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## The Second Annual Distinguished Lecture Florida A&M Environmental Law and Justice Symposium, November 3-4, 2011

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THE SECOND ANNUAL  
DISTINGUISHED LECTURE  
FLORIDA A&M ENVIRONMENTAL LAW  
AND JUSTICE SYMPOSIUM  
NOVEMBER 3-4, 2011

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Thank you all for being here today for this symposium. The title of this symposium is on the question of environmental justice. The question of environmental justice today must be considered in the context of sustainable development, which is the governing philosophy for the management of environmental resources at this point in time.

Sustainable development is about using resources of today without compromising the ability of future generations to use those resources. This concept has been particularly strong when we think about the future. It has not been too strong when we think about questions of justice in the context of the generations of today. In fact, one of the biggest criticisms of sustainable development is with respect to justice and equity among present generations. So for today, I would like to address the issue of equity in the context of climate change governance. As you know the international community has been striving for consensus on a protocol to manage climate change issues after 2012 when the Kyoto Protocol expires.

The concept of intergenerational equity must be considered in this regard. Implicit in the concept of intergenerational equity is the need for justice and the need to distribute benefits that arise out the use of Earth's resources in society today. But along with the concept of distribution of benefits is the question of responsibility for the management of these resources. What we have not been able to find is a formula that balances both the benefits and the responsibilities for stewardship in regard to the management of those resources. And that is what I would like to focus on today: the principle of common but differentiated responsibility.

The history of the climate change convention is well known. In 1979, the first international climate conference identified climate change as an international environmental problem. Considerable re-

search went into this problem and by 1988 there was sufficient consensus about the need for international action and the UN declared climate change as a common concern of mankind. In 1990, under the auspices of the UN General Assembly, a negotiation text for the convention of climate change was drafted. The text was presented to the parties that attended the Rio Conference on Environment and Development in June 1992 for adoption, and it entered into force in 1994 having received the required number of ratifications. Building on that international consensus, the Kyoto Protocol was adopted in December of 1997.

The objective of the UN Framework Convention on Climate Change is to stabilize greenhouse gas emissions. Article 2 states that the ultimate objective of the convention is to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Based on this objective, the Kyoto Protocol imposed certain obligations on states. Many of these obligations relate to development of national inventories, formulations of programs, and technology transfer. But the key objective that the Kyoto Protocol introduced was the reduction commitments articulated in Article 3 of the Protocol. What Article 3 provides is that certain countries are required to reduce the greenhouse gas emissions by 5% below 1990 levels by the year of 2012.

In my view, the ability to introduce these gases into the atmosphere represents activity that uses the atmosphere's capacity to absorb these gases. That capability is the global resource that is available to all of human society. One objective that the Kyoto Protocol has sought to achieve is to apportion that resource only to the industrialized countries. The Kyoto Protocol has provided developing countries unlimited rights of access to the global commons. What this means in regards to developing countries is that there is no emissions reduction obligation. Therefore, this design is flawed because it regulates the use of a global resource for some countries but not for others.

The Kyoto Protocol regime is designed to give effect to the principle of common but differentiated responsibility, which is relatively new to international environmental law. The targets and timetables to achieve greenhouse gas emission reductions for industrialized countries are much more stringent as compared to those for developing countries. In addition, industrialized nations are required to provide technology transfer and financial resources to non-industrialized countries to assist these nations in meeting their obligations. Therefore, all nations have responsibility, but the level of responsibility differs depending on the circumstances of a country.

Industrialized countries have been historically responsible for the majority of greenhouse gas emissions into the atmosphere because of the level of reliance by those countries on fossil fuels. Because of that historical responsibility for emissions of greenhouse gases, it is understood in the context of the climate change convention that industrialized countries must take the lead in tackling the problem that is arising out of the emissions of greenhouse gases. These nations have a historical responsibility for the creation of this problem and the corresponding responsibility to take the lead to address the problem. Conversely, developing countries who have not had the same historical responsibility in causing the problem do not have the same responsibility to address the problem that has arisen.

Based on these concepts, the Kyoto Protocol seeks to control the continued use of the atmosphere by industrialized countries, yet allow developing countries unlimited access to global resources. Developing countries can continue to emit greenhouse gases without control because of the belief that this is an exercise of their sovereign right to develop in much the same way as industrialized countries did. This is the philosophy that influences the way in which the concept of the common but differentiated responsibility was implemented. It was premised on the notion that developing countries must be permitted to emit greenhouse gases. This approach is a folly because it undermines the Kyoto Protocol's ability to achieve the ultimate objective of the climate change convention.

The ultimate objective of the convention is to achieve stabilization of the concentration of greenhouse gases in the atmosphere. This objective cannot be achieved when one set of countries has an unlimited right to emit greenhouse gases into the atmosphere. Whatever benefit is achieved from the reduction of emissions by the category of countries that reduce emissions will likely be canceled out by the increase of emissions from the developing countries.

For those countries that have unlimited access, the incentive is to enhance economic growth by continuing their emissions. And because the opportunity to emit into the atmosphere is available to developing countries in an unlimited way, there is no incentive to restrict their utilization of that resource. This to me is a "tragedy of the commons scenario" that has been embedded into this system.

The Kyoto Protocol allows countries to utilize that resource through the Protocol's numerous "flexible mechanisms." These mechanisms enable countries to fulfill their emission reduction obligations by cooperating and partnering with other countries that have the ability to utilize the resources. The example I would like to use is the Kyoto

Protocol's Clean Development Mechanism. The Clean Development Mechanism is available for industrialized and non-industrialized countries to partner in fulfilling the obligations of the industrialized countries. Industrialized countries, which have emission reduction obligations, undertake a sustainable development project in a developing country. The reductions of greenhouse gases emissions that the developing country achieved are then credited to the industrialized countries. It is cheaper for the industrialized country to pursue such emission reduction projects in developing countries than it would be to take action in the industrialized country.

Essentially, an industrialized country is seeking to maximize the credits that it can obtain by taking action in a non-industrialized country. And because of that, the most logical path for the industrialized country to pursue is to implement projects in countries that have potential for huge emissions of greenhouse gases. Reducing emissions in those countries will be credited to the industrialized country's contribution towards its reduction obligations.

An industrialized country like the United States has a higher incentive to undertake projects in China because the potential to earn credits there is much higher. Therefore, the majority of Clean Development Mechanism projects occur in the most advanced developing countries, and that is perfectly logical. Therefore the development benefits from the Clean Development Mechanism are generated almost exclusively in countries that are already relatively well developed. Countries that are generally poor get virtually no benefits from the system, which is an inequitable result.

Earth has a capacity for absorption of certain volumes of greenhouse gases. The international community must implement a system to ensure that the sharing of that capacity is equitable among countries and that the sharing takes into account the concept of sustainability. There must be a long term perspective in sharing that absorptive capacity. In my view, this must be the governing principle.

In allocating the capacity, one must look to the concept of intergenerational equity. In terms of international law, this concept refers to equity among nations such that all countries share available global resources and absorbing capacity of greenhouse gases emissions.

One must consider the historical realities. What has happened in the past is that industrialized countries have already used a significant share of the atmosphere's absorbing capacity. That must be factored into the allocation formula. Those countries that historically emitted the most greenhouse gases are only entitled to a small portion of the pie.

The second category involves those countries that historically have not emitted that much, but currently are using a significant quantity of Earth's absorbing capacity such as China, India, and Brazil. A third category involves those countries that were very low emitters in the past, currently they continue to be low emitters, and are projected to be low emitters in the future. These are very poor countries, including the African countries (excluding South Africa) and several island states. These countries will get the biggest allocation.

This proposal has three components regarding the available capacity of absorbing greenhouse gases. The benefits are in setting a global cap that establishes an absolute global limit on the available resource. After a global limit is established, then an objective method for negotiating entitlements and reduction commitments must be determined. When the available resource is limited by setting a cap, countries are forced to take account of the fact that in emitting greenhouse gases, they consume an allocation that has been assigned to them. Because the overall allocation has been limited, eventually it forces countries to consider the limits of the available resources. When countries believe they have unlimited resources, then of course they do not control the extent to which they utilize that resource. By establishing a global cap, high emitting countries are forced to understand that the more they use, the less remains available to them. Ultimately, this will force countries to begin to think very seriously about fuel efficiency and using renewable energy.

The recent climate change negotiations have discussed the concept of per capita allocation of emissions. This approach benefits countries with a large population because the bigger the population, the more allocation the country will get. By contrast, the proposal for allocation made here would enable the concept of sustainability to be realized. Once countries are assigned an allocation to emit, they must then think about the implications for the future. This will drive countries to be responsible in using the resources.

This formula facilitates intergenerational equity. It also will force countries to pursue Clean Development Mechanism projects in countries with the highest potential of emissions avoidance. This adjustment will reformulate the way in which the Clean Development Mechanism operates at the moment.

The Clean Development Mechanism operates on the basis that most of these projects are located in the large developing countries because these countries have the highest potential for emission of greenhouse gases. If this proposed formula for allocation is adopted, the countries with the biggest access to the global absorptive capacity

of greenhouse gases will be the countries that are sought after by investors in Clean Development Mechanism projects because these countries historically used very little capacity, and are currently using very little, so they will get the biggest allocation of Earth's remaining absorptive capacity.

That means that the possibility of earning carbon credits in those countries will be higher, so there will be a shift in investment from the large industrialized countries to the poorest countries. This represents a significant expression of equity because the purpose of the Clean Development Mechanism is to drive development in a sustainable manner and that goal is best achieved by investing in the least developed countries.

In order to fulfill the goals of the UN climate change convention, the successor to the Kyoto Protocol must consider both benefits and responsibilities allocated to each country and that each country has an obligation to reduce emissions or avoid emissions. With respect to Africa's interest, the majority of African nations are part of the third (least developed) group of countries. If this proposed formula is adopted, African nations stand to gain a great deal and the goals of the UN climate change convention will have a chance to be fulfilled.

Thank you very much.