

2011

Three Climate Crises

Deepa Badrinarayana

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

Deepa Badrinarayana, *Three Climate Crises*, 44 Case W. Res. J. Int'l L. 435 (2011)
Available at: <https://scholarlycommons.law.case.edu/jil/vol44/iss1/20>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THREE CLIMATE CRISES

*Deepa Badrinarayana**

I. INTRODUCTION	435
II. THE THREE CRISES	436
A. <i>Normative Crisis</i>	436
B. <i>Economic Interest Crisis</i>	437
C. <i>Legitimacy Crisis: Climate Change and Adaptation Strategies</i> ...	439
III. CONCLUSION.....	440

I. INTRODUCTION

The future of international climate change regulation remains uncertain, as nations struggle to prepare an agreement that will govern obligations post-Kyoto Protocol. The negotiations at COP-15 at Copenhagen¹ revealed deep political divisions and demonstrated the changing power dynamics in international relations, COP-16 negotiations in Cancun² restored what appeared to be a derailed international process and COP-17 negotiations at Durban signaled continuing differences among nations to making emissions reduction an obligation, as three major signatories to the Kyoto Protocol—Canada, Japan, and Russia—refused to commit to a second round of emissions reduction obligations.³ Climate negotiations thus continue to expose the continuing crisis in international law. Despite efforts of several nations, many even sincere, it is becoming clear that the chronic illness—of

* Associate Professor of Law, Chapman University School of Law. The author is grateful to the organizers at the Frederick K. Cox International Law Center, the editors of *Case Western International Law Journal* and particularly to Professor Michael Scharf for hosting an intellectually invigorating conference.

¹ See generally Copenhagen Climate Change Conference - December 2009, U.N. Framework Convention on Climate Change, http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php (last visited Jan. 28, 2012) (providing background information on the COP-15 conference).

² See generally U.N. DEVELOPMENT PROGRAMME: BUREAU FOR DEVELOPMENT POLICY, SYNTHESIS OF UNFCCC CLIMATE CHANGE CONFERENCE IN CANCUN, MEXICO (2010) (providing a summary of COP-16 in Cancun).

³ Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, 16th Sess., 6, Draft Decision-/CMP-7 (advance unedited version), available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf (last visited Feb. 6, 2012); Jennifer Morgan & Edward Cameron, *Reflections on COP 17 in Durban*, WORLD RESOURCES INST. INSIGHTS (Dec. 16, 2011), <http://insights.wri.org/news/2011/12/reflections-cop-17-durban>.

poor international law response to environmental and human rights issues—is now approaching crisis proportions in the context of climate change. This thought piece identifies three overlapping areas of crises: normative, economic order, and legitimacy. It argues that hope, the theme of this panel, in averting a crisis relating to climate change lies in embracing the need for a moral compass in addressing this incredibly complex collective action problem.

II. THE THREE CRISES

International legal response to climate change is at crossroads and the way is scattered with several problems and pitfalls. There are, however, three core crises that challenge the efficacy of international law and can potentially exacerbate the international law crisis.

A. *Normative Crisis*

Climate change threatens to devastate several nations, threatening their territorial integrity and domestic sustenance. For example, rising sea levels are predicted to eventually drown the Maldives.⁴ Similarly, severe and sudden weather conditions are predicted to devastate populations and property in Bangladesh.⁵ Both Maldives and Bangladesh are sovereign nations and recognized as such by their membership in the United Nations.⁶ As sovereign nations, international law implicitly and customarily recognizes their right to exercise full control over their domestic affairs.⁷

Their territorial integrity and the property and livelihood of their people are domestic concerns. Nations such as Maldives and Bangladesh are entitled under international law and the founding principle of sovereignty to exercise full control over these matters. However, when their domestic interest in their territory and their people is wrecked by climate impacts caused primarily by activities of foreign nations,⁸ their sovereignty is chal-

⁴ ORRIN H. PILKEY & ROB YOUNG, *THE RISING SEA* 20 (2009) (discussing the construction of a massive sea wall around Male, the capital city of the Maldives, to combat the heightened risk of flooding).

⁵ *E.g.*, MD. SHAMSUDDOHA & REZAUL KARIM CHOWDHURY, *CLIMATE CHANGE IMPACT AND DISASTER VULNERABILITIES IN THE COASTAL AREAS OF BANGLADESH* 10–17 (2007) (explaining how natural disasters and rising sea levels could negatively impact Bangladesh by causing loss of lives and property).

⁶ Press Release, Dep't of Pub. Info., United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006) (listing the 192 Member States of the United Nations).

⁷ *See* STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 11–22 (1999) (explaining the history of the different types of sovereignty).

⁸ *See, e.g.*, Adam Hadhazy, *The Maldives, Threatened by Drowning Due to Climate Change, Set to Go Carbon-Neutral*, *SCI. AM.* (Mar. 16, 2009), <http://www.scientificamerican.com>.

lenged. Further, to the extent that they cannot—through internal measures—mitigate the problem, their ability to exercise their sovereign prerogatives has been compromised. To the extent their influence in the international arena is limited for lack of economic prowess, their ability to control factors and mitigate their loss of sovereignty is further diminished. The fate of nations such as Maldives and Bangladesh and their people lies in the hands of a few developed countries and emerging economies.

To date, the process of globalization notwithstanding, nations may not interfere with another nation's sovereignty, unless the nation chooses to abdicate its sovereignty on its own volition.⁹ Globalization may have lowered national borders, but it has not eradicated these borders. So, when one considers the situation regarding sovereignty as it stands presently, it is evident that respect for sovereignty, per the Westphalian pact,¹⁰ must be extended to all nations recognized by the community of nations.

The tone of international negotiations on climate change, however, underplays the threat that climate change presents to national sovereignty of these nations. In this sense, climate change showcases the normative threat to a fundamental precept of international law. It challenges the international process underlying climate change negotiations.

B. *Economic Interest Crisis*

A second crisis stems from the current global economic order. The end of the Cold War and the emergence of a global economic order through a series of trade and investment liberalization agreements has resulted in the emergence of new economies, Brazil, China, India, Russia, and South Africa (in combination referred to as BRIC or BASIC). While there are mixed views about the emergence of these economies and their general impact on local economies and social conditions, those issues are not discussed here. The focus here is on the ultimate consequence of the emergence of these

com/blog/post.cfm?id=maldives-drowning-carbon-neutral-by-2009-03-16 (noting that because of the fear of rising sea levels, the Maldives plan to go carbon-neutral).

⁹ See, e.g., Ruwantissa Abeyratne, *What Really Is State Sovereignty?*, Sri Lanka Guardian (Oct. 12, 2011), <http://www.srilankaguardian.org/2011/10/what-really-is-state-sovereignty.html> (“Sovereignty in international law is the right to exercise the functions of a State to the exclusion of all other States in regard to a certain area of the world.”).

¹⁰ See Jan Aart Scholte, *Civil Society and Sovereignty in a Post-Statist Circumstance*, in RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA? 331, 345 (Trudy Jacobsen et al. eds., 2008) (explaining how the Westphalian Pact enabled democratic sovereign states to guarantee their democratic credentials); Daniel Philpott, *Westphalia, Authority, and International Society*, in SOVEREIGNTY AT THE MILLENNIUM 144, 160 (Robert Jackson ed., 3rd ed. 1999) (“Westphalia remains the most significant resolution in sovereignty to date. It revised all three facets of authority, and established constitutional authority in the form of the sovereign states system.”).

nations as key players in the global economy on climate change negotiations.

Since these nations are shaping their economies on highly carbon-intensive growth models, since their historic contribution to emissions is low, and since they are unwilling to sacrifice their opportunity for development, the essence of climate negotiations lies in balancing economic interests of nations. Developed countries have been focused therefore on finding solutions that will strike the delicate balance between economic interests and interests in mitigating climate change. To be sure, climate change—if unmitigated—can also affect economic interests, but instead of motivating action, mixed evaluations have resulted in some nations resisting emissions reduction obligations, instead of increased efforts to reduce emissions. Notably, larger emitters such as China and the U.S. have resisted binding emissions obligations.¹¹

The influence of such economic self-interest on international legal obligations mirrors the problems of another era of “globalization,” when the influence of the British Empire spanned the globe.¹² Nations now, as then, are focused on the economic and power-related aspects, sometimes to the detriment of their own citizens. At the height of the British Empire, not only was there unrest in Britain’s colonies, but, in Britain, there were those that also lost their employment and thus did not benefit from the Empire’s economic growth.¹³

The current quest for economic growth by emerging economies overshadows other equally important human interests, even in their own countries. For example, India is an emerging economy whose citizens are consistently listed among the most vulnerable populations to climate change impacts.¹⁴ Yet the Indian government is pursuing policies that favor economic growth and non-legal intervention in its climate policies over other property and livelihood-related interests of its citizens.¹⁵ More generally,

¹¹ Peter H. Koehn, *Underneath Kyoto: Emerging Subnational Government Initiatives and Incipient Issue-Bundling Opportunities in China and the United States*, 8 GLOBAL ENVTL. POLITICS 53, 55 (2008).

¹² See generally 4 EDGAR SANDERSON, *THE BRITISH EMPIRE IN THE NINETEENTH CENTURY* (London, Blackie & Son, Ltd. 1897) (providing a history of the lives of British citizens around the world during the 1800s).

¹³ See 1 *id.* at 222 (London, Blackie & Son, Ltd. 1897) (describing the food shortages affecting British citizens in Canada before and during the colonization period).

¹⁴ U.N. Framework Convention on Climate Change (UNFCCC), *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries*, 20–24 (2007) (noting that India is susceptible to flooding, erosion, mudslides and epidemics of malaria, dengue, and other vector-borne diseases during the wet season).

¹⁵ See Namrata Patodia Rastogi, *Winds of Change: India’s Emerging Climate Strategy*, 46 INT’L SPECTATOR 127, 127 (2011) (shifting climate policies in India must not be implemented at the expense of economic growth and development).

policies pursued by emerging economies and developed countries generally present near-insurmountable problems to other nations, particularly in the sub-Saharan region.

C. *Legitimacy Crisis: Climate Change and Adaptation Strategies*

The third crisis lies in the legitimacy of international response to climate change, particularly with respect to adaptation. The question of legitimacy in international law scholarship has received considerable attention in different contexts. Legitimacy is seen as an essential component of international law, as a reason why nations comply with international law¹⁶ and as a tool to increase the efficacy of international organizations.¹⁷

Whatever view one takes of legitimacy, there is presently a legitimacy crisis with respect to climate change, which is particularly evident in efforts to fund mitigation and adaptation efforts. In an effort to assist developing nations to adapt to climate change and to collect related data, negotiators established a series of financial mechanisms under the Kyoto Protocol, which was operationalized in later meetings.¹⁸ The disbursement of these funds, however, falls short of legitimacy standards for several reasons.

First, the structure for allocating funds is complex, and barring least developed countries, the allocation for developing countries is checkered.¹⁹ Second, the disbursement of funds is governed by multilateral banks, which has resulted in conflict regarding rules governing disbursement and poor participation by the recipient nation in the project selection process.²⁰ Thus, rather than countries identifying projects and receiving funds, donor institutions select projects and countries.²¹ Third, international organizations that

¹⁶ Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 712 (1988) (describing how the components of legitimacy influence states).

¹⁷ See Daniel M. Bodansky, *The Concept of Legitimacy in International Law 2* (Univ. Georgia Sch. Law, Research Paper Series, Paper No. 07-013, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033542##.

¹⁸ E.g., *Adaptation Fund*, UNFCCC, http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php (last updated Dec. 21, 2011) (describing the establishment of the Adaptation Fund, an important financial mechanism supervised and managed by the Adaptation Fund Board, with the purpose to review submission requests for funding).

¹⁹ See generally Adaptation Fund Board, *Initial Funding Priorities*, Nov. 16–18, 2009, U.N. Doc. AFB/B.8/7/Rev.1 (Oct. 29, 2009) (listing the Adaptation Fund's goals for resource allocation decisions).

²⁰ See generally INDEP. EVALUATION GRP., *TRUST FUND SUPPORT FOR DEVELOPMENT: AN EVALUATION OF THE WORLD BANK'S TRUST FUND PORTFOLIO 110 (2011)* (outlining the ways the World Bank serves the Global Environment Facility (GEF)).

²¹ See, e.g., *Adaptation Fund Board*, UNFCCC, http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/4264.php (last updated Apr. 4, 2011) (listing the functions of the Adaptation Fund Board).

disburse the funds, such as the Global Environmental Facility (GEF), have applied their own governing rules for providing aid and therefore, required developing nations to propose projects that bear “global benefits” and not only “local benefits.”²² Such requirements are prima facie illegitimate,²³ especially when one considers that these countries are paying the price for a problem that was caused by a few countries that were pursuing developing activities for *their* national benefit. Fourth, even though nations recently pledged \$100 billion per year starting in 2020, for both mitigation and adaptation activities, it is unclear whether and how these nations are going to meet their goals.²⁴

To be fair, since the COP-16 meeting in Cancun and the COP-17 meeting in Durban, efforts are underway to reduce discrepancies in the financing system. A special committee, comprised of developing countries’ representatives, that was established at COP-16 to create a more transparent system for fund disbursement²⁵ provided its first report in Durban.²⁶ The governance mechanism, however, requires fine-tuning. Even if a more transparent and balanced system is eventually established, the management of internal problems, such as corruption and unaccountable domestic administration of funds, will require close international scrutiny.

Missteps in the generation and administration of vast amounts of funds will mean further weakening of legitimacy of the international legal order governing climate change. This legitimacy concern represents a looming crisis, because failure to properly manage funds could devastate nations—both donors and recipients—even if for different reasons.

III. CONCLUSION

The three crises discussed briefly in this thought piece can be meaningfully addressed by nations. However, to do so, nations must consider the fundamental purpose of not only international law, but law itself. Even if

²² See Nicholas Van Praag, *The Global Environment Facility: Instrument Establishing*, 33 I.L.M. 1273, 1286 (1994) (outlining the way funds are allocated and trustee responsibilities); see also Sophie Smyth, *Collective Action For Development Finance*, 32 U. PA. J. INT’L L. 961, 993 (addressing NGO concerns with the World Bank’s role in financing projects).

²³ DEV. CTR. OF THE ORG. FOR ECON. CO-OPERATION & DEV., FINANCING DEVELOPMENT 2008: WHOSE OWNERSHIP? 12 (2008) (“[E]xternally imposed democratic processes may be regarded as an illegitimate interference by donors in national affairs.”).

²⁴ U.N. Secretary-General, *Report of the Secretary-General’s High-Level Advisory Group on Climate Change Financing* 3, U.N. Doc. 10-63081 (Nov. 5, 2010).

²⁵ See RICHARD K. LATTANZIO, INTERNATIONAL CLIMATE CHANGE FINANCING: THE GREEN CLIMATE FUND (GCF) 6 (2011) (stipulating the terms of the formation of the Transitional Committee).

²⁶ Green Climate Fund, Rep. of the Transitional Committee, 17th Sess., annex II, Draft decision-/CP.17 (advanced unedited version) (on file with author).

technically and mechanically achievable, the separation of morality from law is in many ways central to the present crisis in international law regarding climate change. If one is to hope that crises will provide opportunities to be innovative and courageous, one must equally hope that at least a loose sense of justice enters the negotiations.

By not carefully considering the different interests of citizens in discussing emissions reductions, states have obscured the impact of fundamentally changed nature of this global society in addressing global collective problems. Disparities within nations are now echoed across nations—winners and losers can be found both in developed and developing nations. Thus, even if a few wealthy countries may have contributed to the problem initially, not all citizens within developed countries engage in highly carbon-intensive activities. Similarly, not all citizens in emerging economies pursue a low-carbon intensive lifestyle. These disparities call for more innovative solutions within the domestic context and must be supported through international efforts. At this point, if one has to be hopeful about the role of international law in addressing climate change, one must be guided as much by moral compunctions as by any other alleged self-interest.