, 2004, particularly at 16.

<sup>48</sup> Franck (note 45), at 7.

<sup>49</sup> Ibid., at 351.

<sup>50</sup> Anand (note 47), at 122.

<sup>51</sup> Anand discerns utilitarian, contractarian, egalitarian, and libertarian theories of justice; ibid., at 122 et seq., with references.

<sup>52</sup> Ibid., at 123.

distributive justice, focusing on norms for equitable resource distribution in terms of costs and benefits”.<sup>53</sup> Thus, in her view the issues addressed by environmental justice are: (1) “procedural justice [i.e. process]” that “uncovers the dynamics of the inequitable bargaining powers of people/communities with different levels of economic development”,<sup>54</sup> and (2) “distributive justice [i.e. outcome]” that “uncovers the inequitable distribution of social, economic, and political burdens on people/communities with different levels of development”.<sup>55</sup>

At first sight, justice in inter-state relations seems to be best achieved by providing for full equality of states. Actually, the latter conception is a constitutive element of, if not even the key to, procedural and substantive justice. Among the international legal norms that might guarantee states’ equality, Art. 2 para. 1 of the UN Charter is most striking. It proclaims the principle of sovereign equality of all UN member states. This principle, which is certainly one of the conceptual cornerstones of the universal legal system, embodies a concept of formal equality.<sup>56</sup> It ensures international justice in situations where members of a community are perfectly equal in all respects. This applies to the voting procedure of the UN General Assembly, which is governed by the principle “one state – one vote” (Art. 18 para. 1 of the UN Charter). However, apart from this example of formal equality, today’s inter-state relations, especially in their North-South dimension, to a large extent are far from meeting the ideal of justice.

Formal equality of states alone proves hardly able to provide for international justice. It “seeks to give every member of the community equal opportunities”.<sup>57</sup> However, in a world characterized by disparities in resources and capabilities “equality of rights or opportunities does not necessarily bring about equality of outcomes”.<sup>58</sup> Therefore, formal equality needs to be complemented by substantive equality: This form of equality is first and foremost destined to ensure that the outcomes of inter-state processes meet the requirements of justice or fairness. Substantive equality necessarily implies that existing inequalities in inter-state relations must be taken into account in all decision-making processes at the international level. Consequently, in such situations the realization of substantive equality brings about the need of treating unequal states unequally. Thus, differential treatment can prove to be the only means of ensuring substantive equality that is part of international justice. The concept of “common but differentiated responsibilities” clearly manifests this acknowledgement (see below section IV. 2. b)).

There may be fears that substantive equality in environmental and developmental inter-state relations is an ideal that will never be fully reached in the foreseeable

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<sup>53</sup> Ibid., at 15.

<sup>54</sup> Ibid., at 10.

<sup>55</sup> Ibid. and at 128.

<sup>56</sup> This understanding appears to be widely accepted in legal writings; see only Cullet (note 39), at 22.

<sup>57</sup> Ibid., at 23.

<sup>58</sup> Ibid.

future. However, the more procedural justice will determine relevant international decision-making processes, the better are the chances of coming as close to this ideal as possible. Thus, the realization of the latter component of justice is an indispensable prerequisite for achieving substantively just (or fair) solutions. This is why equitable participation of states, irrespective of their development status, in international decision-making is an issue of particular significance (see below section IV. 2. c)).

Like international solidarity, international procedural and substantive justice is merely a non-legal (moral) idea, rather than an established principle in customary international law.<sup>59</sup> Because of its abstractness and vagueness in substance, it is hardly able to give any clear-cut guidance for states' behavior. However, just as international solidarity, it may prove to be a source from which some more concrete (legal or non-legal) concepts for bridging the North-South-divide may flow.

## 2. Particular Concepts Emanating from Both Ideas

### a) Sustainable Development

The 1992 Rio Declaration, in its Principle 5, states that "(a)ll States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world". Moreover, it emphasizes, in its Principle 6, that "(t)he special situation and needs of developing countries ... shall be given special priority". Thus, there is hardly any doubt that the Rio Declaration assigns to the concept of sustainable development an important role in the process of bridging the North-South divide in international environmental and developmental relations. However, this understanding encounters resistance from some critics of sustainable development. For instance, A. Geisinger suspects this concept of being "not simply a reflection of the successful export of Western ideology, but ... a force of ideological imperialism whereby Western values not shared or willfully accepted by other nations are unconsciously imposed on them through the language and implementation of the principle".<sup>60</sup> The following discussion will show that, contrary to Geisinger's view, sustainable development can very well be construed as a concept that directs states to preserve and protect the Earth's ecosystem without compromising the interests and needs of the developing world's poor peoples.

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<sup>59</sup> Even A n a n d, a protagonist of international environmental justice, emphasizes "the usefulness of the environmental justice framework in better understanding the North-South dimension of international environmental politics" (A n a n d [note 47], at 122), but nowhere in her book she declares environmental justice to be a legally binding principle.

<sup>60</sup> A. Geisinger, *Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature*, Boston College Environmental Affairs Law Review 27 (1999), 43, at 45 and 70 et seq.

As already its genesis shows,<sup>61</sup> the concept of sustainable development provides for a very close interdependence between the competing policy goals of development and environmental protection.<sup>62</sup> It prevents all actors in international relations from taking actions that do not fairly balance the developmental and environmental needs involved. Meeting the essential requirements of environmental protection is an indispensable prerequisite for any developmental policy which merits the designation “sustainable”. Consequently, economic and social development must be an integral part of environmental protection, and vice versa.<sup>63</sup>

Developing countries, which internally face broad patterns of poverty, economic deficiencies and social disruption are tempted to give preference to developmental needs over environmental ones. However, such a strategy appears to be short-sighted as it neglects the fact that environmental problems show “serious social-economic impacts, such as degradation of natural resources resulting in poverty, starvation and disease of affected individuals and local communities”.<sup>64</sup> The only means for lastingly overcoming these problems is to take actions that seek to fully integrate environmental protection with development on an equal footing. Thus, both components of sustainable development are equivalent in substance.

The Brundtland Report of 1987 rightly points to another important feature of “sustainable development” by defining it as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>65</sup> According to this widely accepted definition sustainable development shows both an “intra-generational” and “inter-generational” dimension: it is concerned with relationships both among members of the present generation, and between the present and future generations.<sup>66</sup> In both dimensions, its primary concern is “sustained human development”.<sup>67</sup> This reading is in line with Principle 1 of the 1992 Rio Declaration,<sup>68</sup> which states: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

Accordingly, sustainable development is mostly understood as an anthropocentric concept; it embodies what K. Bosselmann calls “weak sustainability”.<sup>69</sup>

<sup>61</sup> See for the historical origin and evolution of this concept U. Beyerlin, *The Concept of Sustainable Development*, in: R. Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means*, 1996, 95, at 96 et seq.

<sup>62</sup> This is referred to by Sands as the “integration approach” that makes up one element of sustainable development. See Sands (note 3), at 263 et seq.

<sup>63</sup> Compare Beyerlin (note 61), at 121.

<sup>64</sup> Beyerlin (note 21), at 436.

<sup>65</sup> World Commission on Environment and Development (note 1), at 43.

<sup>66</sup> Compare Brown Weiss (note 46), at 21, note 18.

<sup>67</sup> K. Bosselmann, *The Concept of Sustainable Development*, in: K. Bosselmann/D. Grinlinton (eds.), *Environmental Law for a Sustainable Society* (2002), 81, at 84, 96.

<sup>68</sup> Rio Declaration on Environment and Development; ILM 31 (1992), 874.

<sup>69</sup> Bosselmann (note 67), at 84. In Bosselmann’s view “the *Brundtland Report* perpetuated the traditional Western paradigm of ‘development’ being anthropocentric, and material growth oriented”; *ibid.*, at 85.



Contrary to this reading of sustainable development, Bosselmann conceives it as “ecologically sustainable development”.<sup>70</sup> In his view, this concept is “a new, extended form of justice” that “expands our traditional concept of justice in terms of space and time” by including “the entire global community and future generations”, comprising both “people and the nonhuman world”;<sup>71</sup> it calls for “strong sustainability based on ecocentrism”.<sup>72</sup>

If one follows the Brundtland Report’s understanding of sustainable development, this concept requires intra-generational and inter-generational equity: it pleads for a fair distribution of existing resources among people living today and those living tomorrow. While it may be easy to determine the needs of the poor living today, any calculation of future human needs is extremely difficult, if not impossible.<sup>73</sup> Instead of merely speculating on the latter needs, we should feel prompted to leave the Earth’s ecosystem to the generations to come in as sound a condition as possible. We should take all efforts to conserve the “diversity of the natural and cultural resource base” and maintain “the quality of the planet”,<sup>74</sup> including the nonhuman nature. Thus, much speaks in favor of conceiving the inter-generational component of sustainable development in eco-centric terms. As inter-generational equity is inseparably intertwined with intra-generational equity, the concept of sustainable development in its entirety must be perceived as both anthropocentric and eco-centric in nature.<sup>75</sup> Consequently, taking measures in favor of present poor people must not compromise the integrity of the Earth’s ecosystem that is crucial as a life-supporting basis for future generations. Such an understanding of sustainable development implies the acceptance of the view that nature with all its forms of life has an intrinsic value independent from any instrumental

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<sup>70</sup> Ibid., at 84.

<sup>71</sup> Ibid., at 96.

<sup>72</sup> Ibid.

<sup>73</sup> K. Bosselmann, A Legal Framework for Sustainable Development, in: Bosselmann/Grinlinton (note 67), at 152, rightly stresses that “(t)he plain fact that the future is not predictable undermines any attempt to determine what is due to future generations”.

<sup>74</sup> Brown Weiss (note 46), at 38; according to her view, “each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than the present generation received it”. Compare also K. Bosselmann (note 73), at 152 et seq.; C. Redgwell, Intergenerational Trusts and Environmental Protection, 1999, at 80 et seq., and A. Epiney/M. Scheyli, Strukturprinzipien des Umweltvölkerrechts, 1998, at 50 et seq.

<sup>75</sup> While the proponents of an anthropocentric environmental ethic, with several variations, regard “humanity as the centre of existence”, thereby allocating to nature “an instrumental value for humans”, the common feature agreed by the theorists adhering to an eco-centric or eco-philosophical thinking is “that environmental protection must be based upon the inherent (or intrinsic) values of non-human Nature”; see A. Gillespie, International Environmental Law, Policy and Ethics, 1997, at 2, 4. See for a thorough discussion on the main differences between both schools of environmental ethical thinking e.g. K. Bosselmann, Im Namen der Natur. Der Weg zum ökologischen Rechtsstaat, 1992, particularly at 250 et seq.; Gillespie, *ibid.*, at 4 et seq., 127 et seq.; P. Taylor, An Ecological Approach to International Law, 1998, at 29 et seq.; J. Alder/D. Wilkinson, Environmental Law and Ethics, 1999, particularly at 37 et seq.

values for humans.<sup>76</sup> Although this view might take some time to become generally acceptable,<sup>77</sup> there is no alternative but to perceive sustainable development as a concept pursuing an integrated anthropocentric and eco-centric approach.

Profiled in such a way, sustainable development cannot be suspected of being “a force of ideological imperialism” featuring “the idea of nature as separate from man”.<sup>78</sup> It rather gives a meaningful direction to the process of bridging the North-South divide by reminding all players acting in international environmental and developmental relations, coming both from the industrialized or developing world, to administer and conserve the Earth’s ecosystem as indispensable natural resource basis for any good life of present and future humans. It hinders the taking of actions that give intra-generational needs undue predominance over the inter-generational ones, as well as actions that are designed to meet human needs at the expense of nonhuman natural goods.

In both its intra-generational and inter-generational dimension, the concept of sustainable development reflects the idea of distributive justice. It transposes this idea into a concept that gives important impulses to all actors involved in the endeavor to converge the conflicting interests and needs of North and South, although there are doubts whether it is able to deploy immediate steering effects on states’ behavior.<sup>79</sup> To date it has hardly gained the status of a principle of customary international law, but it is a catalyst in the process of further development of international law.<sup>80</sup> It proves to be a source from which subordinate self-contained norms, such as “sustainable use of natural resources”, may be derived.<sup>81</sup> This precept calls upon states owning valuable resources on their territories, as well as third states seeking access to these resources for exploiting them, to use them in a sustainable manner, thereby ensuring their survival. Both groups of states should act as co-equal members of a community committed to the preservation of biological diversity as a goal of common welfare. Thus, sustainable use of natural resources does not only reflect the idea of distributive justice, but also that of international solidarity. It helps preserve the Earth’s ecosystem – for the sake of present and future generations.

“Sustainable use” has been integrated in a number of international environmental agreements,<sup>82</sup> such as the 1992 Convention on Biological Diversity (CBD).<sup>83</sup> This agreement brings “sustainable use” together with components of

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<sup>76</sup> B o s s e l m a n n (note 73), at 151.

<sup>77</sup> Compare *ibid.*, at 153 et seq.

<sup>78</sup> G e i s i n g e r (note 60), at 45.

<sup>79</sup> Compare U. B e y e r l i n, *Different Types of Norms in International Environmental Law: Policies, Principles and Rules*, in: D. Bodansky/J. Brunnée/E. Hey (eds.), *Oxford Handbook of International Environmental Law* (forthcoming).

<sup>80</sup> *Ibid.*

<sup>81</sup> S a n d s (note 3), at 253.

<sup>82</sup> For references see *ibid.*, at 257 et seq.

<sup>83</sup> ILM 31 (1992), 818.

biological diversity, such as flora and fauna, and other natural resources. Art. 2 of the CBD defines “sustainable use” as the use of these components “in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations”. Art. 10 (b) of the CBD specifies the obligations flowing from “sustainable use” by requiring that each contracting party to the CBD has to “(a) adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity”. Due to its repeated incorporation into international environmental agreements, “sustainable use” may even have developed into a rule with customary legal status.<sup>84</sup>

### b) Common but Differentiated Responsibilities

Principle 7 of the 1992 Rio Declaration stipulates: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”<sup>85</sup>

While the first sentence of Principle 7 contains the precept of inter-state cooperation that is inspired by the idea of international solidarity, the following two sentences of this principle stipulate substantive equality among states by differential treatment as a special perception of international justice. The statement in the second sentence of Principle 7 that States have “common but differentiated responsibilities” appears to reflect a wisdom originating from the time of Plato according to which “‘equality among unequals’ may be inequitable and ... differential treatment may be essential for ‘real equality’”.<sup>86</sup>

*Prima facie*, common but differentiated responsibilities appear to be a promising conceptual approach for bridging the North-South divide in international environmental relations. It emphasizes the responsibility of all states for the preservation of the global environment, but declares it both “common” and “differentiated”. In the latter respect, it points to “the need to take account of differing circumstances, particularly in relation to each state’s contribution to the creation of a particular environmental problem<sup>87</sup> and its ability to prevent, reduce and

<sup>84</sup> See again Beyerlin, (note 79).

<sup>85</sup> For a thorough discussion of the concept of “common but differentiated responsibilities” see A.M. Halvorsen, *Equality among Unequals in International Environmental Law*, 1999; B. Kellermann, *Die gemeinsame, aber differenzierte Verantwortlichkeit von Industriestaaten und Entwicklungsländern für den Schutz der globalen Umwelt*, 2000, and Cullet (note 39).

<sup>86</sup> O. Schachter, *Sharing the World’s Resources*, 1977, at 7.

<sup>87</sup> While Principle 7 expressly takes notice of the “different contributions” of States to global environmental degradation”, it avoids to allocate the costs of pollution to those states that inflicted most

control the threat”.<sup>88</sup> Accordingly, the industrialized states must carry most of the burden that is required in order to effectively protect the global environment. Due to their heightened responsibility they must be prepared to enter into agreements that impose on them more stringent obligations than those incumbent on developing country parties. Another technique of differential treatment is granting a longer implementation period to those contracting parties that are unable to meet their obligations in due time.<sup>89</sup> However, any such kind of differential treatment should be granted no longer than necessary, because otherwise the advantages made by the agreement concerned could be seriously diminished.<sup>90</sup>

The concept of common but differentiated responsibilities as laid down in Principle 7 of the Rio Declaration has gained considerable relevance under modern international environmental agreements. For instance, the Kyoto Protocol,<sup>91</sup> which recently entered into force, imposes on its parties highly asymmetric obligations regarding the first commitment period from 2008 to 2012: Solely the industrialized states are bound to reduce their greenhouse gas emissions, while the developing states only must meet some minor procedural obligations, such as reporting. Moreover, the industrialized states are committed to transfer financial resources and technology to the developing countries in order to enable them to fulfill their procedural duties.

Thus, the concept of common but differentiated responsibilities, as applied to the Kyoto Protocol, results in asymmetric substantive environmental obligations of states, as well as a mechanism of compliance assistance.<sup>92</sup> Both components of this concept one-sidedly benefit the developing countries and lead to what may be called “benign” or “positive” discrimination of the Third World<sup>93</sup>.

There are doubts whether asymmetric treaty obligations schemes as rigid as that under the Kyoto Protocol prove to be wise environmental policy in the long run. The concerns focus particularly on the classes of states parties that are committed to reach certain levels of greenhouse gas reduction. There is much in favor of arguing that in the commitment periods subsequent to 2012 the circle of states bound to reduce their greenhouse gas emissions should be considerably broadened. The

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harm on the environment in the past. Thus, the concept of “common but differentiated responsibilities” considerably differs from that of “polluter-pays” (Principle 16 of the Rio Declaration).

<sup>88</sup> Sands (note 3), at 286.

<sup>89</sup> Compare again Sands, *ibid.*, at 289, and Halvorsen (note 85), at 28 et seq.

<sup>90</sup> See Halvorsen (note 85), at 29, and Cullet (note 39), at 29 et seq.

<sup>91</sup> Protocol to the United Nations Framework Convention on Climate Change of 10 December 1997; ILM 37 (1998), 22.

<sup>92</sup> The Kyoto Protocol pursues what M. Bothe (The United Nations Framework Convention on Climate Change – An Unprecedented Multilevel Regulatory Challenge, *ZaöRV* 63 [2003], 239, at 252) has called the “North first” approach. According to him this approach “is a special form of intergenerational equity: The generation living in the industrialised countries of today assumes a responsibility for the emissions produced by the generations of yesterday”.

<sup>93</sup> Halvorsen (note 85), at 28, classifies the concept of “differential treatment” of developing countries “as a kind of ‘international affirmative action’ notion”.

least developed countries, as well as the developing countries which are particularly vulnerable to the effects of climate change, may be left outside the scheme of emissions reduction obligations also in the future. However, this can hardly be valid for two other subgroups of developing countries, i.e. the oil producing countries and particularly the fast industrializing developing countries, such as China, India and Brazil.

The Peoples' Republic of China is reported to be already at present the world's second-largest emitter of greenhouse gases, after the United States, although it has to be admitted that China's relative share is low in terms of *per capita* emissions. The International Energy Agency estimates that the increase of gas emissions in China from 2000 to 2030 will almost equal the increase of all industrialized countries together. India also figures among the top ten contributors to greenhouse gas emissions. And Brazil causes nearly 3 % of the world's greenhouse gas emissions alone by the fact that its vast Amazon rain forests are burned. However, at this stage neither China, nor India, nor Brazil has to meet any reduction targets by 2012.

These figures alone give reason to raise the question whether it really conforms to the idea of international justice to exempt the developing countries altogether from any reduction obligation any longer. All efforts to stop the process of global warming with its disastrous effects on the Earth's ecosystem must fail, unless the parties to the Kyoto Protocol will agree upon shaping its emissions reduction scheme anew. Such a revised scheme should contain a sliding scale of reduction obligations that allows a more flexible differentiation between the parties according to their individual share in greenhouse gas emissions they have at present, or are expected to have in the years to come.<sup>94</sup> This is not to discard the concept of common but differentiated responsibilities. Quite the contrary, it only takes account of the second sentence of Principle 7 of the Rio Declaration according to which states should be treated differentially in view of their different contributions to global environmental degradation. If there is clear evidence that a number of States, which were exempted so far from the class of states parties bound to reduce their greenhouse gas emissions meanwhile have released, or are going to release, critical amounts of greenhouse gases into the atmosphere, it is just in line with Principle 7 to include these newcomers into the circle of states committed to reduce their respective emissions.

The greater the number of developing states to be included into the mandatory emissions reduction scheme, the more the industrialized states will have to provide for technological and financial transfers that help the developing countries meet the costs arising from the fulfillment of their reduction obligations under the Kyoto Protocol. This is the price the industrialized states must pay for gaining the part-

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<sup>94</sup> In order to alleviate the burden any reduction obligation will bring about, the parties to the Kyoto Protocol might agree upon certain exemptions from it. For instance, a developing country that instantly faces an emergency situation may be allowed to postpone or suspend the fulfillment of its reduction obligations for a certain period of time.

nership of developing states on the basis of equal rights and duties. From an environmental point of view, supporting developing countries in taking own environmental action is definitely more desirable than releasing large parts of the state community from any substantive environmental obligations.

In the run-up to the first meeting of the Parties to the Kyoto Protocol in conjunction with the eleventh session of the Conference of the Parties to the Climate Change Convention (COP/MOP 1), which took place from 28 November to 10 December 2005 in Montreal, it was rightly suggested that the problem of commitments under the Kyoto Protocol for the post-2012 period should be urgently addressed. Actually, the COP/MOP 1 agreed<sup>95</sup> to initiate without delay a process to consider further commitments for Annex I Parties for the period beyond 2012 in accordance with Art. 3 para. 9 of the Kyoto Protocol. This process will be conducted by an open-ended ad hoc working group of Parties to the Kyoto Protocol that will meet for the first time in May 2006. With regard to the non-Annex I Parties, the COP/MOP 1 agreed that the planned dialogue on possible post-2012 commitments “should identify approaches which would support, and provide the enabling conditions for, actions put forward voluntarily by developing countries that promote local sustainable development and mitigate climate change in a manner appropriate to national circumstances ...”.<sup>96</sup> Although this agreement for a pathway toward voluntary climate protection measures from developing countries was said to be a crucial part of what happened in Montreal,<sup>97</sup> there is fear that the developing countries will continue to be strongly opposed to any proposals aimed at their inclusion into the Protocol’s scheme of legally binding emission reduction commitments. In this respect, the Submission from Jamaica on behalf of the Group of 77 and China to the COP/MOP 1 is telling enough when it stresses that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof” due to the fact “that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that the *per capita* emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs”.<sup>98</sup>

Considering that the asymmetric reduction obligation scheme of the Kyoto Protocol needs to be shaped anew, at least in the long run, there are reasons to raise the question whether the Protocol offers to its Parties an alternative to meet their “common but differentiated responsibilities” regarding climate protection in a more flexible way. The Clean Development Mechanism (CDM), as defined in Art. 12 of the Protocol, might prove to be a suitable means in this respect. The CDM is designed to induce the Annex I and non-Annex I Parties to make joint efforts to-

<sup>95</sup> See Decision -/CP.11 and Decision -/CMP.1.

<sup>96</sup> Decision -/CP.11, para. 5 (emphasis added by the author).

<sup>97</sup> See International Environment Reporter, vol. 28, no. 25, at 883 (14 December 2005).

<sup>98</sup> Submission dated 30 November 2005, <<http://unfccc.int/resource/docs/2005/cmp1/eng/misc03.pdf>> (visited 22 March 2006).

wards mitigating the detrimental effect of climate change,<sup>99</sup> although the latter Parties are exempted to date from any obligation to reduce their greenhouse gas emissions. It enables both groups of Parties to undertake joint climate protection-related project activities that are favoring both sides: While the Annex I Parties can gain emissions reduction credits by funding projects undertaken within non-Annex I Parties, such project activities assist the latter Parties in achieving sustainable development.<sup>100</sup> Their expectation to profit from foreign technology and funding gives them enough incentive to get involved with such activities. Thus, the CDM, apart from its other purposes, might be seen as a means that enables both the Annex I and non-Annex I Parties to meet their common but differentiated responsibilities by sort of a compromise.

### c) Equitable Participation in International Decision-Making

“Benign discrimination” in favor of Third World states, if sparingly used, is a suitable means for achieving more justice in today’s environmental and developmental relations between North and South. However, it is not the only one. Another promising means for bridging the North-South divide is “equitable participation” in relevant international decision-making. This is what developing countries seem to have in mind when they make claims that international environmental law needs to become more democratic. However, “democracy” is a concept of legitimacy that “is based on the consent of the governed, expressed through regular, free elections, in which leaders can be replaced and policies changed”.<sup>101</sup> Therefore, it can hardly be transposed to the level of inter-state relations.<sup>102</sup> Thus, states’ equitable participation is not a precept of democracy, but a special emanation of international procedural justice. As shown above,<sup>103</sup> this precept is an important correlative to distributive justice among states and even an indispensable prerequisite for achieving the latter.<sup>104</sup>

“Equitable” participation means that all states must have a “just” and “fair” share in all international environmental negotiation and decision-making processes. However, what does just and fair participation mean in practical terms?

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<sup>99</sup> According to Art. 12 para. 5 (b) of the Kyoto Protocol the CDM is aimed at achieving “real, measurable, and long-term benefits related to the mitigation of climate change”.

<sup>100</sup> Compare e.g. *Birnie/Boyle* (note 3), at 528, and *Sands* (note 3), at 373 et seq.

<sup>101</sup> D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, *AJIL* 93 (1999), 596, at 613.

<sup>102</sup> NGOs participating in international decision-making processes may substantially contribute to a pluralistic international public discourse, but because of their lack of democratic legitimacy they are not able to democratize these processes. See J. Delbrück, *Exercising Public Authority beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, *Indiana Journal of Global Legal Studies* 10 (2003), 29, at 41.

<sup>103</sup> See above IV. 1. b).

<sup>104</sup> See *ibid.*

Particularly crucial in this respect is the question how to shape the voting procedure which an international organization or a specific international treaty-body has to employ when it takes a decision concerning the implementation or further development of the respective international environmental agreement. It may be argued that, in order to meet the requirements of equity (fairness, justice), every voting procedure should be governed by the principle of equality of states. This axiom in traditional international law, as expressed in Art. 2 para. 1 of the UN Charter, is certainly best achieved by the rule "one state – one vote". As is generally known, the UN General Assembly ever since has adopted its recommendations on the basis of this rule. While "one state – one vote" genuinely puts formal equality of states into practice, it may be asked whether a voting procedure that neglects the actual disparities among states in population, power and wealth, provides for an equitable outcome at all times.

D. Bodansky takes the view that there is neither an intrinsic nor an equitable reason to treat states as equal. He underlines this position by asking two rhetorical questions: "(W)hy should Nauru, with a population of approximately seven thousand, have an equal say in global issues as China and India, with populations one hundred thousand times as large? Why should the Alliance of Small Island States have forty-two votes in the United Nations, while the United States, comprising fifty semi-sovereign states and a population more than ten times as large, has only one?"<sup>105</sup> While Bodansky seems to be right with his first query, his second may be refuted by arguing that privileging the Small Island States which are gravely threatened by rising sea-levels (as a result of global warming) is just an act of benign discrimination that somewhat compensates these states for having become victims of an environmental threat originating first and foremost from the industrialized world. Nevertheless, there is reason to search for alternative voting techniques that enable all states involved in international decision-making, may they come from the North or from the South, to participate on equitable terms.

At present, conferences and treaty-bodies acting in the field of global environmental protection often make their decisions by consensus, i.e. the absence of formal objection to a proposed decision, which is not necessarily the same as unanimity. While this procedure may promote the reaching of "equitable outcomes", it will often lead to decisions that represent the lowest common denominator and are rather vague in substance.<sup>106</sup> This is why the Conferences of the Parties to multilateral environmental agreements, on a regular basis, have resort to formal voting, if all efforts to achieve consensus among the parties concerned have been in vain.

In order to make sure that neither the North nor the South one-sidedly wins predominance over the other, formal voting procedures should be designed in such a way that they promise to produce outcomes that both state groups estimate just

<sup>105</sup> Bodansky (note 101), at 614.

<sup>106</sup> See R.R. Churchill/G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A little-Noticed Phenomenon in International Law*, *AJIL* 94 (2000), 623, at 642 et seq.



and fair. Theoretically, the spectrum of options that may help to reach this aim is rather broad. It ranges from requiring qualified majority votes, prescribing weighted votes, setting certain quorums of votes in favor of a proposed decision, and giving certain minorities the power to veto decisions (blocking minorities), to making positive decision-taking dependent on reaching double (possibly qualified) majorities from either state group. States may also combine some of these voting techniques with each other in a certain way. This makes their leeway for designing an adequate voting procedure even broader. In the following, we will have a closer look at a number of voting procedures that are currently employed within the framework of modern environmental treaty regimes.

aa) Participation in Decision-Making of the Conference of the Parties (COP) of a Multilateral Environmental Agreement (MEA)

The COP, an organ on which all states parties to the MEA concerned are represented, generally has a variety of functions which range from taking decisions in international matters, contributing to the development of new contractual obligations by amending a MEA or by adopting new protocols to supervising the parties' implementation of, and compliance with, the obligations under the MEA, as well as deciding on the responses to cases of non-compliance.<sup>107</sup> In view of the paramount role COPs usually play within the framework of MEAs, the question as to how to design their rules on voting is particularly crucial. As we will see, it gives reason to ongoing controversies, particularly in the North-South dimension.

The COP of the 1992 UN Framework Convention on Climate Change (UNFCCC)<sup>108</sup> has not yet adopted its Rules of Procedure. It still applies the draft rules proposed at its first meeting. However, there is still considerable controversy regarding the majorities required for decisions the COP takes on matters of substance (Draft Rule 42 on voting). The respective positions range from consensus to two-thirds majority, three-fourths majority, and double majorities of Annex I and non-Annex I Parties. As the COP has not yet reached agreement, it has never engaged in formal voting to date. When the Meeting of the Parties (MOP) of the Kyoto Protocol first met in Montreal (2005), it agreed to apply the COP's draft rules of procedure, again with the exception of disputed Rule 42.<sup>109</sup> Thus, for the time being the COP/MOP will take decisions by consensus only.<sup>110</sup>

The situation is similar for the 1992 Convention on Biological Diversity (CBD). At its first meeting held in Nassau (1994) the COP adopted its rules of procedure with the exception of Rule 40 para. 1. This rule provides that, in the event that the Parties are unable to reach agreement by consensus, decisions on matters of sub-

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<sup>107</sup> Compare *ibid.*, at 626.

<sup>108</sup> Convention of 9 May 1992; ILM 31 (1992), 849.

<sup>109</sup> See Earth Negotiations Bulletin, vol. 12, no. 291, 12 December 2005, at 3.

<sup>110</sup> Compare H. Olivas/F. Gagnon-Lebrun/C. Figueres, *Navigating the COP/MOP. A Guide to the COP/MOP Process*, 2005, at 19.

stance shall be made by a two-thirds majority vote of the Parties present and voting. However, decisions under Art. 21 para. 1 and 1 (Financial Mechanism) shall be taken by consensus. Due to the Parties' ongoing disagreement on voting, the COP's decision-making under the CBD still depends on reaching consensus.<sup>111</sup>

The 1985 Vienna Convention for the Protection of the Ozone Layer<sup>112</sup> requires that the COP adopts amendments of the Convention by a three-fourths majority vote,<sup>113</sup> while it takes its decisions on all matters of substance by a two-thirds majority vote.<sup>114</sup> The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer<sup>115</sup> prescribes a two-thirds majority for the decisions of the COP on all matters of substance.<sup>116</sup> The 1989 Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal requires a two-thirds majority vote for making decisions on matters of substance, if no agreement by consensus has been reached.<sup>117</sup> Under the 1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)<sup>118</sup> the Commission (i.e. the plenary organ of the Convention) is required to adopt its decisions and recommendations by unanimous vote or, should unanimity not be attainable, by a three-quarters majority vote.<sup>119</sup> Amendments of the OSPAR Convention shall be adopted by unanimous vote only,<sup>120</sup> the same generally applies to the adoption of annexes and the amendment of annexes.<sup>121</sup> Substantive issues, other than issues for which the OSPAR Convention or the Rules of Procedure of the OSPAR Commission prescribe some other procedures, shall be determined by a three-quarters majority of the Contracting Parties' votes.<sup>122</sup> The 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade<sup>123</sup> provides that the COP shall make every effort to reach agreement on all matters of substance by consensus; if no agreement has been reached, the decision shall be taken by a two-thirds majority vote.<sup>124</sup>

In sum, the voting rules of COPs acting within modern MEAs show a certain trend towards requiring either a two-thirds or three-fourths majority vote of the

<sup>111</sup> In the current version of COP's Rules of Procedure Rule 40 para. 1 still appears in square brackets.

<sup>112</sup> Convention of 22 March 1985; ILM 26 (1987), 1529.

<sup>113</sup> Art. 9 of the Convention.

<sup>114</sup> Rule 41 of the COP's Rules of Procedure.

<sup>115</sup> Protocol of 16 September 1987; ILM 26 (1987), 1550.

<sup>116</sup> Rule 41 of the COP's Rules of Procedure.

<sup>117</sup> Rule 40 para. 1 of the COP's Rules of Procedure.

<sup>118</sup> Convention of 22 September 1992; ILM 32 (1993), 1069.

<sup>119</sup> Art. 13 of the Convention; Rule 64 of the Rules of Procedure of the OSPAR Commission.

<sup>120</sup> Art. 15 of the Convention.

<sup>121</sup> Art. 16 and 17 of the Convention.

<sup>122</sup> Rule 65 of the OSPAR Commission's Rules of Procedure.

<sup>123</sup> Convention of 10 September 1998; ILM 38 (1999), 1.

<sup>124</sup> Rule 45 of the COP's Rules of Procedure.

parties present and voting for decision-making on matters of substance. However, none of these MEAs requires that the COP concerned adopts its decisions on substantive issues by a qualified majority vote that represents the majority of developed country parties and a majority of the developing country parties, with one exception only: Art. 2 para. 9, *lit. c* of the Montreal Protocol requires that the Contracting Parties shall agree on adjustments to the ozone-depleting potentials specified in the Protocol's Annexes as well as on further adjustments and reductions of production or consumption of the controlled substances whenever possible by consensus, and if this cannot be attained, by a two-thirds majority vote that is carried by a majority of developing states as well as a majority of industrialized states.

#### bb) Participation in the Kyoto Protocol's Compliance Control System

The "Procedures and mechanisms relating to the compliance under the Kyoto Protocol", as agreed upon by the COP 7 of the UNFCCC in its plenary meeting of November 2001,<sup>125</sup> were finally adopted by the COP/MOP 1 at its Montreal Meeting in 2005.<sup>126</sup> They provide for the establishment of the Compliance Committee that is determined to function through a plenary, a bureau and two branches, namely the Facilitative Branch and the Enforcement Branch.<sup>127</sup> Both branches are composed of ten members, one from each of the five regional groups of the United Nations, one member of the Small Island Developing States (SIDS) and two from Annex I and non-Annex I country parties respectively. This formula for composition leads in each branch to a majority of 6 to 4 in favor of the non-Annex I states, i.e. the group of developing countries.<sup>128</sup> While the Facilitative Branch, in cases where its members failed to reach consensus, shall adopt decisions by an overall majority of three-fourths of the members present and voting, decisions of the Enforcement Branch also must be adopted by a three-fourths majority, but need a double simple majority of Annex I as well as non-Annex I countries in addition. Consequently, any decision must be approved at least by eight of ten members, among whom, due to the requirement of simple double majority, must be at least three Annex I states and four non-Annex I states respective. Thus, due to the fact that two Annex I states can prevent the Enforcement Branch from tak-

<sup>125</sup> See Decision 24/CP.7, <<http://unfccc.int/resource/docs/cop7/13a03.pdf>> (visited 22 March 2006).

<sup>126</sup> See Decision -/CMP.1, <[http://unfccc/meetings/cop\\_11/application/pdf/cmp1\\_23\\_7\\_procedures\\_and\\_mechanisms\\_compliance.pdf](http://unfccc/meetings/cop_11/application/pdf/cmp1_23_7_procedures_and_mechanisms_compliance.pdf)> (visited 22 March 2006).

<sup>127</sup> The facilitative branch is responsible for promoting compliance with the Kyoto Protocol commitments by using facilitative means, such as financial and technical assistance and advice, while the enforcement branch is responsible for controlling the Annex I parties' compliance with their reduction commitments or eligibility requirements for emissions-trading under the Protocol, as well as for applying sanctions and penalties, such as suspension of eligibility to participate in the Protocol's flexible mechanisms or 30 % penalties for every excess ton of emission, in case of non-compliance.

<sup>128</sup> For more details see G. Ulfstein/J. Werksman, *The Kyoto Compliance System: Towards Hard Enforcement*, in: G. Ulfstein/O.S. Stokke/J. Hovi (eds.), *Implementing the Climate Regime: International Compliance*, 2005, 39, at 45 et seq.

ing a positive decision, the double majority requirement offsets the numerical predominance of the developing states over the industrialized states.<sup>129</sup> Taking into account that the Enforcement Branch responds to non-compliance with obligations of Annex I parties only, its sophisticated voting system all in all may be said to be just and fair.

cc) Participation in Decision-Making within the Clean Development Mechanism (CDM) under the Kyoto Protocol

The CDM as defined in Art. 12 of the Kyoto Protocol provides for Annex I parties to implement project activities that reduce emissions in non-Annex I parties, in return for certified emission reductions (CERs) that can be used by Annex I parties to help meeting their emissions targets under the Protocol. Such project activities are to assist the developing country host parties in achieving sustainable development and in contributing to the ultimate objective of the UNFCCC. Under the authority and guidance of the COP/MOP, an Executive Board supervises the CDM.<sup>130</sup> Among its tasks are the accreditation of independent organizations (operational entities), which provide for the validation of proposed CDM project activities and the verification and certification of emissions reductions, as well as issuing CERs equal to the verified amount of emissions reduction.<sup>131</sup> Thus, the Executive Board plays a central role in shaping the process of inter-action between North and South within the CDM. According to its Rules of Procedure, as adopted by COP 7 of the UNFCCC,<sup>132</sup> the composition of the Executive Board, as defined in Rule 3, is identical to that of the two branches of the Compliance Committee under the Kyoto Protocol. However, according to Rule 28 any positive decision-making requires that at least two thirds of the members of the Executive Board, representing a double majority of members from Annex I parties and non-Annex I parties, are present at the meeting. Thus, three members from industrialized states and four members from developing states constitute a quorum. Rule 29 prescribes that decisions of the Executive Board, if no consensus has been reached, shall be taken by a three-fourths majority of the members present and voting at the meeting. Consequently, eight of ten, respectively six of seven, members must vote in favor of the proposed decision in order to reach its adoption; thus, in cases where six, respectively four, members from non-Annex I parties present vote in favor of the decision, three of four, respectively two of three, members of Annex I parties constitute a blocking minority that bars the Executive Board from taking any positive decision.

<sup>129</sup> Compare for the whole *ibid.*, at 53.

<sup>130</sup> This body was established at the seventh meeting of the COP in 2001. Its procedural rules were streamlined and its financing strengthened at the COP/MOP's first meeting.

<sup>131</sup> See *Sands* (note 3), at 379 et seq.; *C. Kreuter-Kirchhof*, *Dynamisierung des internationalen Klimaschutzregimes durch Institutionalisierung*, *ZaöRV* 65 (2005), 967, at 997 et seq.

<sup>132</sup> They are laid down in Decision 21/CP.8, Annex I; FCCC/CP/2002/7/Add.3.

## dd) Participation in Decision-Making of the Montreal Multilateral Fund

The Multilateral Fund is functioning as the financial mechanism of the 1987 Montreal Protocol. Contrary to the Bretton Woods system, where voting is based on the respective shares provided to the financial institutions, the Executive Committee of the Montreal Fund can neither be controlled by the group of industrialized states alone nor by the group of developing states. This is due to the fact that any decision requires a two-third majority, which must include the majority of both, industrialized as well as developing countries.<sup>133</sup>

## ee) Participation in Decision-Making of the GEF

The Global Environment Facility (GEF) constitutes the financing mechanism of the Conventions on Climate Change and Biological Diversity. Although redesigned in 1994,<sup>134</sup> its voting mechanism raises some doubts as to whether it fully meets the requirements of equitable participation. The GEF Council, composed of 32 members with an equal balance of developed and developing states,<sup>135</sup> takes decisions, by consensus whenever possible, but otherwise “by a double weighted majority, that is, an affirmative vote representing both a 60 % majority of the total number of Participants and a 60 % majority of the total contributions”.<sup>136</sup> Consequently, neither the industrialized nor the developing countries are in the position to out-vote each other. However, it cannot be ignored that the donor states have a *de facto* veto power whenever the GEF Council is required to take a decision by formal vote.<sup>137</sup> This parallelism with the Bretton Woods system<sup>138</sup> has been criticized by the developing states as constituting a step back when compared to the Montreal Fund.

It may be asked whether such *de facto* discrimination is in line with GEF’s mission to act as a mechanism for providing funds to help developing countries meet the “agreed incremental costs” of environmental measures that are intended to achieve “agreed global environmental benefits”. GEF’s funding measures do not necessarily benefit the receiver country, but eventually benefit the international

<sup>133</sup> Art. 10 para. 9 of the Montreal Protocol expressly requires such a qualified double majority vote.

<sup>134</sup> See the Instrument for the Establishment of the Restructured Global Environment Facility accepted by the states participating in the GEF at their Geneva meeting, 16 May 1994; ILM 33 (1994), 1273.

<sup>135</sup> According to Para. 16 of the 1994 Instrument the GEF Council consists of 16 members from developing countries, 14 members from developed countries, and 2 members from the countries of Central and Eastern Europe and the former Soviet Union.

<sup>136</sup> Paras. 25 (b) und (c) of the 1994 Instrument.

<sup>137</sup> Compare P.-T. Stoll, *The International Environmental Law of Cooperation*, in: R. Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as a Viable Means?*, 1996, 39, at 77 et seq., and Kellersmann (note 85), at 182 et seq.

<sup>138</sup> It consists of the World Bank, the International Monetary Fund (IMF) and the GATT.

community as a whole.<sup>139</sup> This is why the voting rules of the GEF Council should not favor the donor countries over the receiver countries in the way they currently do.

After all is said and done, the current practice of decision-making in global environmental affairs does not yet show consistent patterns of equitable participation in the North-South dimension. Strikingly enough, neither the COP/MOP acting under the climate protection regime nor the COP of the CBD have agreed upon formal voting as yet, and those COPs' voting rules already in force considerably differ from each other. All this reflects a high degree of uncertainty in determining what just and fair participation of both state groups in decision-making means in practice. As a matter of fact, the criteria of equity, which a COP should meet when it further develops the treaty regime concerned, may considerably differ from those which should govern decision-making in cases of non-compliance or funding. Thus, if there is any universally valid voting procedure that is just and fair, it is perhaps the one that, subject to variation, makes any positive decision-taking on substantive matters dependent on a qualified double majority of both the industrialized and developing country parties. In any case, it should be a rule that equally meets the specific interests and needs of both sides involved.

#### d) Equitable Sharing of Benefits Arising Out of the Use of Genetic Resources

Conservation and sustainable use of biological diversity today is a particularly crucial issue in the North-South context. This is due to the fact that the states harboring valuable biological resources on their territories quite often are other than those disposing over the technological know-how that is needed for the exploitation and economic usage of such resources. While the former states predominantly belong to the developing world, the latter mostly are highly skilled industrialized states and their companies. Against this factual background it does not come as a surprise that the interests and needs of the two groups of states that are involved in undertakings of exploitation of biological resources and their genetic materials are seriously opposed to each other.

Until recently, prospectors coming from the industrialized world felt free to take biological resources from the countries of origin and to use them to develop drugs and other commercial products.<sup>140</sup> The companies sold these products under the protection of patents and other intellectual property rights, while the countries of origin did not receive any meaningful benefit from the commercial exploitation of their resources. This is all the more alarming, as most biodiversity is found in the developing world. It has been estimated that about 85 % of all known plant species are situated in areas that are the traditional homelands of indigenous people. For instance, the tropical rain forests that provide the habitat for 50 million in-

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<sup>139</sup> Compare again Stoll (note 137), at 77 et seq., and Kellersmann (note 85), at 296 et seq.

<sup>140</sup> Wild genetic resources are most intensively sought after by the industrialized world as the raw materials for future medicines, food and fuels.

indigenous people are thought to contain more than half of the species in the entire world biota. Since the advent of modern biotechnology, the pharmaceutical industry, as well as the agro-industry, have shown an increasing interest in the specific knowledge and plants the indigenous and local communities have often used for many generations. The pharmaceutical industry is expecting to gain insight into new substances and healing methods from such traditional knowledge, and traditional plant varieties provide for a reservoir of biological material that is indispensable for research on and development of new, high yielding varieties for modern agriculture.<sup>141</sup> Taking valuable biological resources away from the developing states' local and indigenous communities without adequate compensation is the more objectionable as these communities still rely upon these resources very intensely. Thus, for instance, 80 % of the population of developing states worldwide depend on plant-derived medicine for its primary health care needs.<sup>142</sup>

Seeking a theoretical approach for reconciling the severely conflicting interests of the North and South in having access to valuable biological resources and benefiting from their economic use, the idea of "international justice" comes to mind.<sup>143</sup> Especially, "distributive justice", combined with some elements of "procedural justice", may lay the theoretical foundation for the efforts of states towards developing an international regime of relevant North-South-cooperation that is aimed at coequal partnership rather than mere conflict management.

With the Convention on Biological Diversity (CBD) of 1992 a process of ending unfair foreign exploitation practices was set in motion. The CBD pursues three main objectives, namely conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Art. 15 CBD is apparently inspired by the idea of international justice. It creates a legal framework for balancing the sovereign rights of states over their natural resources and the interests of foreign states and their companies in exploiting these resources. Art. 15 reads as follows:

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties ...
3. ...
4. Access where granted, shall be on mutually agreed terms ...
5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources ...
6. ...
7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, ... with the aim of sharing in a fair and equitable way the results of research

<sup>141</sup> See for the whole A. v. Hahn, *Traditionelles Wissen indigener und lokaler Gemeinschaften zwischen geistigen Eigentumsrechten und der public domain* (2004), at 5 et seq., 37 et seq., 41 et seq.

<sup>142</sup> See Africa Environment Outlook (note 19), at 59.

<sup>143</sup> See above in section IV. 1. b).

and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.”

This framework provision offers to both the North and South considerable incentives for making joint efforts towards sustainable use of the biological resources concerned. States hosting such resources (henceforth called “countries of origin”) have to create conditions to facilitate access to their resources for environmentally sound uses. However, in each individual case such access must be provided on mutually agreed terms and is therefore subject to the country of origin’s prior informed consent. States seeking access (henceforth called “user countries”) must offer to the countries of origin sufficient *quid pro quo* in terms of inducements, such as technology transfer, participation in the scientific research and sharing the benefits arising out of the commercial and other utilization of genetic resources.

The environmental philosophy that underlies this policy is that only a state which attaches significant economic value to its biological resources has enough incentives to provide for the latter’s adequate conservation and management. The greater the benefits a country of origin can draw from foreign use of its genetic resources, the more it feels prompted to conserve and make use of them in a sustainable manner.

The same applies to the local and indigenous communities in a developing country that directly live with valuable species of flora and fauna: the more they benefit from foreign utilization of these species, the greater is their inducement to get actively involved with resource conservation. Thus, governments of the countries of origin should move towards establishing mechanisms of natural resources management at the national level that are based on the idea of conservation and sustainable use. These mechanisms should be combined with pursuing a community-based approach that ensures a meaningful participation of local communities and indigenous people in relevant decision-making processes.<sup>144</sup>

Aware of the need of further specifying the CBD’s rules on access and benefit-sharing, the COP of the CBD, at its sixth meeting in 2002, adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of

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<sup>144</sup> The idea of sustainable use of wildlife, combined with pursuing a community-based approach, is clearly reflected in the Protocol on Wildlife Conservation and Law Enforcement, which was signed by all member states of the Southern African Development Community (SADC) on 18 August 1999 (text in: <[http://www.iucnrosa.org.zw/elisa/SADC-Protocols/wildlife\\_protocol.html](http://www.iucnrosa.org.zw/elisa/SADC-Protocols/wildlife_protocol.html)> [visited 22 March 2006]), as well as in the revised African Convention on the Conservation of Nature and Natural Resources of 11 July 2003, especially in its Art. XVII para. 3, which reads as follows: “The Parties shall take measures necessary to enable active participation by the local communities in the process of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources.” See the text of the African Convention, which has not yet entered into force, in: <[http://www.iucn.org/themes/wcpa/wpc2003/pdfs/outputs/africa/africa\\_pasconvention.pdf](http://www.iucn.org/themes/wcpa/wpc2003/pdfs/outputs/africa/africa_pasconvention.pdf)> (visited 22 March 2006). Compare Beyerlin (note 21), at 431 et seq.



Benefits Arising out of their Utilization.<sup>145</sup> These guidelines are intended to assist parties to the CBD in developing an overall access and benefit-sharing strategy.

The Bonn Guidelines should only be seen as a first step of an evolutionary process in the implementation of the CBD's relevant provisions. In 2002, the Johannesburg Summit, in its Plan of Implementation, called for action "to negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources".<sup>146</sup> The Inter-Sessional Meeting on the Multi-Year Programme of Work of the Conference of the Parties up to 2010, in March 2003, addressed the issue of an international regime on access and benefit-sharing (henceforth called ABS Regime) and mandated its Ad Hoc Open-ended Working Group to consider the process, nature, scope, elements and modalities of the ABS Regime.<sup>147</sup> In December 2003, the Ad Hoc Open-ended Working Group submitted recommendations on the terms of reference for the negotiations of the planned ABS Regime to the COP's seventh meeting in February 2004. Among the elements the Working Group is considering for inclusion in the planned ABS Regime are measures to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources; measures to ensure compliance with the mutually agreed terms on which access to genetic resources was granted; disclosure of the origin of genetic resources and associated traditional knowledge in applications for intellectual property rights; and recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources.<sup>148</sup> In its Decision VII/19, the COP mandated the said Working Group with the collaboration of another Working Group on Art. 8 (j) and related provisions of the CBD, ensuring the participation of indigenous and local communities, NGOs, industry and scientific and academic institutions, as well as inter-governmental organizations, to elaborate and negotiate the planned ABS "with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8 (j) of the Convention and the three objectives of the Convention".<sup>149</sup>

As the negotiations on the ABS Regime are still underway, one should refrain from speculating about their outcome or about the regime's legally binding or

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<sup>145</sup> Decision IV/24, Access and benefit sharing as related to genetic resources, A. (Annex), adopted by the COP to the CBD at its 6<sup>th</sup> Meeting, The Hague, 7-19 April 2002; UNEP/CBD/COP/6/20, 262.

<sup>146</sup> Para. 44 (o) of the Johannesburg Summit's Plan of Implementation.

<sup>147</sup> See Fourth Meetings of the Working Groups in Art. 8 (j) and on Access and Benefit-Sharing of the Convention on Biological Diversity <<http://www.iisd.ca/vol09/enb09334e.html>> (visited 22 March 2006).

<sup>148</sup> See Terms of Reference for the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, Annex to the Decision VII/19, <<http://www.biodiv.org/decisions/?dec=VII/19>> (visited 22 March 2006).

<sup>149</sup> See International Regime on Access to Genetic Resources and Benefit-Sharing, UNEP/CBD/COP/7/21, Decision VII/19 D., 300, <<http://www.biodiv.org/doc/decisions/COP-07-dec-en.pdf>> (visited 22 March 2006).

non-binding nature.<sup>150</sup> However, in order to become a success, the envisaged ABS Regime should achieve two main objectives: It should transform the complex system of rules related to access and benefit-sharing into a fully workable mechanism that offers soundly balanced incentives to both the countries of origin and the user countries. Furthermore, it should ensure that in any particular case all players involved in this mechanism make use of it in a fair and equitable way.

In the latter respect, the ABS Regime should meet the following requirements: First, it should provide for clear-cut rules that prevent the user country from gaining pre-dominance over the country of origin in the procedure of obtaining prior informed consent, as well as in the negotiation processes on “mutually agreed terms” that cover the conditions and modalities of benefit-sharing. Second, in cases where the contractual arrangements on access and benefit-sharing have not been respected by either side, the non-compliant should run the risk to be subject to sanctions, including penalties and compensation. This is why the Regime should include monitoring, compliance and enforcement mechanisms to be established in accordance with the CBD. Third, the Regime should ensure that particularly on the part of the country of origin all relevant stakeholders are consulted and their views taken into consideration in each step of the process, especially with regard to determining access, negotiating and implementing mutually agreed terms, and benefit-sharing.

Among the stakeholders to be necessarily included in these processes are the indigenous and local communities of the countries of origin. They must be enabled to control their traditional knowledge in a way that outsiders cannot use that knowledge for their own interests without the consent of the communities concerned. Consequently, the envisaged Regime must ensure that the established legal rights of indigenous and local communities associated with the genetic resources being accessed are respected, and that the prior informed consent of these communities and the approval of the holders of traditional knowledge are obtained in each particular case.

In January 2005 the Group of Like Minded Megadiverse Countries (LMMC), which comprises a total of 17 developing countries<sup>151</sup> possessing 60-70 % of the world’s biodiversity, adopted the New Delhi Ministerial Declaration of Megadiverse Countries on Access and Benefit Sharing<sup>152</sup> that, *inter alia*, stated that the proposed ABS regime should include “mandatory disclosure of the country of origin of biological material and associated traditional knowledge in the IPR (Intellectual Property Right) application, along with an undertaking that the prevalent laws and practices of the country of origin have been respected and mandatory specific

<sup>150</sup> See J. Langford, Nature of an International ABS Regime, <<http://www.canmexworkshop.com/documents/papers/II.1d.3.pdf>> (visited 22 March 2006), and L.L. Lin/C.Y. Heong, *Megadiverse Countries Join Efforts for Strong International Law on Access and Benefit Sharing*, <<http://www.twinside.org.sg/title2/service157.htm>> (visited 22 March 2006).

<sup>151</sup> Among them are a number of newly industrializing countries, such as Brazil, China and India.

<sup>152</sup> See its text in: Third World Network Biosafety Information Service, 25 January 2005 <<http://www.twinside.org.sg/title2/service157.htm>> (visited 22 March 2006).

consequences in the event of failure to disclose the country of origin in the IPR application".<sup>153</sup> Moreover, the Megadiverse countries agreed to ensure that the proposed ABS Regime, including legally binding instruments, contains prior informed consent of the country of origin and mutually agreed upon terms between the country of origin and user country.<sup>154</sup>

At the third meeting of the ABS Working Group, the International Indigenous Forum on Biodiversity called particular attention to the rights of indigenous and local communities over traditional knowledge and the genetic resources to which it is inextricably linked. Interestingly enough, it underscored that any disrespect for these rights even raises human rights concerns.<sup>155</sup>

In any case, the project of an international ABS Regime is doomed to failure, unless it guarantees that in future the countries of origin, as well as their indigenous and local communities have a fair and equitable share in the benefits arising from foreign use of their genetic resources. If doing so, it provides for more distributive justice between the North and South as the key to overcome one of the most serious barriers that divide one state group from the other.

## V. Conclusions

While today states may show an increasing readiness to accept that global environmental protection is a common concern of humankind, they do not yet constitute a community that, in the spirit of international solidarity and justice, acts in concert for achieving this end. States are still far from taking joint protective and remedial environmental action that suffices to achieve the aim of preserving and administering our common natural heritage for the benefit of the present and future generations.

As shown above, the basic ideas of international solidarity and justice should constitute the theoretical starting-point for constructing an international legal framework of environmental and developmental cooperation between the North and South. However, both perceptions, because of their abstractness and vagueness, only give some rough direction to the way in which both sides should shape their future inter-relationship in substantive and procedural terms. Therefore, they should be understood as sources for developing more meaningful instruments that might bridge the North-South divide in practice.

Our search for ways and means of better integrating the specific concerns of the developing world in international environmental law has revealed that "sustainable development", "common but differentiated responsibilities", "equitable participa-

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<sup>153</sup> Ibid., at 3.

<sup>154</sup> Ibid.

<sup>155</sup> See International Indigenous Forum on Biodiversity, Opening and Closing Statements at CBD Working Group on ABS, <[http://ipcb.org/pipermail/ipcb-net\\_ipcb.org/2006-February/000043.html](http://ipcb.org/pipermail/ipcb-net_ipcb.org/2006-February/000043.html)> (visited 22 March 2006).

tion”, and “equitable sharing of benefits” may constitute concepts that promise to help in this respect. All of them might contribute to shifting the inter-relationship between the North and South from disparity to equal partnership.

As shown above, the concept of “sustainable development”, in both its intra-generational and inter-generational dimension, can be understood as an emanation of solidarity and, concurrently, as a specification of the idea of distributive justice. Particularly in the latter respect, it becomes instrumental in the North-South context. Although a mere political ideal, rather than a legal principle, “sustainable development” has proven to be an important catalyst in the process of further developing international environmental law.<sup>156</sup> It induces states to refrain from taking any environmental action that does not take into account the necessities of economic and social development. Calling for full integration of both environmental and developmental interests and needs on a par with each other, the concept of “sustainable development” has brought about a fundamental paradigm shift from strict conservation<sup>157</sup> to sustainable management of natural resources, such as water, soil, and flora and fauna. While “sustainable development”, because of its ambiguous normative language, cannot deploy any appreciable steering effect on states’ behavior, “sustainable use”, a derivative of the former, does have such effect, provided that it is – as in the 1992 Convention on Biological Diversity – pulled together with components of biological diversity, such as flora and fauna, and other natural resources.<sup>158</sup> Meanwhile, a number of international agreements on wildlife conservation and utilization at the regional and sub-regional level provide for wildlife management systems that embody the idea of “sustainable use”, feature the devolution of responsibility to local and indigenous communities, and ensure the latter’s active participation in natural resource management.<sup>159</sup> Thus, it is obvious that developing countries and their underprivileged societies are highly benefiting from “sustainable development” and its subtype “sustainable use”.

“Common but differentiated responsibilities” and “equitable participation” are important manifestations of international justice. They both may help to reconcile the dichotomy between North and South in global environmental affairs, such as combating climate change and preserving biological diversity.

The concept of “common but differentiated responsibilities” reflects the idea of international distributive justice that legitimizes various forms of differentiation between the North and South. As applied to the Kyoto Protocol, it results in asymmetric substantive environmental obligations of the state parties concerned

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<sup>156</sup> See Beyerlin (note 79).

<sup>157</sup> Several agreements on nature protection of the 1970s pursue a strategy of rigid conservationism showing remnants of colonial thinking that did not care for the interests and needs of the indigenous and local communities directly living with, and depending on, native flora and fauna. Thus, these agreements may be said to reflect the legacy of colonialism. Compare Mickelson (note 6), at 57 et seq.

<sup>158</sup> See again Beyerlin (note 79).

<sup>159</sup> For relevant practice in southern Africa see Beyerlin (note 21), at 431 et seq.

and a mechanism of compliance assistance in favor of those parties unable to bear alone the costs of fulfilling their procedural obligations.

Both forms of compensatory “benign discrimination” against the South should only be granted on a temporary basis. Thus, developing countries can never claim preferential treatment in absolute terms. They are nothing more than revocable beneficiaries of the latter. Whenever the preconditions of differential treatment cease to exist, the developing countries are no longer legitimized to take advantage of being dispensed from certain contractual obligations and getting compliance assistance from developed countries. Therefore, any differential treatment in treaty practice should be kept continuously under review. With these reservations, “common but differentiated responsibilities” is a principle of distributive justice that has considerable steering effect on the further development of the environmental relations between the North and South. Although it has left several marks in the modern treaty practice of states, it can hardly claim customary legal status to date.<sup>160</sup>

As the ideal of distributive justice cannot be expected to be perfectly achieved in future North-South-relations, the idea that both state groups should have an equitable share in international environmental decision-making gains even greater importance. As an emanation of international procedural justice, “equitable participation” means that any relevant decision-making procedure should be shaped in such a way that it creates best possible preconditions for reaching a just and fair outcome. Particularly crucial, in this respect, is the development of equitable voting procedures to be employed by decision-making treaty bodies and other international institutions. Although a voting rule that, subject to variations, requires for any positive decision-making in substantive matters a qualified double majority of both the industrialized state and developing country parties may come rather close to what might be perceived as “equitable”, there is hardly one such rule that could claim universal validity. Thus, in every particular case the precept of procedural justice should induce the states concerned to agree upon a voting rule that is best tailored to the North-South interests and needs involved, although it might often be difficult to reach a common understanding on the criteria of equity.

If devolved to the national and sub-national levels of developing countries, the concept of equitable participation could benefit the latter’s underprivileged societies, especially their indigenous and local communities, which highly rely upon natural resources, such as land, soil, water, and flora and fauna, and therefore often are the first to become victims of the degradation of nature. Actually, the governments of developing countries should feel prompted to give their indigenous and local communities an equitable share in all relevant decision-making processes at the national level. They would be legally bound to do so, if individuals and groups of individuals could claim their active participation in these processes by virtue of an international human rights guarantee. However, there is not yet evidence

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<sup>160</sup> Compare Beyerlin (note 79).

enough in human rights practice for showing that equitable participation has already gained such status.<sup>161</sup>

If linked together, “distributive justice” and “procedural justice”, in its sub-form of “equitable participation”, may prove to be the conceptual key to settle the conflicting interests of the North and South that are usually involved in the management and use of natural resources and their genetic materials. They both could give important guidance shaping the planned international ABS regime. While granting an equitable share of the state of origin and user state in the benefits arising out of the genetic resources marks the result of distributive justice finally to be achieved, the way towards reaching this end, i.e. obtaining prior informed consent and negotiating the “mutually agreed terms” must comply with the requirements of procedural justice. Thus, the latter is not an end by itself, but determines the steps to be taken in order to achieve distributive justice. While procedural justice is behavior-oriented in the sense of giving direction to the steps to be taken for reaching a certain end, distributive justice is goal-oriented in the sense of designating that end in substance. The working groups mandated with the elaboration of the proposed international ABS Regime must not lose sight of both procedural and distributive justice. Coming to terms with a regime that strikes an equitable balance between the states’ conflicting interests in the use of genetic resources is most important. Whether based on a legally binding instrument or not, it could remove a serious impediment that still bars the North and South from turning to a policy of joint management of natural resources.

If combined with each other, all four conceptual approaches discussed above – sustainable development, common but differentiated responsibilities, equitable participation in international environmental decision-making, and equitable sharing of benefits arising from the use of genetic resources – can provide a basis for developing new or reinforced strategies aimed at bridging the North-South divide in international environmental law. Inspired by international solidarity and justice, both state groups might succeed in getting at least one step further on their cumbersome way towards reaching an “understanding of the indivisibility of the earth’s natural systems” that could help strengthen “the vision of a human family” – a hope that was expressed thirty-five years ago in the Founex Report.<sup>162</sup>

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<sup>161</sup> See for a more thorough discussion on procedural human rights in the context of environmental protection, especially with regard to the use of natural resources, Beyerlin, *Umweltschutz und Menschenrechte*, ZaöRV 65 (2005), 525, at 537 et seq.

<sup>162</sup> Quoted in Mickelson (note 6), at 81.