

The promotion of regional environmental security and Africa's common position on climate change

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Summary

The African continent is vulnerable to the consequences of climate change. Climate change poses a serious threat to peace and security on the African continent since it may, for instance, result in competition for and conflict about scarce resources. The capacity to adapt may reduce potential conflict, but there are various constraints on the capacity of African countries. Thus, support for climate change adaptation is essential. Africa may increase their adaptive capacity through international negotiations, but African states lack the resources to pursue this goal. The African Union has therefore facilitated the establishment of a common African position on climate change aimed at international climate change negotiations. Accordingly, the main aim of the article is to discuss the pursuit of the enhancement of adaptive capacity and therefore environmental security of African states through Africa's common position on climate change.

1 Introduction

All of Africa is very likely to warm during this century ... The warming is very likely to be larger than the global, annual mean warming ...¹

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¹ Intergovernmental Panel on Climate Change IPCC Fourth Assessment Report Working Group I Report (2007) 866 <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1-chapter11.pdf> (accessed 31 March 2010).

The continent of Africa is warmer than it was 100 years ago.² During the twentieth century, an average warming of 0,5 degrees Celsius has occurred on the continent. Climate variability and change will have profound effects on water accessibility and water demand, the agricultural and health sectors, energy use, coastal zones, tourism, settlements, infrastructure, and aquatic and terrestrial ecosystems.³ The African continent, in particular the sub-Saharan region, is the most vulnerable of all regions to the consequences of climate change.⁴ Climate change may have various negative consequences on the African continent. The effects of climate change may hamper the achievement of the Millennium Development Goals⁵ and the development of African states.⁶ It is also becoming clear that the effects of climate change threaten the enjoyment of a range of human rights, such as the rights to life, adequate food, water, health, adequate housing and self-determination.⁷ Thus, climate change may contribute to the further marginalisation⁸ of the African continent.

The African contribution to climate change is negligible since most African states' emissions are low. African states had contributed merely 3,6 per cent of global greenhouse gas emissions by 2000 and the *per capita* contributions from most African states remain small.⁹ An exception is South Africa,¹⁰ which has one of the highest emissions in the

² M Hulme *et al* 'Global warming and African climate change: A reassessment' in PS Low (ed) *Climate change and Africa* (2005) 29-40.

³ IPCC Fourth Assessment Working Group II Report (n 1 above) 444.

⁴ IPCC Fourth Assessment Working Group II Report (n 1 above) 443.

⁵ GA/RES/55/2 of 18 September 2000.

⁶ IPCC Fourth Assessment Working Group II Report (n 1 above) 450.

⁷ Resolution 7/23 of the United Nations Human Rights Council recognises the link and requests the United Nations High Commissioner for Human Rights to conduct a study on this relationship. In terms of Resolution 10/4, the Council decides to hold a panel discussion on the relationship between climate change and human rights. See the Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General. Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, A/HRC/10/61 of 15 January 2009 <http://www2.ohchr.org/english/issues/climatechange/index.htm> (accessed 31 March 2010). See, for a general overview on the relationship between climate change and human rights, S Humphreys *Climate change and human rights: A rough guide* (2007).

⁸ U Schuerkens 'Transformation of local socio-economic practices in a global world' in U Schuerkens (ed) *Globalisation and transformation of local socio-economic practices* (2008) 8.

⁹ Africa Environment Outlook 2 *Our environment, our wealth* (2006) 59. It should, however, be borne in mind that African air pollution is increasing and emissions may rise.

¹⁰ S Åke Bjørke (ed) *Vital climate graphics Africa: The impact of climate change* (2002) 14. See Greenhouse Gas Inventory South Africa 1990 to 2000. <http://www.pmg.org.za/files/docs/090812greenhouseinventory.pdf> (accessed 31 March 2010).

developing world.¹¹ It is therefore evident that Africa has not contributed significantly to the threat that it faces.

Climate change also poses a serious threat to peace and security on the African continent since it has the potential to exacerbate competition and conflict concerning scarce natural resources.¹² The capacity to adapt may reduce potential conflict. However, various constraints on the adaptive capacity of African states exist, such as poor governance and underdevelopment. The limited capacity of African states to respond to climate change, coupled with the dependence of citizens on natural resources¹³ for their livelihood, makes it essential for African states to access assistance for climate change adaptation. Adaptive capacity and adaptation thus emerge as critical areas for consideration on the continent.¹⁴ The fact that African states have not contributed to the problem therefore does not imply that African states may remain passive. African states are among the most vulnerable and have the most to lose. Thus, capacity building pursuant to adaptation can contribute to the prevention of further insecurity on the African continent.

African states can pursue adaptive capacity through international negotiations with developed states. Individual African states, however,

¹¹ Subsidiary Body for Implementation The Sixth Compilation and Synthesis of Initial National Communications from Parties not Included in Annex I to the Convention <http://unfccc.int/resource/docs/2005/sbi/eng/18a02.pdf> (accessed 31 March 2010). South Africa ranks in the top 20 greenhouse gas emitters (1,8% of global emissions) and is responsible for 42% of Africa's emissions <http://www.africancarbontrust.org/> (accessed 31 March 2010).

¹² O Brown *et al* 'Climate change as the "new" security threat: Implications for Africa' (2007) 83 *International Affairs* 1141-1151. The notion of 'environmental security' has gained acceptance among international lawyers. 'Environmental security' refers first to the maintenance of an ecological balance, which is necessary to sustain resource supplies in life-support systems. Second, it includes the prevention and management of conflict over scarce or degraded resources. J Brunnée & SJ Toope 'Environmental security and freshwater resources: A case for international ecosystem law (1994) 5 *Yearbook of International Environmental Law* 46; J Brunnée and SJ Toope 'Environmental security and freshwater resources: Ecosystem and regime building' (1997) 91 *American Journal of International Law* 26-59; G Handl 'Environmental security and global change: The challenge to international law' (1990) 1 *Yearbook of International Environmental Law* 3. See also J Brunnée 'The role of international law in the twenty-first century: Environmental security in the twenty-first century: New momentum for the development of international environmental law?' (1995) 18 *Fordham International Law Journal* 1742. The second dimension emphasises the traditional dimension of security. See N Schrijver 'Natural resource management and sustainable development' in TG Weiss & S Daws (eds) *The Oxford handbook on the United Nations* (2007) 592. Conflicts concerning resources are a particular problem. Security Council Resolution 1807 of 2008, eg, recognises the link between the illegal exploitation of natural resources and the fuelling and exacerbating of conflicts in the Great Lakes region of Africa. See, for the latest authoritative legal contribution pertaining to environmental security, (2008) 19 *Oxford Yearbook of International Environmental Law*.

¹³ Africa Environment Outlook 2 (n 9 above) 36-38.

¹⁴ As above.

lack the capacity and bargaining power to pursue their interests at climate change negotiations. The African Union (AU) as a regional organisation has facilitated co-operation pursuant to a common African position on climate change with the goal of strengthening the voice of the African continent pertaining to negotiations. The Conference of the Parties in Copenhagen (COP 15),¹⁵ for instance, presented the African continent with an opportunity to articulate a common position on climate change, which has the potential to pursue adaptive capacity and therefore further environmental security.

It is accordingly the aim of this article to discuss the pursuit of the enhancement of adaptive capacity of African states through a common position on climate change. The first section of the article reflects briefly on the international climate change regime and the situation of Africa. The second section deals with the lack of a unitary African approach towards climate change. Regionalisation as a response to the marginalisation of Africa receives attention in the third section of the article. I address the deliberations of the AU pursuant to a common position on climate change, and this is followed by a critical evaluation of the common position. The last section presents a brief reflection on the Copenhagen accord. I conclude with a few general remarks.

2 The climate change regime

The United Nations (UN) Framework Convention on Climate Change of 1992 (UNFCCC) acknowledges the particular situation of African states and the importance of adaptation for the continent.¹⁶ Article 4(4) of the UNFCCC states:

The developed country parties and other developed parties included in Annex II shall also assist the developing country parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.

In accordance with the common but differentiated responsibility principle,¹⁷ African states did not incur any emission reduction targets

¹⁵ COP 15 of the United Nations Framework Convention on Climate Change took place 7-18 December 2009.

¹⁶ See art 4(3), read with arts 4(1)(e) & 4(4). These articles state that developed states shall provide new and additional financial resources to meet the agreed full costs of adaptation by developing states, especially African states and other that are particularly vulnerable to climate change.

¹⁷ See art 3(1) of the UNFCCC. W Scholtz 'Different states, one environment: A critical southern discourse on the common but differentiated responsibilities principle' (2008) 33 *South African Yearbook of International Law* 113-136.

in terms of the Kyoto Protocol of 1997.¹⁸ The climate change regime provides for various differential treatment provisions, which acknowledge the situation of developing states.¹⁹ All states, including those in Africa,²⁰ have certain general obligations²¹ in terms of the climate change regime, such as the establishment of national inventories of anthropogenic emissions as well as reporting obligations.²² These states also have to formulate and implement national programmes to mitigate climate change by addressing anthropogenic emissions and adaptation measures.²³ African states also are required to 'take climate change considerations into account' in their relevant social, economic and environmental policies and actions.²⁴

The climate change regime is not static. The first commitment period in terms of the Kyoto Protocol is restricted to 2012.²⁵ In November 2005, the 11th meeting of the Conference of the Parties to the UNFCCC (COP 11) convened to consider the post-2012 period.²⁶ It is important that African states ensure that their needs concerning adaptive capacity receive attention during the post-2012 period. It should be borne in mind that industrialised states have in general proved to be reluctant to play a leading role in terms of the climate change regime.²⁷ It is crucial for African states to articulate their needs in order to strengthen their adaptive capacity through negotiations.

¹⁸ The Kyoto Protocol, which was adopted under art 17 of the Convention, follows the blueprint of the UNFCCC. Art 3(1) of the Protocol obliges parties included in Annex I of the UNFCCC to ensure, individually or jointly, that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases included in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B with a view to reducing their overall emissions of such gases by at least 5% below 1990 levels in the commitment period 2008-2012.

¹⁹ L Rajamani *Differential treatment in international environmental law* (2006) 176.

²⁰ Art 4(1)(e) acknowledges the particular vulnerability of Africa and the need for adaptation to climate change.

²¹ Art 4. In terms of art 4(3), developed country parties shall provide new and additional financial resources to assist developing states to fulfil their obligations.

²² Arts 4(1)(a) & 4(2) read with art 12.

²³ Art 4(1)(b).

²⁴ Art 4(1)(f).

²⁵ See art 3(1) read with sub-art (9) of the Kyoto Protocol. See also arts 15 & 17 of the UNFCCC.

²⁶ Art 3(9) states that commitments for subsequent periods are to be determined through the Conferences of the Parties (COPs). See, for a discussion of the onset of the post-2012 process, C Bausch & M Mehling "'Alive and kicking": The first meeting of the parties to the Kyoto Protocol' (2006) 15 *Review of European Community and International Environmental Law* 196.

²⁷ See arts 3(1) & 4(1) of the UNFCCC. See also J Gupta 'Leadership in the climate regime: Inspiring the commitment of developing states in the post-Kyoto phase' (1998) 7 *Review of European Community and International Environmental Law* 180-190.

3 The lack of an African position

African states have previously failed to articulate an African position during the UNFCCC negotiations.²⁸ Mumma is of the opinion that this does not mean that Africa has not taken a stand on certain issues.²⁹ The problem is that Africa's stand is one of solidarity with the position of G77 states. The grouping together of African states with G77 states means that extremely under-industrialised African states are lumped together with industrialising states, such as India and China that emit a lion's share of global greenhouse gases. A possible reason for the grouping is the belief of smaller states that they do not have the power to negotiate with developed states and that it is therefore advantageous to co-operate with China and India.³⁰ The problem is, however, that the grouping results in the failure of African states to articulate the distinct interests of the continent.³¹ Gray and Gupta also discuss Africa's climate change negotiating history and distinguish two periods: the pre-1996 and post-1996 periods.³² During the pre-1996 period, Africa was 'more or less swept into the negotiating process', whereas the post-1996 period was characterised by an increasing awareness and preparatory work prior to the COP-meeting.³³ In general, however, African government participation has had little impact on the outcome of the negotiations and constituted a 'muted voice' during negotiations.³⁴ Africa lacks the necessary expertise to develop

²⁸ A Mumma 'The poverty of Africa's position at the climate change negotiations' (2000-2002) 19 *UCLA Journal of Environmental Law and Policy* 198. Mumma dissects the African Common Position on the Clean Development Mechanism, Paper 1: Uganda (on behalf of the African Group), UNFCCC COP, 4th session, FCCC/CP/1998/MISC 7/Add 2 (1998) in support of his argument. See 199-202. See also AM Halvorssen 'The Kyoto Protocol and developing states – The clean development mechanism' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 366.

²⁹ Mumma (n 28 above) 199-202.

³⁰ W Gerber 'Defining "developing country" in the Second Commitment Period of the Kyoto Protocol' (2008) 31 *Boston College International and Comparative Law Review* 334.

³¹ This situation also arises in the instance where African states are grouped together under the banner of a common African negotiating position, especially in relation to climate change. South Africa has very different interests from Lesotho or Madagascar. In this sense, a common position does not necessarily solve the problem of asymmetry. However, the pursuit of a regional common position may group states that have more aligned common interests based on shared problems and values. In general, African states have characteristic problems. The G77 consists of 130 members that exhibit vast differences and interests. In various instances, ideological considerations are the only glue that binds the states; <http://www.g77.org/doc/> (accessed 31 March 2010). Thus, the African forum presents a platform for co-operation based on more optimal common interests, which does not imply that asymmetry does not exist.

³² KR Gray & J Gupta 'The United Nations climate change regime and Africa' in B Chaytor & KR Gray *International environmental law and policy in Africa* (2003) 75.

³³ As above.

³⁴ As above.

and articulate a common position at negotiations and it is therefore of particular importance that the capacity of African negotiators be increased.³⁵

Furthermore, existing issues and interests on the continent have impeded the establishment of a common position on climate change.³⁶ Oil-producing states fear a shrinking of oil exports, while sub-Saharan states experience desertification because of climate change. Coastal states are concerned about the shrinking of coastlines and diminishing fish stocks. However, issues that serve as common ground for a united front are the vulnerability of African states, their lack of responsibility for the problem and their lack of resources to address it. It is important to use the latter shared concerns as a basis for co-operative measures regarding climate change.³⁷

4 Regional efforts towards a common position concerning a common concern

We must all accept that the African Union is the organisation in which the common good of the Continent is advanced and promoted. This will require the acceptance by us all to act in a manner that balances the collective interest of the continent over individual national interests.³⁸

Individual African states³⁹ are unable to enhance their adaptive capacity through international negotiations. It is therefore important that African states co-operate in order to increase their collective bargaining power during international climate change negotiations. Further, capacity building concerning a common vision is crucial in order to advance

³⁵ Mumma (n 28 above) 202. See also para 7 of the Strategic Plan to Build Africa's Capacity to Implement Global and Regional Environmental Conventions (Annex 1 to the Action Plan of the Environment Initiative of NEPAD).

³⁶ Strategic Plan (n 35 above) 76-77.

³⁷ This means that it is important to focus on the commonalities in order to overcome the obstacles posed by differential interests. It does not imply that plural interests disappear.

³⁸ Statement of the outgoing Chairperson of the Executive Council of the Ministers of the AU, Nkosazana Clarice Dlamini Zuma (6 July 2003) [http://www.africa-union.org/Official_documents/Speeches_&_Statements/other/Dr%20Zuma%20Prime%20minister\(South%20Africa\)_%20July%206%20Maputo.htm](http://www.africa-union.org/Official_documents/Speeches_&_Statements/other/Dr%20Zuma%20Prime%20minister(South%20Africa)_%20July%206%20Maputo.htm) (accessed 31 March 2010).

³⁹ It is important to bear in mind that the colonial scramble resulted in the fragmentation of Africa. Thus, the colonial legacy bequeathed the continent with mini-states with small populations, miniscule internal markets and a lack of infrastructure. SKB Asante *Regionalism and Africa's development expectations, reality and challenges* (1997) 28.

an articulate African position.⁴⁰ Regional integration⁴¹ can facilitate the strengthening of its bargaining power, which may offer greater voting power to African states.⁴² It should be borne in mind that Africa is the largest negotiating bloc⁴³ as it represents more than 25 per cent of the parties to the UNFCCC.⁴⁴ Regional integration may also serve as a vehicle for consensus building concerning common objectives. A common objective in this particular instance will be the threat to the African continent posed by climate change. This imminent threat is a catalyst which sparks a common position on climate change and must spawn the required regional legal framework to address the problem. Regional arrangement measures may provide a framework for co-operation on shared resources (in this particular instance the atmosphere) and shared problems (such as the threat of climate change).⁴⁵ Regional co-operation may also facilitate the pooling of resources pursuant to an enhancement of capacity and expertise on a common position.

African leaders view regional integration as a response to the challenges of globalisation and the marginalisation of the African

⁴⁰ Expanding capacity in order to establish and advance the interest of Africa concerning climate change must form part of a holistic strategy to address the woes of Africa. It is important to promote the interests of the African continent as a whole and not merely the governing elite that focuses on self-preservation. In this regard, the promotion of good governance on the continent may create a more accountable system that responds to the needs of the people, which could break the culture of authoritarianism that impairs the mobilisation of African resources pursuant to solutions. See AP Mutharika 'Some thoughts on rebuilding African state capability' (1998) 76 *Washington University Law Quarterly* 285.

⁴¹ Integration refers to a process where the economies of states merge into a regional economy. R Davies 'The case for economic integration in Southern Africa' in PH Baker & A Boraine (eds) *South Africa and the world economy in the 1990s* (1993) 217. See also M Lundahl & L Petersson 'Economic integration efforts in Southern Africa' in M Lundahl (ed) *Globalisation and the Southern African economies* (2004) 92. See, however, A Smith 'The principles and practice of regional economic integration' in V Cable & D Henderson (eds) *Trade blocs? The future of regional integration* (1994) 17.

⁴² RJ Langhammer & U Hiemenz *Regional integration among developing states: Opportunities, obstacles and options* (1990) 9-10.

⁴³ See, on the role of negotiating blocs and climate change, OR Young *International governance: protecting the environment in a stateless society* (1994) 38. See, for a discussion of the potential dangers of blocs, D Snidal 'Endogenous actors, heterogeneity and institutions' in RO Keohane & E Ostrom (eds) *Local commons and global interdependence: Heterogeneity and co-operation in two domains* (1995) 66.

⁴⁴ Gray & Gupta (n 32 above) 75.

⁴⁵ Economic Commission for Africa *Accelerating Regional Integration in Africa* Item 1. Thus, regional integration is a multidimensional process that also includes political and security dimensions; Asante (n 39 above) 7. The first wave of regionalism occurred during the 1950s and primarily related to economic integration. The second wave began by mid-1980. For a theoretical discussion concerning regionalism, see L Fawcett & A Hurrell *Regionalism in world politics: Regional organisations and world order* (1995) 37-73.

continent.⁴⁶ African states previously experimented with the idea of pan-African regional co-operation pursuant to common interests.⁴⁷ Heads of State established the Organisation of African Unity (OAU) in May 1963 in Addis Ababa. The eradication of colonialism was one of the most important purposes of the OAU.⁴⁸ Different opinions existed on the level of economic integration and political unity that states had to pursue. The OAU applied a policy of non-intervention and as such did not succeed in its efforts to influence the policies of its members.⁴⁹ In effect, the OAU was a 'toothless talk shop'. With the end of the Cold War and the fall of apartheid, the opportunity presented itself to reform the OAU.⁵⁰

The OAU Assembly of Heads of State and Government convened on 8 and 9 September 1999 in Sirte, Libya, to establish the AU.⁵¹ The Constitutive Act of the AU was signed on 11 July 2000 in Lomé, Togo, and entered into force on 26 May 2001. The AU was officially inaugurated on 9 July 2002 in Durban, South Africa.

The AU emerged in the context of globalisation and was established to confront the various challenges⁵² faced by the continent.⁵³ The objectives of the AU are *inter alia* to accelerate political and socio-economic integration;⁵⁴ to promote peace and security;⁵⁵ democratic principles

⁴⁶ M Spicer 'Globalisation, regional integration, economic growth and democratic consolidation' in JB Macedo & O Kabbaj *Regional integration in Africa* (2002) 163-170; T Murithi *The African Union: Pan-Africanism, peacebuilding and development* (2005) 5; M Ndulo 'The need for harmonisation of trade laws in SADC' (1996) 4 *African Yearbook of International Law* 222.

⁴⁷ C Heyns *et al* 'The African Union' (2003) 46 *German Yearbook of International Law* 252-283.

⁴⁸ Art 2(1) contains the five purposes of the OAU.

⁴⁹ Murithi (n 46 above) 26.

⁵⁰ Heyns *et al* (n 47 above) 259.

⁵¹ CAA Packer & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365-379; T Maluwa 'The Constitutive Act of the African Union and institution building in post-colonial Africa' (2003) 16 *Leiden Journal of International Law* 157-170.

⁵² Africa is the world's poorest and most underdeveloped continent. The African continent is characterised by deadly diseases, governments that commit serious human rights violations, military conflict, grinding poverty, illiteracy, malnutrition and inadequate water supply and sanitation, as well as poor health and environmental degradation. The bottom 25 ranked nations of the UN's Human Development Report of 2003 are all from Africa. It is, in particular, the sub-Saharan region that displays underdevelopment and extreme poverty. An estimated 40% of the population live on less than \$1 a day. This region accounts for less than 2% of world trade and global GDP. The African continent therefore is in dire need of development in order to better the lives of its people. Human Development Index of the Human Development Report 2003 Millennium Development Goals: A compact among nations to end human poverty <http://hdr.undp.org/en/reports/global/hdr2003/> (accessed 31 March 2010). See in this regard S Naidu & B Roberts *Confronting the region: A profile of Southern Africa* (2005) 47.

⁵³ See the Preamble and art 3 of the Constitutive Act of the AU.

⁵⁴ Art 3(c).

⁵⁵ Art 3(f).

and good governance;⁵⁶ human and peoples' rights;⁵⁷ sustainable development⁵⁸ and 'co-operation in all fields of human activity to raise the living standards of African peoples'.⁵⁹

The AU is the appropriate regional organisation to facilitate the development of a common African position on climate change.⁶⁰ This is in line with the objectives of the AU amongst others to promote and defend African common positions;⁶¹ establish the required conditions to enable the African continent to take its rightful place in international negotiations;⁶² to encourage international co-operation;⁶³ and to promote sustainable development.⁶⁴ It is accordingly necessary to reflect briefly on the development of the African common position and to analyse this position.

The Action Plan of the Environment Initiative of the New Partnership for Africa's Development (NEPAD) affirms the concerns of Africa regarding climate change, since it is one of eight priority programmes.⁶⁵ Further, the AU Assembly made important decisions that sparked the development of a common position on climate change. The 8th ordinary session instructed members and Regional Economic Communities (RECs) to integrate climate change in their respective development programmes.⁶⁶ The 12th session of the Assembly in 2009 approved the Algiers Declaration on Climate Change, which is to serve as the platform for the common position of African states during the COP

⁵⁶ Art 3(g).

⁵⁷ Art 3(h).

⁵⁸ Art 3(j).

⁵⁹ Art 3(k). Furthermore, the establishment of an African Economic Community is a priority of the AU as this is viewed as a mechanism to promote the socio-economic development of the continent. Regional Economic Communities (RECs), such as the Southern African Development Community, constitute building blocks for the achievement of the objectives of the AU. See art 3(l) of the Act. The AU serves as an example of a multidimensional process of regional integration.

⁶⁰ See, for a discussion on a common position concerning natural resources in the context of regional integration, C Ayangafac 'Utilising the management of natural resources to forge a union government for Africa' in T Murithi (ed) *Towards a union government for Africa. Challenges and opportunities* (2008)161-170.

⁶¹ Art 3(d).

⁶² Art 3(i).

⁶³ Art 3(e).

⁶⁴ Art 3(j).

⁶⁵ <http://www.nepad.org/2005/files/documents/113.pdf> 29 (accessed 31 March 2010).

⁶⁶ Assembly of the AU, 8th ordinary session, 29-30 January 2007, Addis Ababa, Ethiopia, Assembly/AU Dec 134/(VIII) Decision on Climate Change and Development in Africa Doc Assembly/AU/12/(VIII). See Item 5. See also the AU Assembly/AU Dec 4/(VIII) Declaration on Climate Change and Development. The Sirte Declaration also expresses the concern of the Ministers concerning the threat that climate change poses to the African continent; 10th session of the African Ministerial Conference on the Environment, 29-30 June 2004, Sirte, Libya, Sirte Declaration on the Environment and Development [http://www.unep.org/roa/Amcen/ Meeting_Documents/default6.asp](http://www.unep.org/roa/Amcen/Meeting_Documents/default6.asp) (accessed 31 March 2010).

negotiations.⁶⁷ Furthermore, the Assembly emphasised that global carbon trading mechanisms emerging from the COP 15 negotiations should give African states the opportunity to demand compensation for damage caused to the economies of these states by climate change.⁶⁸ The Assembly approved the decision that a single delegation should represent African states.⁶⁹ The Assembly mandated the AU Commission to work out ways in which such representation could be achieved. The Commission accordingly submitted its recommendations to the Assembly.⁷⁰ The 13th ordinary session in Sirte, Libya, *inter alia* established the Conference of African Heads of State and Government on Climate Change (CAHOSCC).⁷¹ CAHOSCC is to spearhead Africa's negotiations on climate change. The Assembly authorised the accession of the AU to the UNFCCC and Kyoto.⁷² Furthermore, the Summit urged CAHOSCC, AU ambassadors and African negotiators to make use of the approved African common position on climate change.

The African Ministerial Conference on the Environment (AMCEN)⁷³ has played an important role in the African response to climate change. The work of AMCEN is primarily based on Decision Two on Climate Change, made at its 12th session in Johannesburg. This consists of two parts: Africa's preparations for the development of a common position on climate change and a comprehensive framework of African climate change programmes.⁷⁴ The first part is concerned with the involvement

⁶⁷ Assembly of the AU, 12th ordinary session, 1-3 February 2009, Addis Ababa, Ethiopia, Assembly/AU Dec 236/XII Decision on the African Common Position on Climate Change Doc Assembly/AU/8 (XII) Add 6. See item 3.

⁶⁸ Item 5.

⁶⁹ Item 6.

⁷⁰ See Executive Council, 15th ordinary session, 24-30 June 2009, Sirte, Libya EX CL/Dec 500(XV) Decision on the Implementation of the Decision on the African Common Position on Climate Change Doc EX.CL/525(XV).

⁷¹ Assembly of the AU, 13th ordinary session, 1-3 July, Sirte, Libya Assembly/AU/Dec 257(XIII) Rev 1 Decision on the African Common Position on Climate Change including the Modalities of the Representation of Africa to the World Summit on Climate Change.

⁷² Assembly of the AU, 13th ordinary session, 1-3 July, Sirte, Libya Assembly/AU/Dec 248(XIII) Decision of the Accession of the African Union to the United Nations Framework Convention on Climate Change and the Kyoto Protocol.

⁷³ AMCEN is a specialised technical committee of the AU. AMCEN is currently discussing the harmonisation and links between itself and the AU Commission. AMCEN's mandate is *inter alia* to provide advocacy for environmental protection in Africa. Since its creation in 1995, it has fulfilled several roles, such as the development of common positions pursuant to negotiations of international environmental treaties and capacity building in the field of environmental management; <http://www.unep.org/ROA/amcen/> (accessed 31 March 2010).

⁷⁴ Decision 2 deals with the issue of climate change and *inter alia* refers to the decision of AMCEN to request the 'United Nations Programme, in collaboration with the Commission of the African Union, the secretariat of NEPAD, the United Nations Economic Commission for Africa, the African Development Bank and other relevant intergovernmental institutions to organise a series of preparatory meetings for Africa's climate change negotiators and to provide the negotiators with substantive

of negotiators from African states in regional consultative meetings⁷⁵ that must lead to the development of a common position on climate change as well as capacity building of negotiators. The second part of the deliberations of AMCEN involves sub-regional meetings of experts and negotiators aimed at a better understanding of the issues concerned with the negotiations under the UNFCCC and Kyoto Protocol and the preparation of the framework of African Climate Change programmes.⁷⁶

It is in particular the third special session of the AMCEN held in Nairobi on 29 May 2009 that marked a decisive event in the response of Africa to the threats of global climate change.⁷⁷ This meeting was significant since it was the first meeting of the African Group of Negotiators with AMCEN and the first meeting of the African High Level Expert Panel on Climate Change. The Ministers adopted the Nairobi Declaration on the African Process for Combating Climate Change,⁷⁸ which serves as a unified expression of the African continent's resolve to be part of the solution to the climate change challenge. The Declaration emphasises the major challenges and opportunities that the African negotiators face. The Declaration highlights the priorities for Africa, which include adaptation, capacity building, financing and technology development and transfer and it urges the international community to base increased support for the continent on these priorities.⁷⁹ The document affirms the importance of the adopted common position on climate change⁸⁰ and the need to establish a 'comprehensive framework of African climate change programmes'.⁸¹ AMCEN accordingly reaffirmed the

technical and policy analysis support to strengthen their preparations'. Further, the deliberations of the expert segment of the AMCEN resulted in the development of an 'indicative conceptual outline of a comprehensive framework of African climate change programmes'. This framework is based on the primary priority of adaptation and the need for mitigation, supported by finance, capacity building and technology. See the Decisions adopted by the African Ministerial Conference on the Environment and its 12th session http://www.unep.org/roa/Amcen/Amcen_Events/12th_Session_AMCEN/index.asp (accessed 31 March 2010).

⁷⁵ Several regional consultations have taken place http://www.unep.org/roa/amcen/docs/AMCEN_Events/climate-change/Briefing-Phase2-ClimateChange.pdf (accessed 31 March 2010).

⁷⁶ http://www.unep.org/ROA/amcen/Projects_Programme/climate_change/default.asp?ct=SR (accessed 31 March 2010).

⁷⁷ This session was a follow-up to the 12th session held in Johannesburg, 10-12 June 2008, which also dealt with climate change.

⁷⁸ UNEP/AMCEN/12/9 <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=589&ArticleID=6199&l=en&t=long> (accessed 31 March 2010). The Executive Council has endorsed the Declaration. See 15th ordinary session of the Executive Council 24-30 June 2009, Sirte, Libya EX CL/Dec 502(XV) Decision on the Report of the African Ministerial Conference on the Environment (AMCEN) Special Session on Climate Change Doc EX CL/519(XV).

⁷⁹ See eg item 3.

⁸⁰ See items 1 & 2.

⁸¹ See item 34. This is in line with art 4(1)(b) of the UNFCCC.

Conceptual Framework of African Climate Change Programmes.⁸² It is further interesting to note that the Declaration emphasises the resolve of AMCEN to integrate adaptation measures into national and regional development plans, policies and strategies, where appropriate, in order to ensure adaptation to climate change in such areas as the environment and energy security.⁸³

The Nairobi meeting also resulted in the updated Algiers Declaration,⁸⁴ which served as a reference document for the African negotiators at the AWG-KP9⁸⁵ and the AWG-LCA 6⁸⁶ held in Bonn from 1 to 12 June 2009.

5 Common African position on climate change

This document is based on the pillars of the Bali Action Plan,⁸⁷ namely, adaptation, mitigation, financing and technology transfer. It embodies the shared vision⁸⁸ of Africa concerning climate change, which emphasises that a climate regime must be 'inclusive, fair and effective' and that it should recognise that a solution to the problem will only be

⁸² The Decision on the African process for combating climate change emphasises that 'Africa's priorities are to implement climate change programmes in such a way as to achieve sustainable development'. UNEP/AMCEN/12/9, annex II.

⁸³ See item 23.

⁸⁴ Paper 2: Algeria on behalf of the African Group, AWG-LCA 6, FCCC/AWGLCA/2009/MISC 4 (Part I). The initial Algiers declaration served as a reference document for African negotiators at COP 14/CMP 04 held in Poznan, Poland, in December 2008. Prior to this document, a draft African position paper for COP 12 and COP/MOP 2 was the outcome of a meeting organised by AMCEN and UNEP in September, 2006 in Naivasha, Kenya.

⁸⁵ Session 9 of the *Ad Hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol. COP 11 serving as the Meeting of the Parties (CMP1) to the Kyoto Protocol established the *Ad Hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) in order to discuss future commitments for industrialised states under the Protocol. See Decision_/CMP01.

⁸⁶ Session 6 of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention (AWG-LCA). This subsidiary body was established at COP 13 and is responsible to conduct a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term co-operative action, now, up to and beyond 2012, in order to reach an agreed outcome at COP 15. See Bali Action Plan, FCCC/CP/2007/6/Add 1 1, Decision 1/CP 13.

⁸⁷ The COP 13 of the UNFCCC and the COP/MOP 3 were held in Bali in 2007. The conference delivered a 'road map' that includes the Bali Action Plan on how to reach a post-2012 agreement before the expiry of the first commitment period of 2008-2012. See, for a discussion of the Bali Action Plan, L Rajamani 'From Berlin to Bali and beyond: Killing Kyoto softly?' (2008) 57 *International and Comparative Law Quarterly* 909-939; C Spence *et al* 'Great expectations: Understanding Bali and the climate change negotiating process' (2008) 17 *Review of European Community and International Environmental Law* 142-153; J Depledge 'Crafting the Copenhagen consensus: Some reflections' (2008) 17 *Review of European Community and International Environmental Law* 154-165.

⁸⁸ Para 1.

possible if it is undertaken in the context of ‘developing states’ need for development space’.⁸⁹

Paragraph 2 addresses the issue of adaptation, the vulnerability of the continent and the need for international co-operation in this regard. The common position calls for the establishment of an Adaptation Action Programme that must be country-driven. This Programme must provide ‘scaled-up new, additional, adequate, predictable and sustainable financial, technological and capacity building support’ to address the key areas of the programme. The target for financial adaptation support to developing states should be at least \$67 billion *per annum* by 2020. Adaptation as such is not a controversial issue since consensus exists that it should be a priority in the post-2012 regime.⁹⁰ The World Bank estimates that the cost of adaptation will be \$75 to \$100 billion *per annum* for the period 2010-2050.⁹¹ The problem is the financing⁹² of adaptation in developing states by developed states. Several complex questions arise concerning the sources of funding and the mechanisms thereof. It is most probable that the issue of adaptation may be stalled by the lack of agreement on financial contributions. This may further deepen the divide between developing and developed states. The Adaptation Fund⁹³ serves as an example. It is estimated that the Fund will have approximately \$500 million available until 2012.⁹⁴ Furthermore, the current financial economic crisis may have a negative impact on the financial capacity of developed states to provide further funding for adaptation.

In relation to mitigation, the document proposes the maintenance of a ‘firewall’ between mitigation actions by developed states and devel-

⁸⁹ Art 2 of the UNFCCC prescribes that the stabilisation of greenhouse gases should be achieved within a period to enable *inter alia* ‘economic development to proceed in a sustainable manner’.

⁹⁰ Negotiating text of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention, FCCCA/AWGLCA/2009/8; Revised negotiating text of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention, FCCC/AWGLCA/2009/INF 1; Reordering and Consolidation of text in the Revised Negotiating text of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention, FCCC/AWGLCA/2009/INF 2 and Non-paper 31 of 20 October 2009 of the Contact Group on Enhanced Action on Adaptation and Its Means of Implementation. Refer also to Decision 1/CP.10, FCCC/CP/2004/10/Add 1 and FCCC/CP/2005/5/Add 1, Decision 1 CP 11.

⁹¹ <http://beta.worldbank.org/content/economics-adaptation-climate-change-study-homepage> (accessed 31 March 2010).

⁹² On the issue of financing: MJ Mace ‘Funding for adaptation to climate change: UNFCCC and GEF developments since COP-7’ (2005) 14 *Review of European Community and International Environmental Law* 225-246.

⁹³ Art 12.8 of the Kyoto Protocol. See para 8 of the FCCC/CP/2001/13/Add 1 Decision 5/CP 7. See also FCCC/KP/CMP/2008/11/Add 2, Decision 1/CMP 4.

⁹⁴ <http://climate-l.org/guest-articles/ga25.html> (accessed 31 March 2010). On 31 August 2009, the Fund held in trust \$15,48 million. See Status of Resources of the Adaptation Trust Fund, AFB/B 7/10.

oping states.⁹⁵ Subsequent paragraphs clarify this point of departure. Paragraph 1(b)(i) of the Bali Action Plan refers to 'measurable, reportable and verifiable nationally appropriate mitigation commitments or actions'. The reference to 'action' may be an indication that options other than commitments, such as targets, may be appropriate. This viewpoint finds support because of the import of the term 'including quantified emission limitation and reduction objectives'. The African position does not allow for this option. It clearly states that developed states have mitigation commitments and developing states mitigation actions. Thus, only developed states should incur quantified emission reduction commitments (QERCs).⁹⁶ Annex I Parties must reduce their greenhouse gas emissions by at least 40 per cent below 1990 levels by 2020 and at least 80 per cent to 95 per cent below 1990 levels by 2050.⁹⁷ In this regard, the aggregate number is for all developed states, irrespective of whether they have ratified the Kyoto Protocol or not. The ambitious targets may prove to be unacceptable for Annex I states.⁹⁸ Most Annex I states did not comply with the previous tar-

⁹⁵ Para 3. This issue relates to the two-track structure of the negotiating process under the AWG-KP and the AWG-LCA. In general, Annex I states are reluctant to accept new emission targets under Kyoto for the post-2012 period unless other major emitters accept emission commitments as well. They accordingly prefer a single new comprehensive agreement that would replace the Protocol. Developing states oppose a one-track approach and emphasise that the AWG-KP process should receive equal attention in order to make progress. They do not want to replace the established 'fire-wall' between Annex I and non-Annex I states with a new legal agreement. It must, however, be borne in mind that developing states hold different views concerning the AWG-LCA result. For instance, Brazil, South Africa, India and China (BASIC group) have demanded that developed states accept a second commitment period under Kyoto, but have opposed the establishment of a new legal agreement that addresses their emissions. Some small island states are in favour of a new legal agreement that would address the emissions of more advanced developing states. See, for a discussion in this regard, K Kulovesi & M Gutiérrez 'Climate change negotiations update: Process and prospects for a Copenhagen agreed outcome in December 2009' (2009) 18 *Review of European Community and International Environmental Law* 229-243.

⁹⁶ Para 3.1. The document uses the language of the Bali Action Plan since it refers to developing and developed states instead of Annex I and non-Annex I parties. The only reference to the latter categorisation occurs when reference is made to numerical targets. The document does not define developing and developed states.

⁹⁷ This is in accordance with the IPCC Report, which prescribes reductions of 10-40% for developed states by 2020 and 40-95% by 2050. IPCC Fourth Assessment Working Group III Report 90. The position does not state whether mitigation should be taken on a national or international level. This is in line with paragraph 1(b) of the Bali Action Plan that leaves this option open since it refers to national/international action on climate change.

⁹⁸ This was also an issue of disagreement during COP 14, which was held in Poznań. IISD Reporting Services Earth Negotiations Bulletin <http://www.iisd.ca/climate/cop14/> (accessed 31 March 2010). The African Group recently walked out from negotiations at Barcelona (AWG-KP 9 and AWG-LCA 6) to protest the 'business as usual' attitude of developed states. The African bloc complained that the industrialised states' carbon cut was too small and they refused to return until more was done by the rich nations <http://www.guardian.co.uk/environment/2009/nov/04/africa-walk-out-climate->

gets. Furthermore, future projections are pessimistic since an increase in emissions is expected.⁹⁹ The position of developed states such as the USA may also impede international consensus.¹⁰⁰ The African group refuses to differentiate between advanced developing states and developing states.¹⁰¹ However, the US has been insistent on a classification between developed, more advanced developing states and developing states. It is the position of the USA that advanced the need for developing states to adopt national mitigation strategies based on a deviation from business-as-usual emissions. In accordance with the African proposal, 'the aggregate number is for all developed states, regardless of whether they have ratified the Kyoto Protocol or not'. A refusal of developed states to agree to post-2012 commitments based on a disagreement concerning this classification may therefore further encumber other developed states with unrealistic commitments if one adheres to the African position.

In accordance with the viewpoint of the African group, developing states will not be encumbered with QERCs. The common position states that developing states 'choose from a toolbox of voluntarily registered, nationally appropriate mitigation actions (NAMA)',¹⁰² 'including sustainable development policies and measures (SD-PAMS),¹⁰³ programmatic CDM and others'.¹⁰⁴ The mitigation actions of developing states are conditional on the provision of technology, financing and capacity building in a 'measurable, reportable and verifiable' manner.¹⁰⁵ The African group accordingly sets a target of financial flows

talks-barcelona (accessed 31 March 2010).

⁹⁹ See NH Stern *The economics of climate change: The Stern Review* (2007) 201-202.

¹⁰⁰ The USA under the new administration took a u-turn on American climate change policy and returned to the negotiations in 2009. The US announced their reluctance to ratify the Kyoto Protocol since the goal that they had to commit to was unfeasible. The USA will have to make up for lost time and reduce emissions by 2012 below 1990 levels. This will prove extremely difficult. The US favours a bilateral approach under a multilateral umbrella. See US Submission on Copenhagen Agreed Outcome, AWG-LCA 6, FCCC/AWGLCA/2009/MISC 4 (Part III). See further T Skodvin & S Andresen 'An agenda for change in US climate policies: Presidential ambitions and congressional powers' (2009) 9 *International Environmental Agreements* 263-280. See also the American Clean Energy and Security Act (the Waxman-Markey Bill) <http://www.govtrack.us/congress/bill.xpd?bill=h111-2454> (accessed 31 March 2010).

¹⁰¹ This is also the position of most developing states. The issue of differentiation was rejected during COP 14.

¹⁰² It seems that no general definition of this concept exists. Various states have made proposals concerning the link between NAMAs and other mitigation mechanisms. The African group identifies two registries, namely, a registry on national actions that are nationally funded and a registry for actions with international (multilateral) support. The UNFCCC will implement MRV measures in relation to the second registry.

¹⁰³ See in this regard Submission from South Africa, Dialogue Working Paper 18, UNFCCC, Dialogue on Long-Term Co-operative Action to Address Climate Change by Enhancing the Implementation of the Convention.

¹⁰⁴ Para 3.2.

¹⁰⁵ This is in line with art 4.7 of the UNFCCC.

at \$200 billion by 2020.¹⁰⁶ Developed parties will have to report their progress through national communications.

It is interesting to compare the African position with the prescription of the actions required by developing states in the Bali Action Plan. Paragraph 1(b)(ii) refers to 'nationally appropriate mitigation actions by developing country parties in the context of sustainable development, supported and enabled by technology, financing and capacity building, in a measurable, reportable and verifiable manner'. The language in the Bali Action Plan is dubious. Does the MRV clause apply to the actions of developing states only, to the support of developed states or to both? The African position clarifies this since paragraph 3.3 explicitly states that MRV applies to mitigation actions and support.

The insistence on a 'firewall' between mitigation commitments of developed states and actions of developing states must also be understood in the context of the need of developing states for development space. However, development does not have to be unsustainable and an investment in environmentally-friendly technology may have various advantages.¹⁰⁷ It is in this regard important to recall that adaptation is the first priority for African states pursuant to their own survival. These states are not responsible for the consequences of climate change and developed states need to assist them in order to adapt to climate change. The African position makes provision for mitigation in order to cater for the industrialisation of African states. This is important for the promotion of continental sustainable development. Adaptation, however, is the primary priority pursuant to environmental security.

The African Group furthermore supports the creation of an enhanced financial mechanism as proposed by the G77 and China.¹⁰⁸ The source of funding will be developed states through the realisation of their commitment under article 4.3 of the UNFCCC. Funding will be 'new and additional' and over and above overseas development assistance. Furthermore, funding pledged outside of the Convention shall not be regarded as a fulfilment of article 4.3 obligations. In general, the financial expectations of Africa may be incompatible with the financial capability of industrialised states.

In relation to forestry, the common position is in favour of a REDD-Plus mechanism¹⁰⁹ that should accommodate 'different national circumstances and respective capabilities'. Funds should be 'adequate, predictable and sustainable' from a variety of sources, which include

¹⁰⁶ Para 3.3.

¹⁰⁷ See R Howse & MJ Trebilcock 'The free trade-fair trade debate: Trade, labour, and the environment' in JS Bhandari & AO Sykes (eds) *Economic dimensions in international law: Comparative and empirical perspectives* (1997) 224-30.

¹⁰⁸ G 77 and China Proposal Financial Mechanism for Meeting Financial Commitments under the Convention, AWG-LCA 3, FCCC/AWGLCA/2008/MISC 2/Add 1.

¹⁰⁹ This refers to the potential to reduce emissions from deforestation and forest degradation.

global carbon markets.¹¹⁰ This position allows for support from public and private resources.¹¹¹

6 Critical thoughts on a common African position¹¹²

The discussed common position of Africa raises a few general issues of importance in the context of the current discussion.

First, it is important to bear in mind that the African group is not homogeneous.¹¹³ The African group consists of oil-producing states, coastal states, island states and agricultural states that have unique interests concerning climate change. These states have different interests, which may hinder the development of a 'common interest'¹¹⁴ among African states. It is therefore difficult to establish a truly unitary position that could present the interests of all of the states on the continent. States may accordingly betray the common position in order to realise their own interests at negotiations.¹¹⁵ Unfortunately, member states of the AU exhibit a lack of commitment to real integration. These states still cling to

¹¹⁰ Para 3.2.

¹¹¹ See, for a discussion of this issue, I Fry 'Reducing emissions from deforestation and forest degradation: Opportunities and pitfalls in developing a new legal regime' (2008) 17 *Review of European Community and International Environmental Law* 166-182.

¹¹² This part of the discussion does not represent an analysis of the content of the common position since this is the concern of para 5.

¹¹³ This is not unique to the African continent. The European Union, eg, also has to grapple with asymmetry between member states, but have produced a common position on climate change and a comprehensive regulatory framework. See M Peeters 'European climate change policy: Critical issues and challenges for the future' (2005) 16 *Yearbook of International Environmental Law* 179-210. Various institutional differences, however, exist between the AU and the EU. The degree of differentiation between member states is not the same in both organisations and political will and commitment concerning co-operation often falls short in the AU. See also W Scholtz 'Environmental harmonisation in the SADC region: An acute case of asymmetry' in K Meesen *et al* (eds) *Economic law as an economic good: Its rule function and its tool function in the competition of systems* (2009) 385-397.

¹¹⁴ In the instance of climate change, the survival of humankind is the common interest of all states. States therefore need to co-operate pursuant to the common interest. The common interest of states may serve as a driving force in the creation of rules that address the common concern. For a discussion of the incorporation of common interest in the matrix of state behaviour pursuant to environmental security, see W Scholtz 'Collective (environmental security): The yeast for the refinement of international law' (2008) 19 *Oxford Yearbook of International Environmental Law* 150.

¹¹⁵ This was indeed the case during COP 15. See para 7. A discussion of state behaviour usually reflects that states pursue their own national interests. See D Armstrong *et al* *International law and international relations* (2007) 270. This statement does not imply that state interest is the sole explanation for state behaviour. See M Koskeniemi *From apology to utopia: The structure of international legal argument* (2006) 59. The pursuit of individual state interest may not be beneficial to other member states of the AU.

nationalism and pursue shortsighted self-interest. It is therefore important that African states do not merely pay lip service to the common position. Further, African states have different levels of development. South Africa serves as an example of an advanced developing country that contributes to climate change and that may have to contribute more actively to the global solution through mitigation actions. Emissions from other states are miniscule. It is possible for more powerful states, such as South Africa, to ensure that an African position is not contrary to its national interests. This results in a situation where African states (with negligible emissions) are grouped with South Africa. The situation that arises is ironic. A lack of capacity among African states necessitates a pooling of resources pursuant to a common position on climate change. This lack of capacity, however, also creates the opportunity for more powerful states to dominate the outcome of the co-operation. This means that the voices of less powerful states may be drowned through the capacity of the powerful in a regional grouping. The refusal to distinguish between advanced developing and other developing states may be to the benefit of South Africa, but from a pragmatic point of view is not of relevance to most African states. It may be based on an ideological consideration of historic responsibility that, however, does not promote the interests of African states if one considers that African states are the victims of greenhouse gasses, irrespective of whether it stems from developed or advanced developing states.

A practical illustration of the effect of the asymmetry between African states is evident in the instance of technology transfer. Clearly, South Africa does not have the same needs concerning technology transfer as Lesotho. However, the presence of South Africa can also have positive advantages since it may enhance the capacity of the African negotiators. It is therefore important to optimise the positive influence of South Africa. South Africa must assume a leading role pursuant to the interests of the African continent. Thus, African states should indeed aim to act and speak with one voice based on solidarity¹¹⁶ and acknowledge that the continent faces a threat which requires collective measures.¹¹⁷

¹¹⁶ My statement implies that solidarity, as a moral principle of international law, should form the basis for the actions of African states in this regard. This implies that states should not take into consideration only their own interests in shaping their international interests, but also those of other members or the interests of the AU, or both. This may amount to wishful thinking, but wishful thinking is required. See R Wolfrum 'Solidarity amongst states: An emerging structural principle of international law' in P-M Dupuy *et al* (eds) *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (2006) 1087-1101. Art 3(a) includes 'solidarity between the African states and the peoples of Africa' as one of the objectives of the AU.

¹¹⁷ The implication of this statement is that instances may arise where individual state interest may defer to the collective continental interest. This requires political will and commitment of member states to the objectives and principles of the AU, which needs to counter criticism that the AU is a 'mere "talk shop" for travel-loving ministers'. See J Hall 'Politics: African Union struggles to achieve concrete goals' *The New York Amsterdam News* 19-25 June 2003 2. This viewpoint adheres to the Action

Second, the existence of a common position on climate change does not mean that Africa has won the battle. Negotiators should put forward the common position of Africa in such a manner that it influences negotiations pursuant to an agreement beneficial to the African continent. This raises a few important issues. The relationship between the African group and CAHOSCC is not clear. CAHOSCC is supposed to spearhead the negotiations. It is important to ensure that this group possesses the necessary capacity in order to pursue the interests of Africa during climate change negotiations. Thus, this group should ultimately serve as a regional negotiating force of African expertise concerning climate change. In this manner, regionalism will cater for environmental security. It is therefore necessary to ensure that the common position co-ordinates the interests of member states of the AU. This means that political goodwill concerning climate change as reflected by the common position needs to be translated into concrete actions at the upcoming negotiations and beyond. The AU must be a force to be reckoned with.

Third, the second important phase concerning the deliberations of AMCEN requires action. This refers to the implementation of the African framework for climate change programmes. RECs,¹¹⁸ such as the Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS),¹¹⁹ will have to play an important role in relation to the implementation of these programmes at sub-regional level. The African continent in the past has lacked the capacity¹²⁰ for a co-ordinated implementation of environmental measures and it is important to address this issue in order to ensure that action speaks louder than words.¹²¹

Fourth, multi-stakeholder involvement concerning the response of the AU to climate change is vital to ensure that the needs of interested parties are taken into account. The enhancement of the capacity of

Plan of the Environment Initiative of the New Partnership for Africa's Development (NEPAD), which recognises that inter-African partnerships as well as partnerships between African states and the international community are key elements of a common vision pursuant to sustainable development.

¹¹⁸ See art 3(l) of the Constitutive Act of the AU.

¹¹⁹ ECOWAS has already adopted a common position on climate change <http://allafrica.com/stories/200909170199.html> (accessed 31 March 2010).

¹²⁰ See FDP Situma 'Africa's potential contribution to the implementation of international environmental law' (2000) 10 *Transnational Law and Contemporary Problems* 415.

¹²¹ It is important to recall that the AU also faces various challenges, such as funding, that may have an influence on the implementation of environmental measures. See, eg, H Richardson 'The danger of oligarchy within the pan-Africanist authority of the African Union' (2003) 13 *Transnational Law and Contemporary Problems* 255-275; D Obowu 'Regional integration, development, and the African Union agenda: Challenges, gaps and opportunities' (2003) 13 *Transnational Law and Contemporary Problems* 211-253.

regional NGOs,¹²² community organisations and research groups will ensure a constructive contribution to the implementation of frameworks in Africa.¹²³

Fifth, it is interesting to note that the common position does not make any explicit mention of the important relationship between climate change and human rights in the AU context. The impact of climate change on human rights has been explicitly recognised by the African Commission on Human and Peoples' Rights (African Commission) in its Resolution on Climate Change and Human Rights and the Need to Study its Impacts in Africa.¹²⁴ The AU Resolution 'calls on the Assembly of Heads of State and Government to take all necessary measures to ensure that the African Commission on Human and Peoples' Rights is included in the African Union's negotiating team on climate change'. It must be borne in mind that article 24 of the African Charter on Human and Peoples' Rights (African Charter) provides for the right of peoples to a 'general satisfactory environment favourable to their development'. Article 16(1) stipulates that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'. In the *SERAC* case the African Commission held, *inter alia*, that article 24 of the African Charter imposes an obligation on the state to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources'.¹²⁵ It is therefore possible to argue that member states of the AU have an obligation to take specific action in order to address climate change pursuant to human rights protection. Constructive participation at international climate change negotiations based on a common position aimed at the enhancement of adaptive capacity, mitigation and the transfer of technology and financial resources may constitute a reasonable measure to secure sustainable development. Thus, the common position on climate change may have the potential to contribute to the promotion of human rights in Africa.

Sixth, the marginalisation of the continent in the global economic and political decision-making system means that Africa in general finds it difficult to make its voice heard.¹²⁶ It is therefore possible to learn from

¹²² Climate Network Africa is an example of a Civil Society Organisation that plays an active role concerning climate change in Africa http://www.unep.org/civil_society/Registration/index2.asp?idno=2561 (accessed 31 March 2010).

¹²³ This is in line with the objective of art 3(g) of the Constitutive Act, which is to 'promote democratic principles and institutions, popular participation and good governance'.

¹²⁴ ACHPR/Res 153 (XLV09).

¹²⁵ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case) paras 52-53. See for a discussion D Shelton 'Decision regarding communication 155/96' (2003) 96 *American Journal of International Law* 937-942.

¹²⁶ Mutharika (n 40 above) 283.

the way in which the common position concerning climate change has been developed and carried forth.

Seventh, the common position provides the African continent with an opportunity to contribute to an agreement¹²⁷ on post-2012 measures to address climate change that is fair and equitable. In this manner it may ensure that the AU contributes constructively to the future development and implementation of international environmental law.

7 Copenhagen Conference¹²⁸

The Copenhagen Conference (COP 15)¹²⁹ constituted a deadline to resolve questions concerning the post-2012 climate regime.¹³⁰ The Conference, however, could not meet expectations. Instead, it resulted in the Copenhagen Accord of 18 December 2009, which reflects a political agreement. Ethiopia (on behalf of the African group) and South Africa were among the states that reached an agreement on the accord.¹³¹ The accord therefore does not represent a detailed legal Protocol pertaining to the post-2012 period.¹³² The Copenhagen Accord rather serves as the basis for further international negotiations. In this sense, it represents a point of departure rather than a final product.¹³³ This implies that the African common position will continue to fulfil an important role during upcoming negotiations at COP 16¹³⁴ and COP

¹²⁷ The deliberations of AWG-LCA 6 provided input for a negotiating text prepared by its chair (FCCC/AWGLCA/2009/8) and resulted in a revised negotiating text (FCCC/AWGLCA/2009/INF 2). See art 20(2) of the Kyoto Protocol.

¹²⁸ It is not my intention to dissect COP 15 and its outcomes in detail. I shall briefly refer to issues of relevance for the current discussion. For an analysis, see D Bodansky 'The Copenhagen Climate Change Conference: A post-mortem' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553167 (accessed 31 March 2010).

¹²⁹ COP 15 took place from 7-19 December 2009 in Copenhagen; <http://unfccc.int/2860.php> (accessed 31 March 2010).

¹³⁰ This view was reflected in the unofficial slogan for the conference, 'seal the deal'.

¹³¹ Reportedly, 29 states reached the accord. These states represent major emitters, the most vulnerable as well as least developed states. For a discussion of the Copenhagen Accord and COP 15, see L Rajamani 'Neither fish nor fowl' <http://www.cprindia.org> (accessed 31 March 2010). States may associate themselves with the accord through notification and are included in the list of states in the chapeau; http://unfccc.int/files/parties_and_observers/notifications/application/pdf/notification_to_parties_20100118.pdf (accessed 31 March 2010).

¹³² Due to objections by a group of states (led by Sudan, Venezuela and Bolivia), the COP was unable to adopt the accord. Instead the COP took 'note of' it.

¹³³ This seems to be in line with para 1 of the Bali Action Plan, which reads that the COP 'decides to launch a comprehensive process ... in order to reach an agreed outcome ...'. The inclusion of 'agreed outcome' implies that the Bali Action Plan is not prescriptive on the legal form or content of the COP 15 result.

¹³⁴ Mexico will host COP 16 during December 2010.

17¹³⁵ pursuant to the enhancement of the adaptive capacity of African states.

It is interesting to reflect on the actions of the African group during COP 15. African states boycotted negotiations on 14 December in order to compel developed nations to adopt a second round of commitments.¹³⁶ This was done in protest against the perceived efforts of the developed states to kill Kyoto. African nations' call threw the negotiations in disarray. Africa is in favour of an agreement with emission reduction targets in order to avoid the catastrophe of climate change. The real impact of this display of power is questionable, but it indicates a more active and co-ordinated negotiating partnership that pursues the interests of the continent in a forceful manner.

However, the African consensus was disrupted after Ethiopian Prime Minister Meles Zenawi, who is the co-ordinator of CAHOSCC, unilaterally departed from the common position and submitted the Joint Appeal of France and Ethiopia, Representing Africa, for an Ambitious Copenhagen Accord.¹³⁷ Sudan's chief negotiator and Chairperson of the G77, Lumumba Di-Aping, accused Zenawi of capitulating under pressure from rich states. The actions of Zenawi and the response thereto accordingly led to the demise of the common negotiating strategy of the African group.¹³⁸

The current discussion also warrants a brief reflection on the Accord. The Accord reiterates the particular vulnerability of Africa and that developed states shall support the implementation of adaptation action in developing states through 'adequate, predictable and sustainable financial resources, technology and capacity building'.¹³⁹ Developed states have committed themselves to new and additional funding 'approaching \$30 billion for the period 2010-2012 with balanced allocation between adaptation and mitigation'.¹⁴⁰ Africa will have priority access to adaptation funding. Furthermore, by 2020, developed states commit to a goal of \$100 billion, but this is linked to 'meaningful mitigation actions and transparency on implementation'. The Accord establishes the Copenhagen Green Climate Fund,

¹³⁵ South Africa will host COP 17 during December 2010.

¹³⁶ <http://www.iisd.ca/vol12/enb12455e.html> (accessed 31 March 2010).

¹³⁷ The appeal constitutes a new proposal for the negotiations and some see it as a betrayal of the African continent. The most controversial issue was the provision for a start-up fund of \$10 billion per annum for 2010-2012; <http://ecadforum.com/News/2166> (accessed 31 March 2010).

¹³⁸ The AU Assembly recently endorsed the leadership of Zenawi for COP 16 and COP 17. AU Assembly, 14th ordinary session, 31 January 2010-3 February 2010, Addis Ababa, Ethiopia, AU/Assembly/Dec 281 (XIV), Decision on the 15th Conference of the Parties to the United Nations Framework Convention on Climate Change and the Kyoto Protocol, Doc Assembly/AU/10 (XIV).

¹³⁹ Para 3.

¹⁴⁰ Para 8.

which shall operate as an entity of the financial mechanism.¹⁴¹ The commitment of the developed world seems to be a far cry from the support envisaged in the common position, which refers to \$67 billion *per annum* for adaptation and \$200 billion in support of mitigation by 2020. The MRV clause applies in relation to financial support. The Accord does refer to the establishment of a High Level Panel under the COP 'to study the contribution of the potential sources of revenue'.¹⁴² It is not clear what the exact powers of this Panel will be.

It is too early to determine whether the calls for ambitious QER targets, as reflected in the common position, will be agreed upon. The Accord specifies that industrialised states will commit to implement (individually or jointly) quantified economy-wide emission targets for 2020, to be submitted to the secretariat by 31 January 2010.¹⁴³ The MRV clause will also apply in this regard. This means that Annex I states may define their own target level and base year.

Developing states will implement mitigation actions.¹⁴⁴ The Accord therefore underwrites the distinction between the commitments of industrialised states and the national actions of developing states. Mitigation actions will be submitted to the UNFCCC secretariat. Mitigation actions that do not receive financial support will be subject to domestic MRV and states will report through national communications with provisions for 'international consultation'. The Accord makes provision for a registry for the listing of NAMAs that will receive support. Supported NAMAs will be subject to international measurement, reporting and verification in accordance with guidelines adopted by the COP. This approach is in line with the distinction that the African position makes between supported NAMAs and other actions.

The Accord also establishes a technology mechanism as called for in the common position.¹⁴⁵ The Accord calls for the immediate establishment of a mechanism in order to mobilise funds for REDD-plus from developed states.¹⁴⁶ However, it does not resolve the issue of private versus public sources.

In general, it seems that not all of the concerns of Africa as embodied in the common position have been met since no agreement has been reached on the emission targets of industrialised states. Furthermore, financial contributions clearly fall short from that required by developing states. The AU Assembly, however, recently endorsed the Accord

¹⁴¹ Para 10.

¹⁴² Para 9.

¹⁴³ The Accord makes provision for a system of 'pledge and review' for mitigation commitments and actions. For a list of QER pledges, see <http://unfccc.int/home/items/5264.php> (accessed 31 March 2010).

¹⁴⁴ Para 5. For a list of NAMA pledges, see <http://unfccc.int/home/items/5265.php> (accessed 31 March 2010).

¹⁴⁵ Para 11.

¹⁴⁶ Para 6.

and urged members to make individual submissions to the UNFCCC Secretariat.¹⁴⁷

8 Concluding remarks

Regional integration, through the AU, has the potential to facilitate co-operation pursuant to the articulation of African interests at international environmental negotiations. The aforementioned discussion of the common position on climate change indicates that regional integration can pursue much-needed adaptation through international negotiations and in this sense even promote environmental security since an enhanced adaptive capacity could curb conflicts concerning scarce resources in the context of the threats that climate change pose. However, recent practice pertaining to the common position and the actions of the African group during COP 15 indicate that the continent needs more than a 'common position on paper' in order to realise adaptive capacity through international climate change negotiations. The establishment of a common position and experiences during COP 15 provide valuable lessons and insights for future climate change negotiations. It is important that the African group learns from mistakes made during COP 15. It is unacceptable that the Ethiopian President decided to depart from the agreed position. It is even stranger that the AU Assembly subsequently endorsed his position for upcoming negotiations. Thus, heterogeneity of the group may continue to haunt these states. It is therefore important that African states aspire to the objectives and principles of the AU in order to overcome this obstacle. African states must stay committed to the agreed position and act together forcefully in order to further adaptive capacity. How will African states be able to develop and implement a comprehensive framework of African climate change programmes if they are unable to carry forth a common position?

The narrative concerning the actions of African states, however, also contains positive features. The grouping of African states based on shared vulnerability places the continent in a more powerful position which may counter marginalisation. The walk-out of African states during COP 15 supports this viewpoint. Pan-Africanism,¹⁴⁸ which is after all the underlying rationale for regional integration on the African continent, may therefore set the stage to address the threat of climate change. However, the outcome of further negotiations in 2010 and 2011 will indicate whether the fruits of pan-Africanism can amplify the voice of a marginalised continent for the well-being of its people.

¹⁴⁷ See AU Assembly (n 138 above).

¹⁴⁸ Murithi (n 46 above) 7-38.