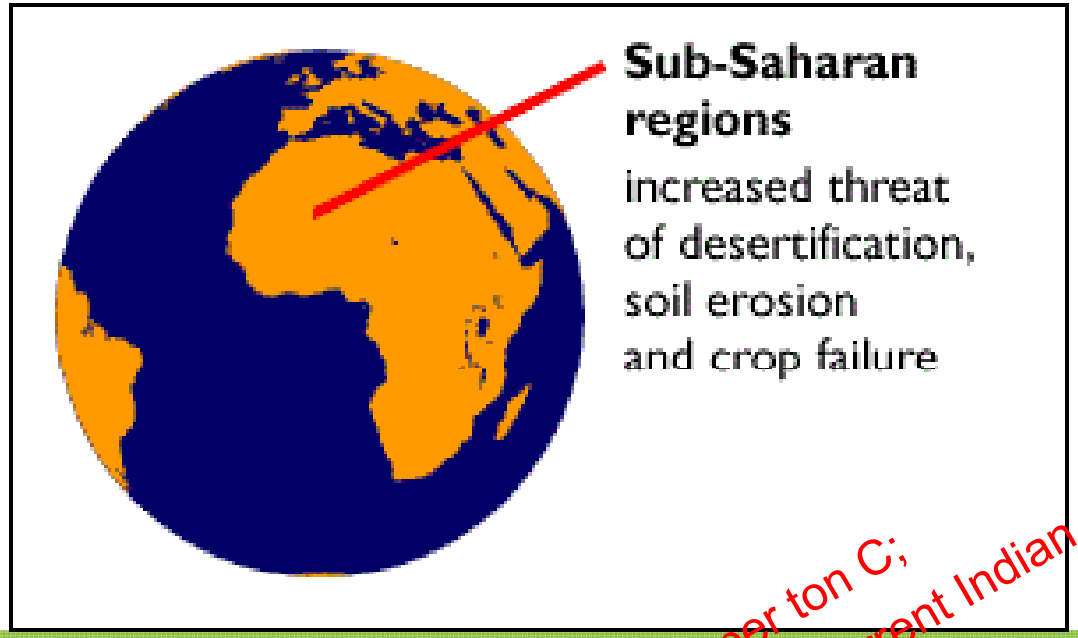
VU University Amsterdam



Climate change and liability

Prof. Dr. Joyeeta Gupta

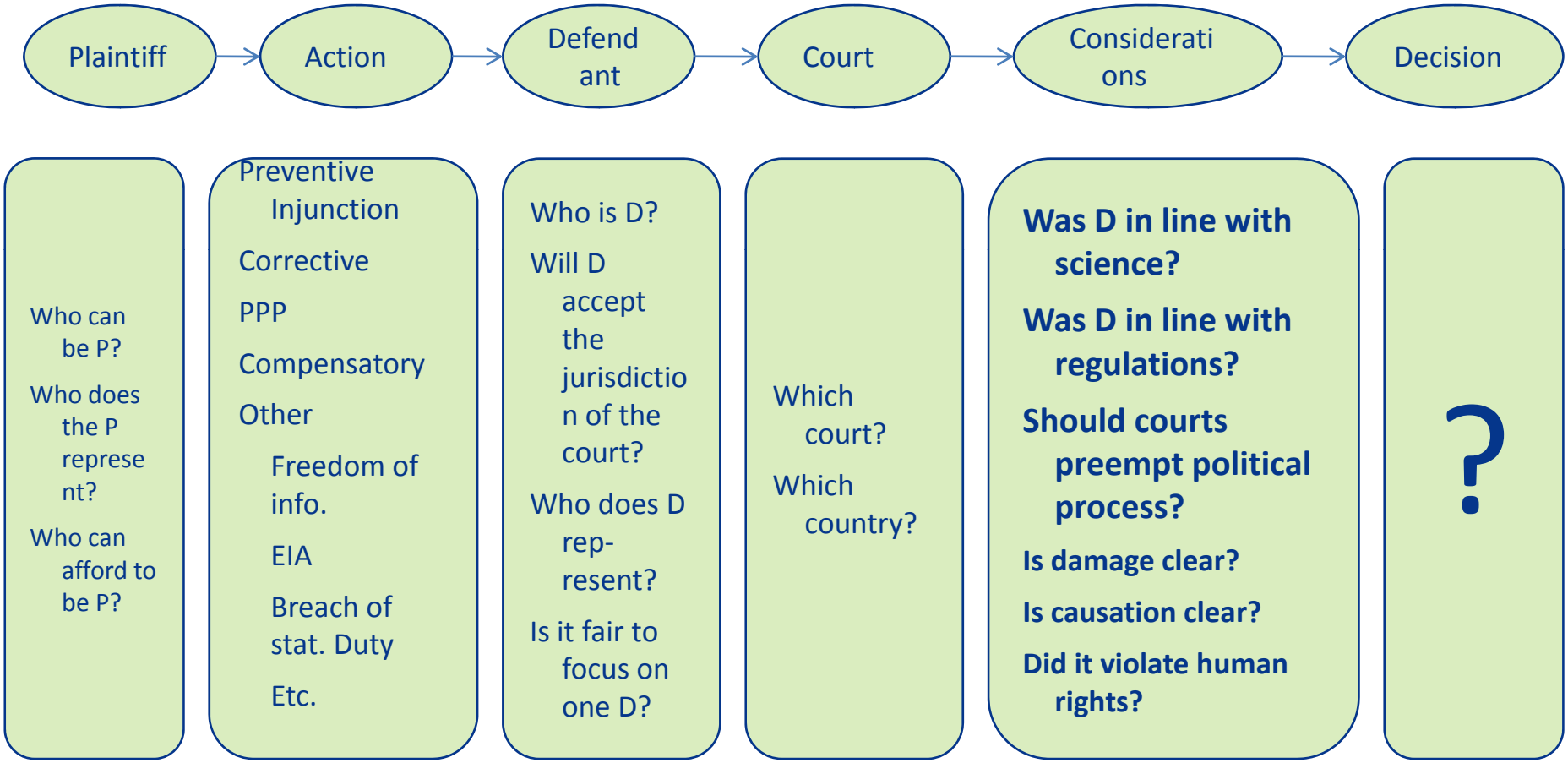
Damage is: $62-$314 per ton C;
550 / 2050 stabilization – current Indian per capita emissions;

IVM Institute for Environmental Studies

Structure of the presentation

- The process of liability
- Science and liability
- Regulation and liability
  - Framing and liability
  - Leadership and liability
  - Mainstreaming cc in development
  - Human rights approach
  - Back to liability
- Legal action and potential legal actions
- Advantages of liability
- Sharing responsibility (the scientific complexity)

The process


Plaintiff
Action
Defend ant
Court
Considerati ons
Decision
Who can be P?
Who does the P represe nt?
Who can afford to be P?
Preventive Injunction
Corrective
PPP
Compensatory
Other
Freedom of info.
EIA
Breach of stat. Duty
Etc.
Who is D?
Will D accept the jurisdictio n of the court?
Who does D rep- resent?
Is it fair to focus on one D?
Which court?
Which country?
Was D in line with science?
Was D in line with regulations?
Should courts preempt political process?
Is damage clear?
Is causation clear?
Did it violate human rights?
?

Science and liability: Uncertainty & law (Weiss 2006)

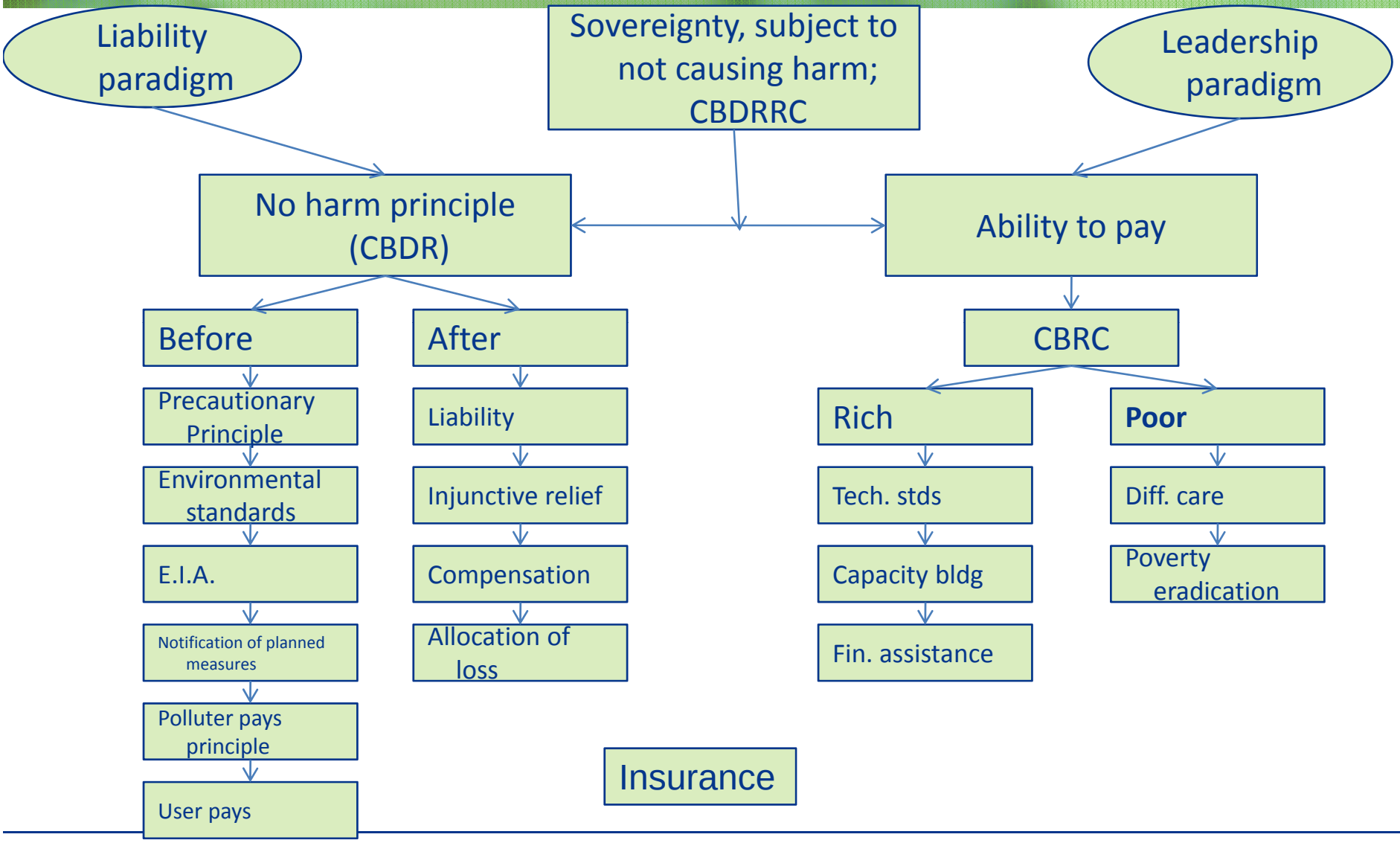
Bayesian prob.	IPCC scale	Informal scientific	Legal stds of proof	For legal situation
100%	Not on scale	Firmly estd.	Virtually certain	
99%	Virtually certain	Rigorously proven	Beyond reasonable doubt	Criminal conviction
90-99%	Very likely	Scientifically proven	Clean & convincing evidence	Quasi penal civil action
80-90%	Likely	Very probable	Clear showing	Temporary injunction
67-80%	Med. Likelihood	Probable	Substantial & credible evidence	Impeachment
50-67%		More probable than not	Preponderance of evidence	Civil judgments
33-50%		Strong evidence	Clear indication	Field arrest/ search warrant
20-33%		Increasing evidence	Probable cause	Initiate inquiry
10-22%	Unlikely	Plausible	Reasonable indication	Stop and frisk
1-10%		Suggestive	Grounds for suspicion	
<1%	Very unlikely	Unlikely	No grounds for suspicion	
0%	Not on scale	Violates well estd. laws	No ground for conjecture	

Modest precautionary principle

Proactive PP

Risk minimization

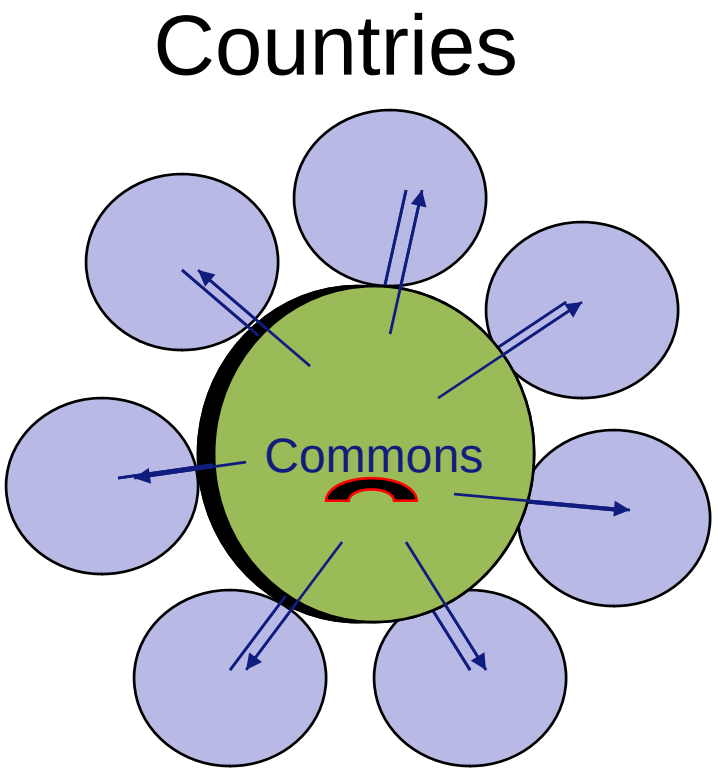
Legal options: No harm



Framing and liability: The commons approach

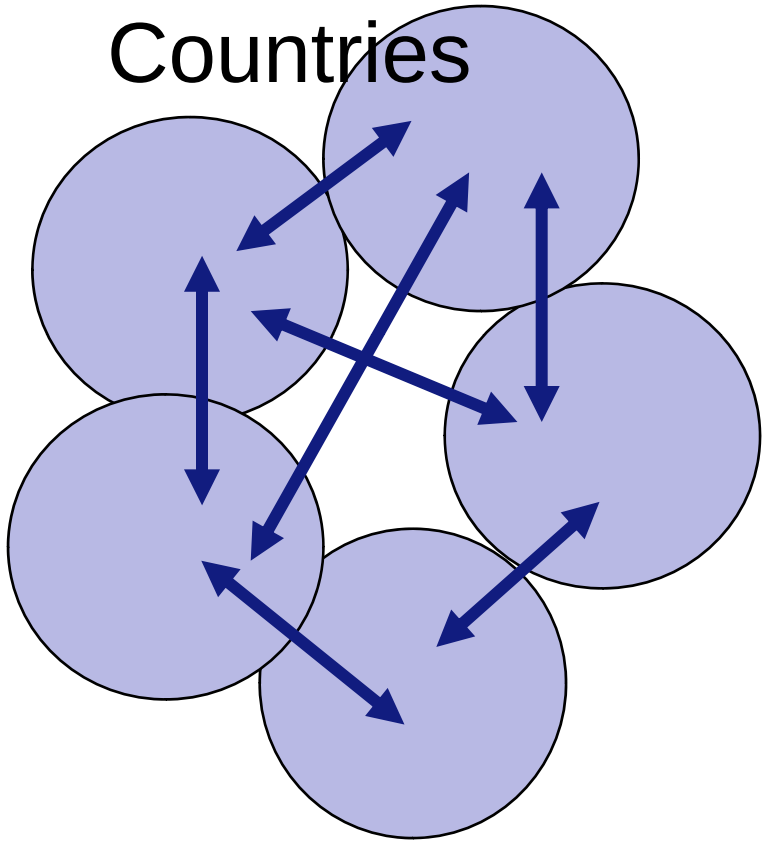
- Inspired by Hardin's Tragedy of the Commons
- The commons approach:
  - Allows separation of emissions from impacts
  - We are all polluters, current and future polluters
  - Commons can be dealt with by property rights

The question: How can we design collective action knowing that each country negotiates on the basis of narrow national interests?

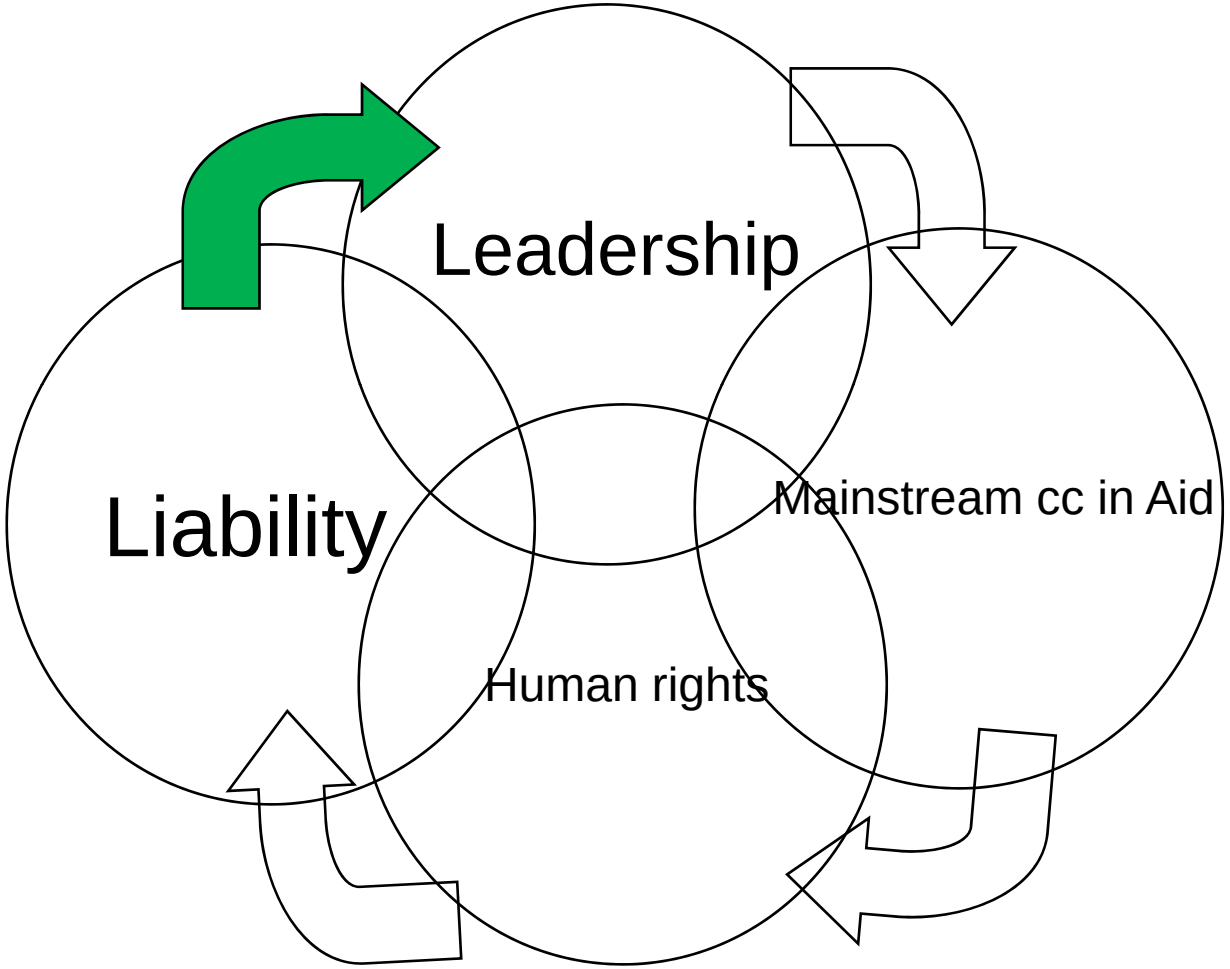


Framing and liability: Transboundary pollution approach

- No harm principle
- Implies
  - Emissions cause impacts
  - Those emitting now are responsible now;
  - Those emitting in the future are on notice.
- The question
  - How can science support the use of legal tools?



Alternative framings: Preview

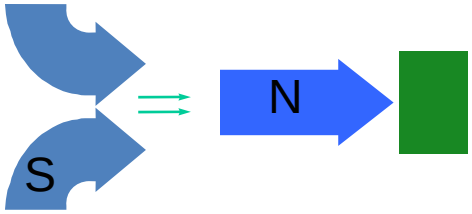


The Developments so far

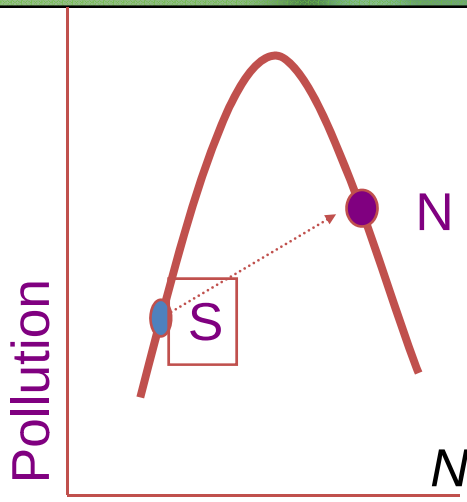
Period	**The paradigm**	Key outcomes
1: Before 1990	**Framing the problem**	1979: First World Climate Conference 1988/9: Conferences 1990: SWCC; IPCC- FAR
2: 1991-1996	**Leadership articulated**	1992: Climate Change Convention 1995: COP-1 -- Berlin Mandate; AIJ 1996: Second Assessment Report of IPCC
3: 1997-2001	**Conditional leadership**	1997: COP-3 -- The Kyoto Protocol 2000: Third Assessment Report of IPCC 2001: COP-7 -- The Marrakech Accords; US withdraws
4: 2002-2007	**Leadership competition**	…….: US initiates many agreements 2005: Kyoto enters into force 2007: COP-13-- Bali Roadmap
5: Post 2008	**Developing countries taking lead?**	2008: Global recession starts 2009: COP-15 -- Copenhagen agreement? 2010: COP-16 -- Cancun

Climate cooperation: Changing NS deal

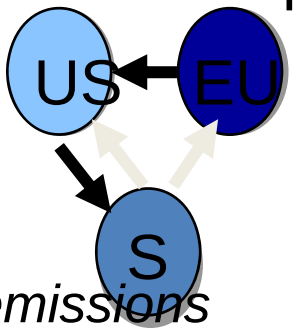
Leadership paradigm



N reduces emissions and helps S



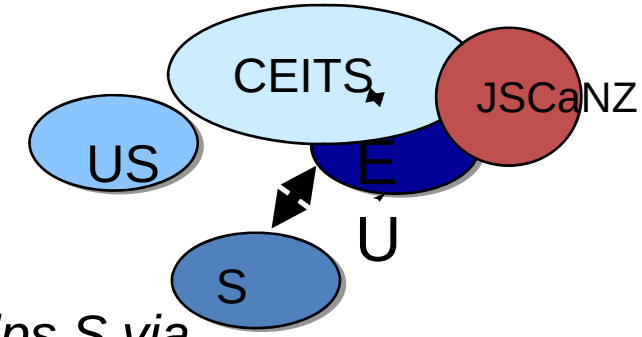
Conditional leadership



N reduces emissions partly via helping S - CDM

Inverted U curve may be a zig-zag curve

Leadership *sans* US



N helps S via CDM

Leadership competition

N mainstreams cc help in development cooperation

Emissions Trading: Implications for Liability

- Assess total permissible emissions
  - –No long term target, so not assessed.

Divide between countries

- –Either per capita

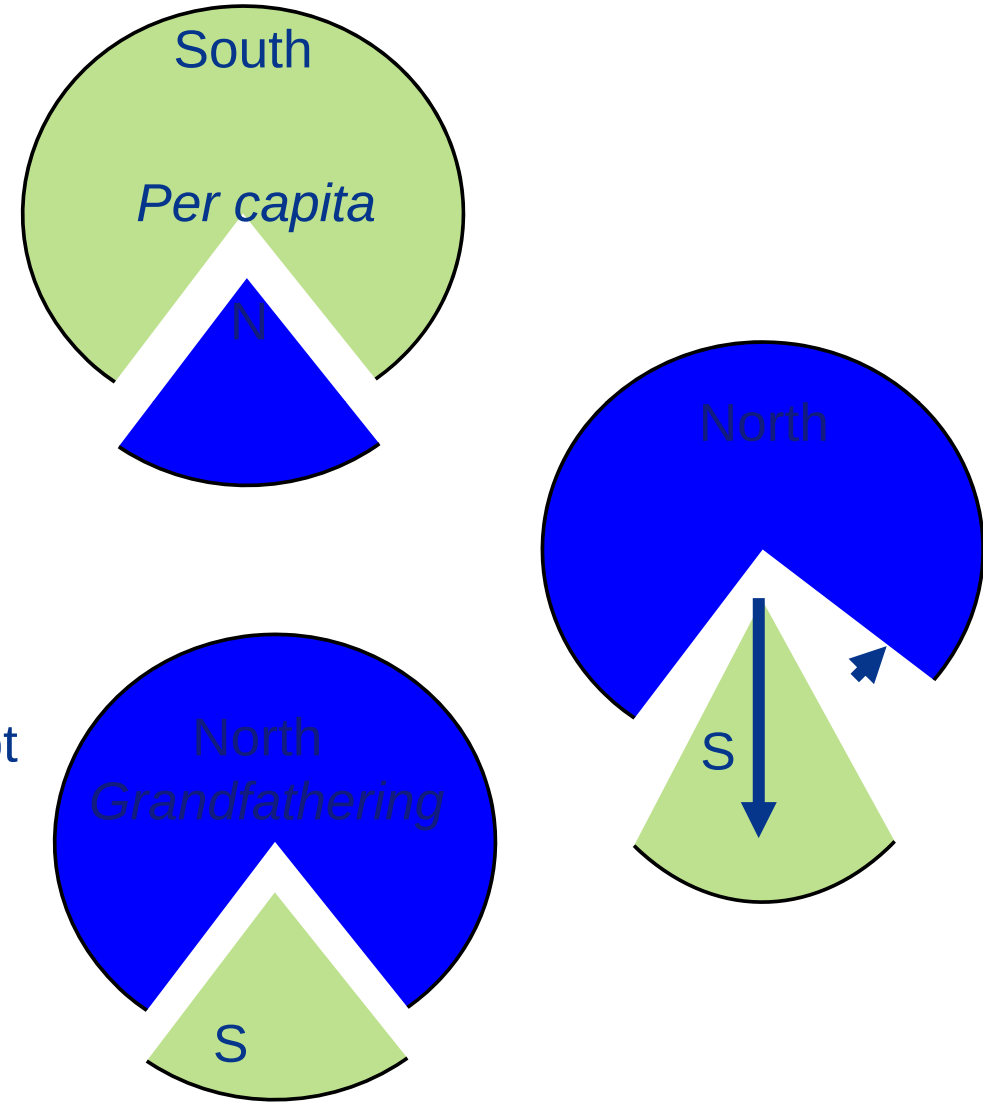
Not politically possible

- –Or grandfathering

Not politically possible, except through a smart negotiating strategy

Countries can trade

Efficient solution



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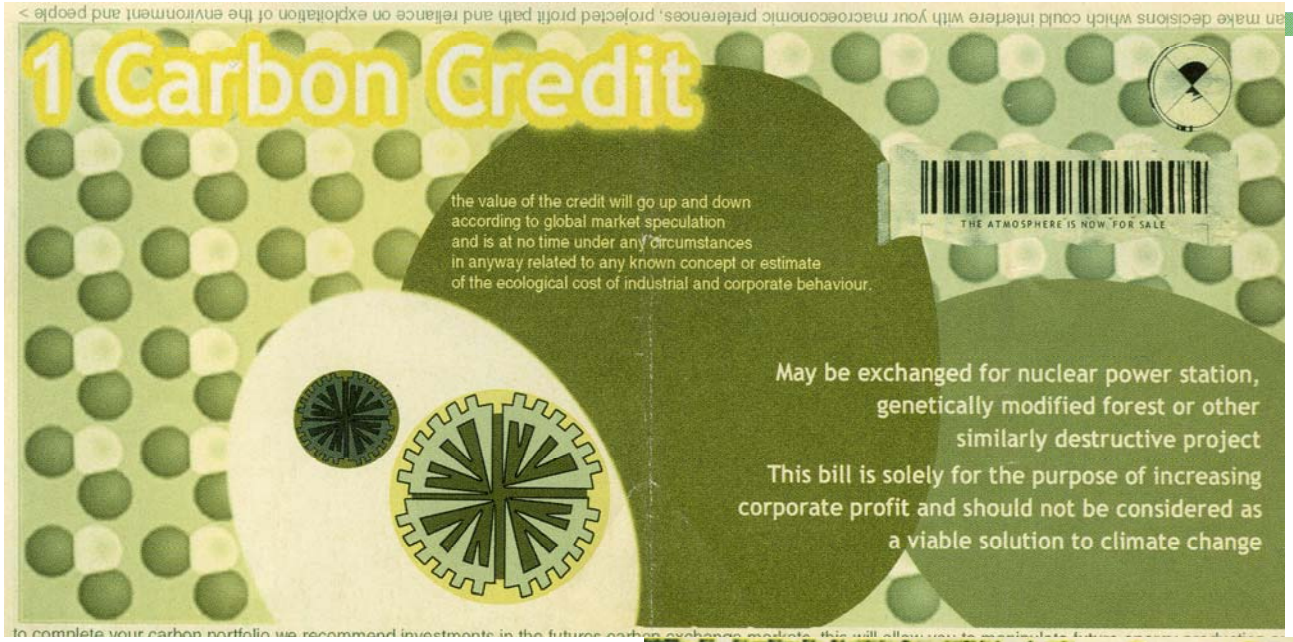
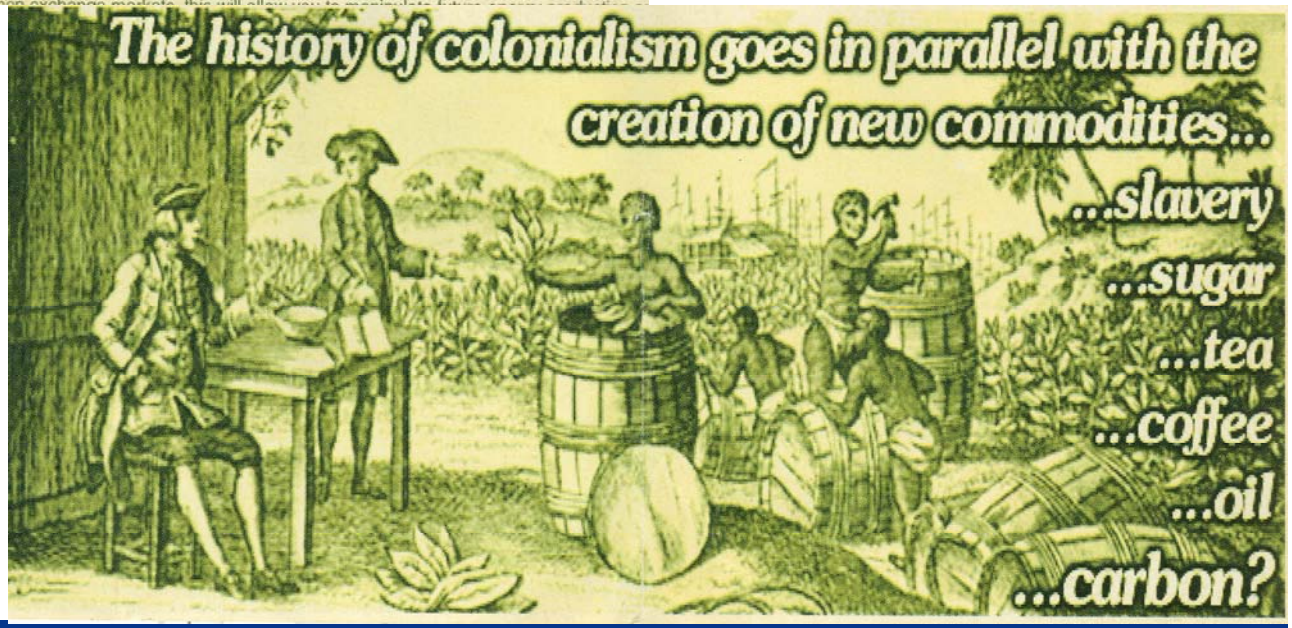
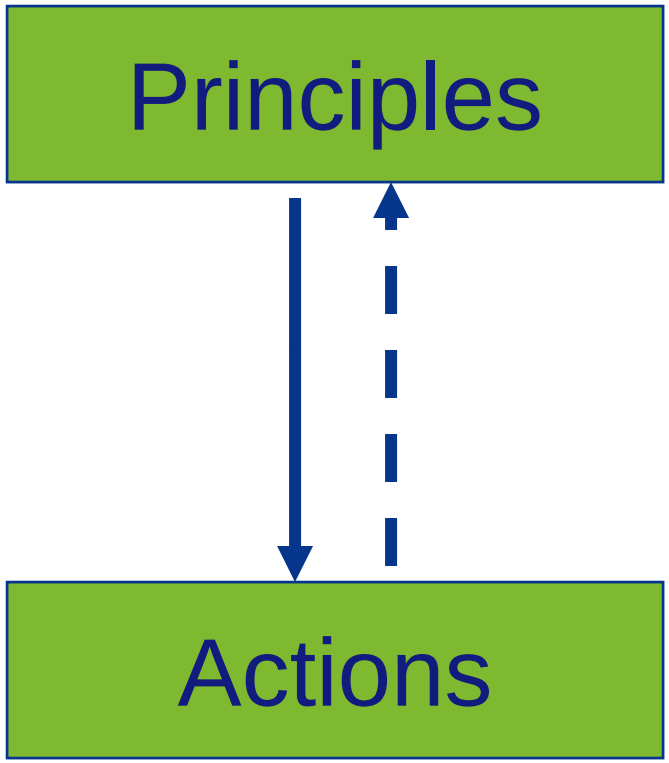
The new currency?





Principles (CBDR, PP): Towards Ad hocism

- Five principles
- Title disputed
- Some principles missing
  - No harm
  - PPP
- Cost-effectiveness
- Implicit acceptance of grandfathering principles



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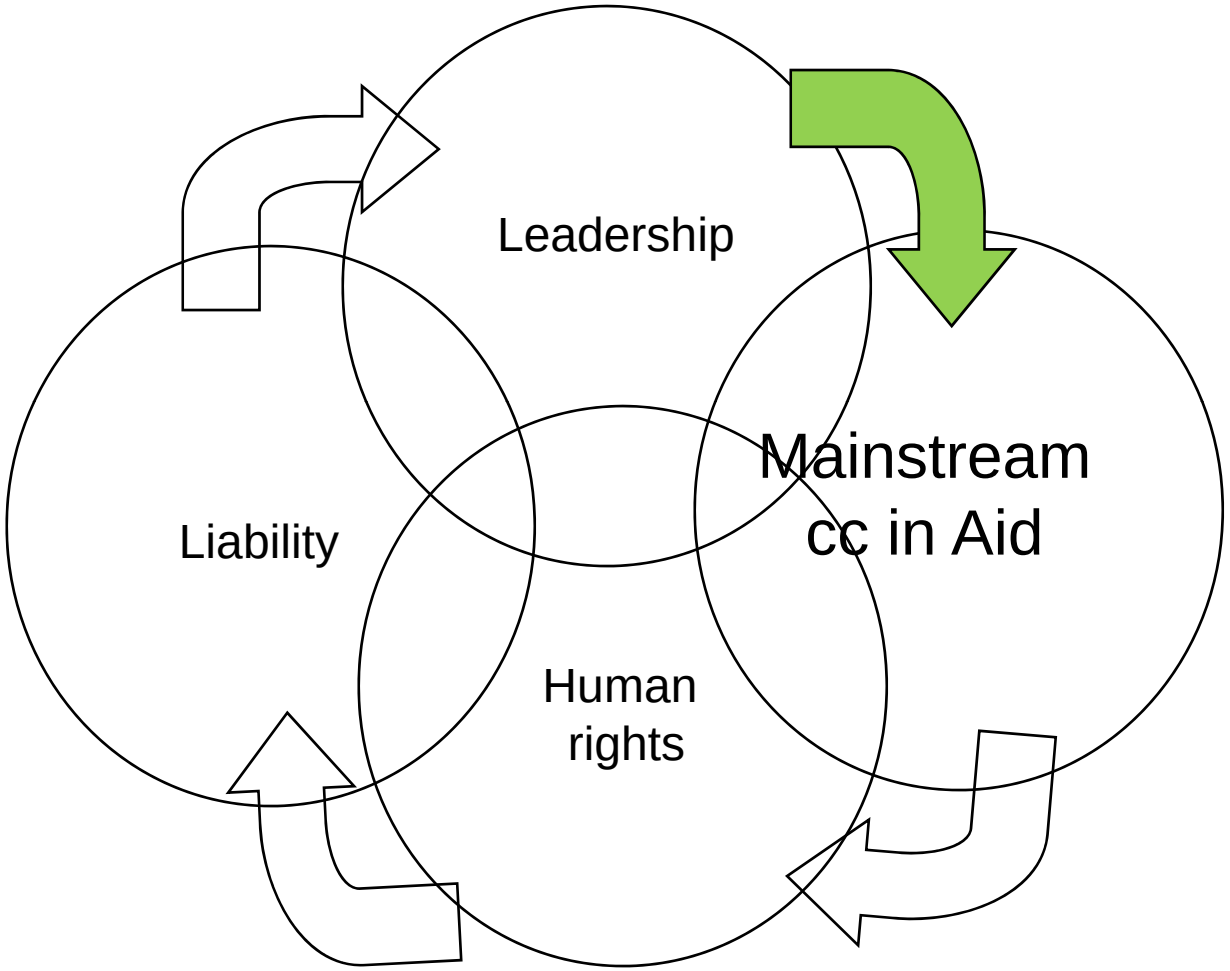
Lessons from climate cooperation: LAME efforts

- Leadership paradigm is failing
- Aid levels are in millions; aid needed is in billions;
- Markets: The CDM is problematic – it offsets Northern emissions thus reducing the need to reduce emissions in North; does not transfer technologies; is frequently not additional; and the sustainable development component is elusive.
- Technology: General requests to promote technology transfer don't work; Technologies cost money!! FDI continues to market old technologies.

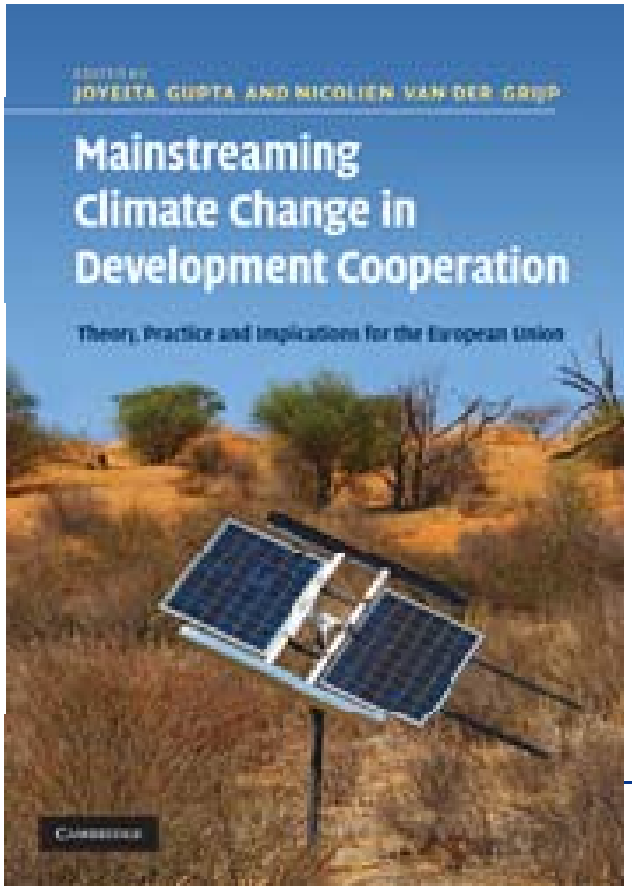
- Should Tuvalu go to court and seek compensation, not aid? Is token aid being given to avoid law suits?

Alternative framings: Preview



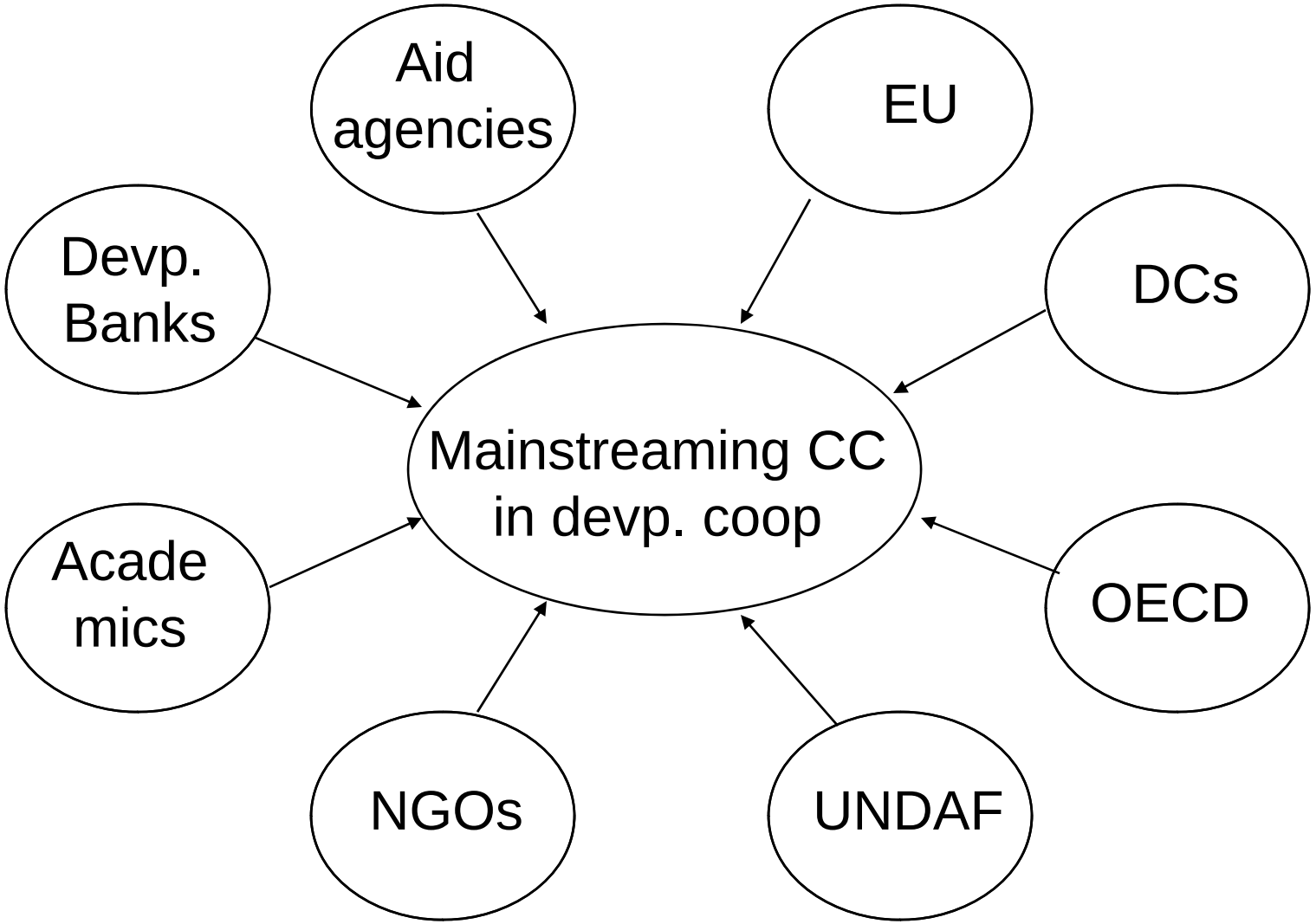
Climate Regime: Paradigm Shift to a development issue

- 1990s
  - Abstract, Global, Future issue
  - Economic and technical issue



- 2000s
  - Real, interfering with daily activities and needs (MDGs)
  - Multi-level
  - Current issue
  - Development issue: Climate change is the defining development issue of our generation (UNDP 2007)
  - Problem: should climate change be mainstreamed into development and development cooperation?

Mainstreaming: Driving Converging Forces



Development has a NS character

- Right to Development:
  - Accepted but under-emphasized

The Evolution of the Right to Development

Year	Event	Item
1948	Universal Declaration on Human Rights	Sets the stage for human rights issues (western perspective)
1960s	Developing countries seeking NIEO	Sets the stage for demanding a change in the global order (southern, non-aligned movement perspective)
1966	Covenant on Political Rights Rights	Legally binding, first generation rights (western demand)
1960s	Covenant on Social-Economic Rights	Legally binding, second generation rights (Communist and developing countries)
1970s	Articulation of the concept by developing and developed country experts	Articulation of the Right to Development – third generation rights
1981	Banjul Charter	Adoption of the Right as the right of peoples by African countries
1986	UN Declaration on the Right to Development	Adoption by UN Human Rights Commission, Opposed by US, 8 states abstained from voting; mentions NIEO
1993	Vienna Declaration and Programme of Action (#10)	Adopted by 172 countries at World Conference on Human Rights
1998	Working group on the Right to Development	Monitors progress made at UN level on this right.
2000	Millennium Declaration (#11)	Adopted by 147 countries
2001	Durban Declaration and Programme of Action (#19, 28)	Discussed the right to development in the context of racism and
2008	UN Human Rights Council	Establishment of a process to study the human right with respect to climate change, water and sanitation.

The evolution of the 0.7% target

Year	Venue/Proposer	Comment
1958	World Council of Churches	1% of GNI
1960	UNGA	1% of GNI
1964	UNCTAD	1% of GNI
1970	International Development Strategy for the Second UN Devp.Decade	1%
1970	UNGA 2626	1%
1975	UNGA 3517	0.7%
1992		
2002	Monterrey	0.7%
2005	G7	0.7%

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Development has a NS character

- Right to Development:
  - Accepted but under-emphasized
- 0.7 percent target:
  - Accepted, emphasized but not achieved
- Linking right to development & 0.7% target:
  - Contested
- The MDGs and development cooperation:
  - New emphasis on achieving MDGs; but resources have to double if these are to be achieved.

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Climate change has a NS character

- Convention recognizes and fosters differences;
- Structural differences:
  - In emission levels between average Northern and average Southern country especially in the past – and this is the most serious determining factor for climate impacts until 2050.
  - If emission levels are to be kept within safe levels – the world budget for the 21st century is over by 2032.
  - Impacts more severe in the South – both location wise; and because vulnerability is the greatest.
  - Was seen initially as a sectoral issue, only now as a development issue; initially only mitigation, now adaptation.

CC & devp have together an intensive NS character

- The right to development not recognized; just a need to develop. (now discussions on human rights and cc.)
- The resources promised remain elusive
- Third, the market mechanism offsets Northern emissions.

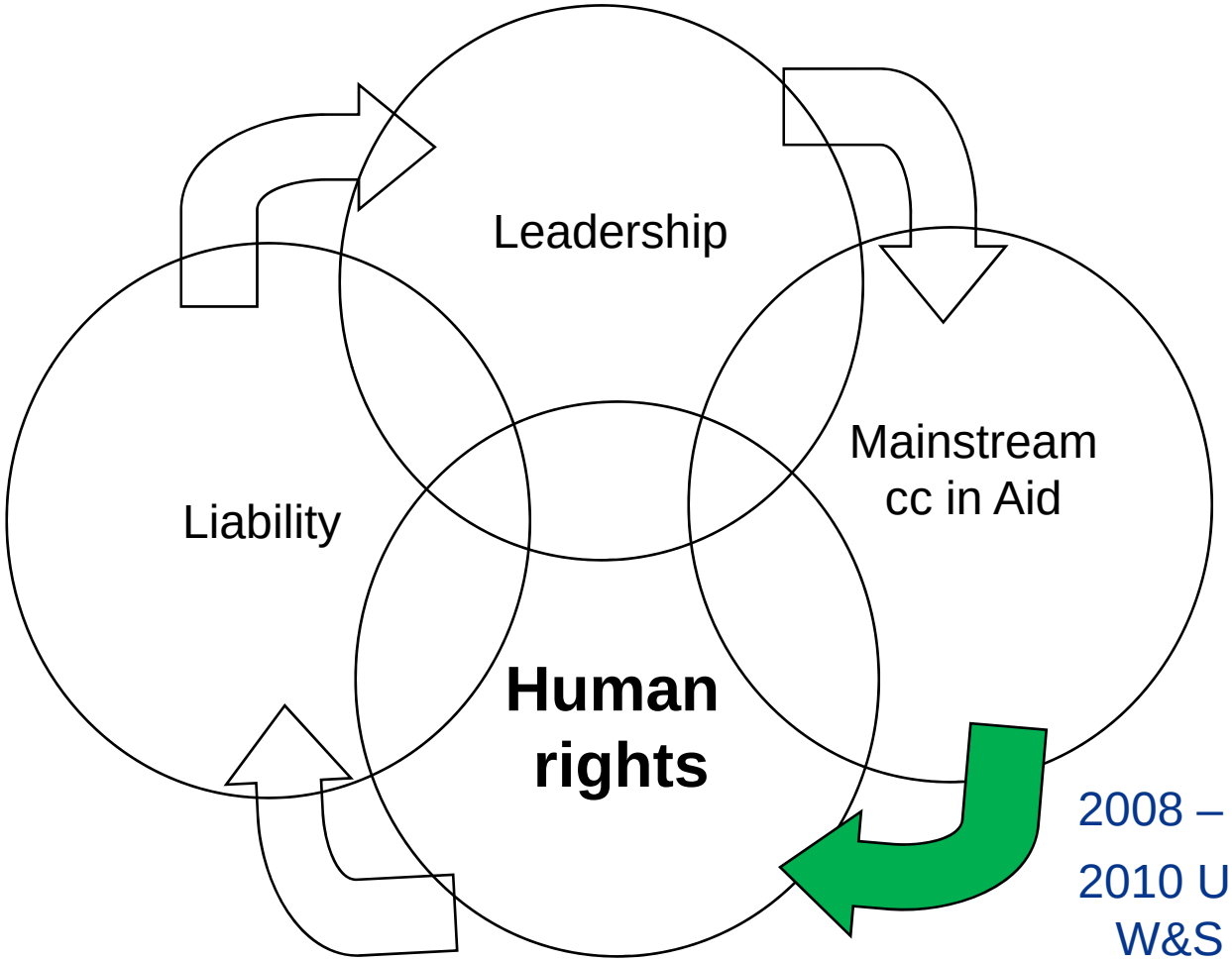
Arguments in favour of mainstreaming in aid

- Substantive arguments
- Financial arguments: (a) not enough money for MDGs; (b) not enough money for CC; hence link.
- Practical argument: (a) institutional synergy; (b) domestic support in donor countries.

Arguments against

- Politically sensitive: 0.7% GNI promised since 1970s
- Falls short of what is needed to compensate
- Falls short of what is needed to reduce emissions
- Beneficiaries are different
- May become a conditionality and experience shows conditionalities fail

Alternative framings: Human rights framing



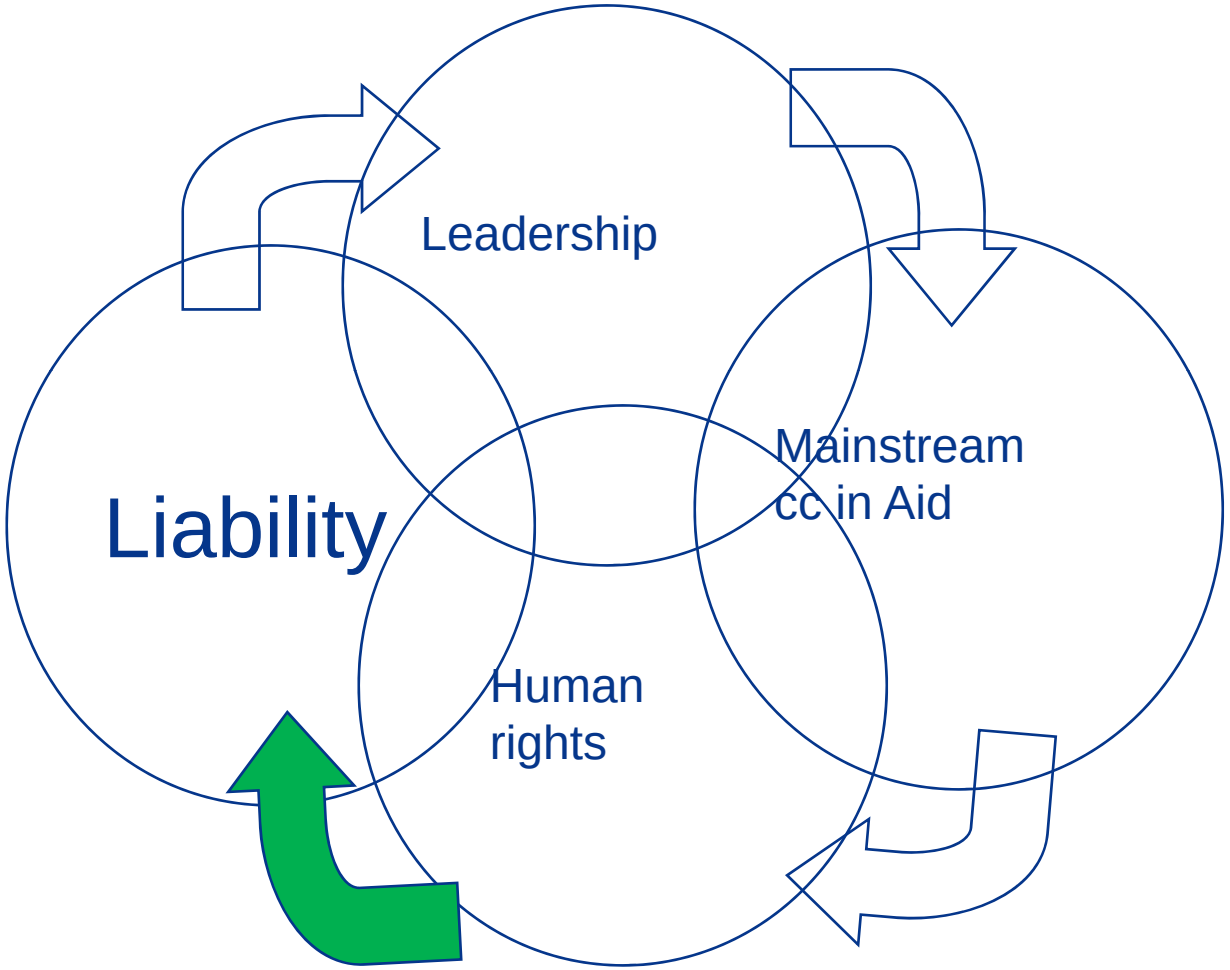
2008 – 2012 UNHRC

2010 UNGA HR to W&S

Human right to water and sanitation

Year	Declarations (D), Resolutions (R), Comments (C) and Treaties (T)	Consensus?
1979	Convention on the Elimination of All Forms of Discrimination Against Women (T)	186 (excluding US, Iran, Somalia, Sudan, Nauru, Palau, and Tonga).
1989	Convention on the Rights of the Child (T)	192 (excluding US and Somalia)
1994	Cairo Population Conference (D)	177 countries
1996	Habitat II (D)	171 countries
2001	Committee of Ministers on the European Charter on Water Resources	
2002	Agenda 21	All participating countries
2002	General Comment (C)	145 countries
2006 2008 2009	Non Aligned Conference (D)	All participating countries
2006	First Africa-South America Summit (ASA) (D)	65 countries
2007	1st Asia-Pacific Water Summit (D)	37 countries
2008	3rd South Asian Conference on Sanitation (D)	8 countries
2010	**UNGA Resolution (R)**	**122 countries**

Alternative framings: Conclusions



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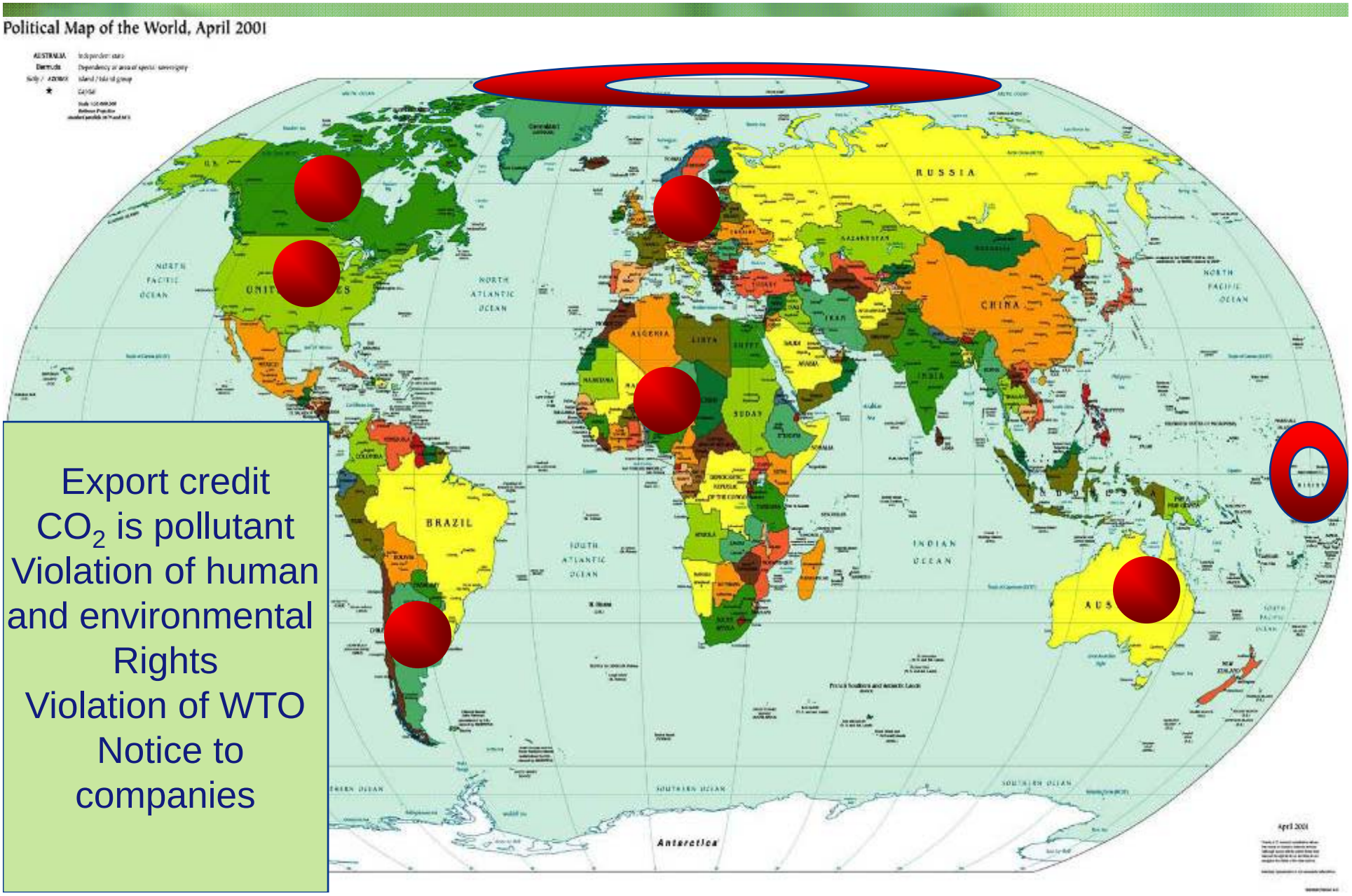
Legal actions around the world

Subject	Action	Country
Export credit	Freedom of info	De
	EIA	USA
Mine expansion	Breach of statutory duty, EIA	Australia
Corral reefs	Breach of statutory duty, EIA	
Gas flaring	Violation of human rights/ env. obli	Nigeria
Public info.	Freedom of information	Argentina
Power co.	Common law nuisance	USA
GHGs	EIA: CO_2 should be seen as pollutant	USA
	Violation of human rights	Inuit
World Heritage site	Listing in World Heritage Convention	Peru, Belilze, Canada, USA

Litigation



Export credit
CO_2 is pollutant
Violation of human and environmental Rights
Violation of WTO
Notice to companies

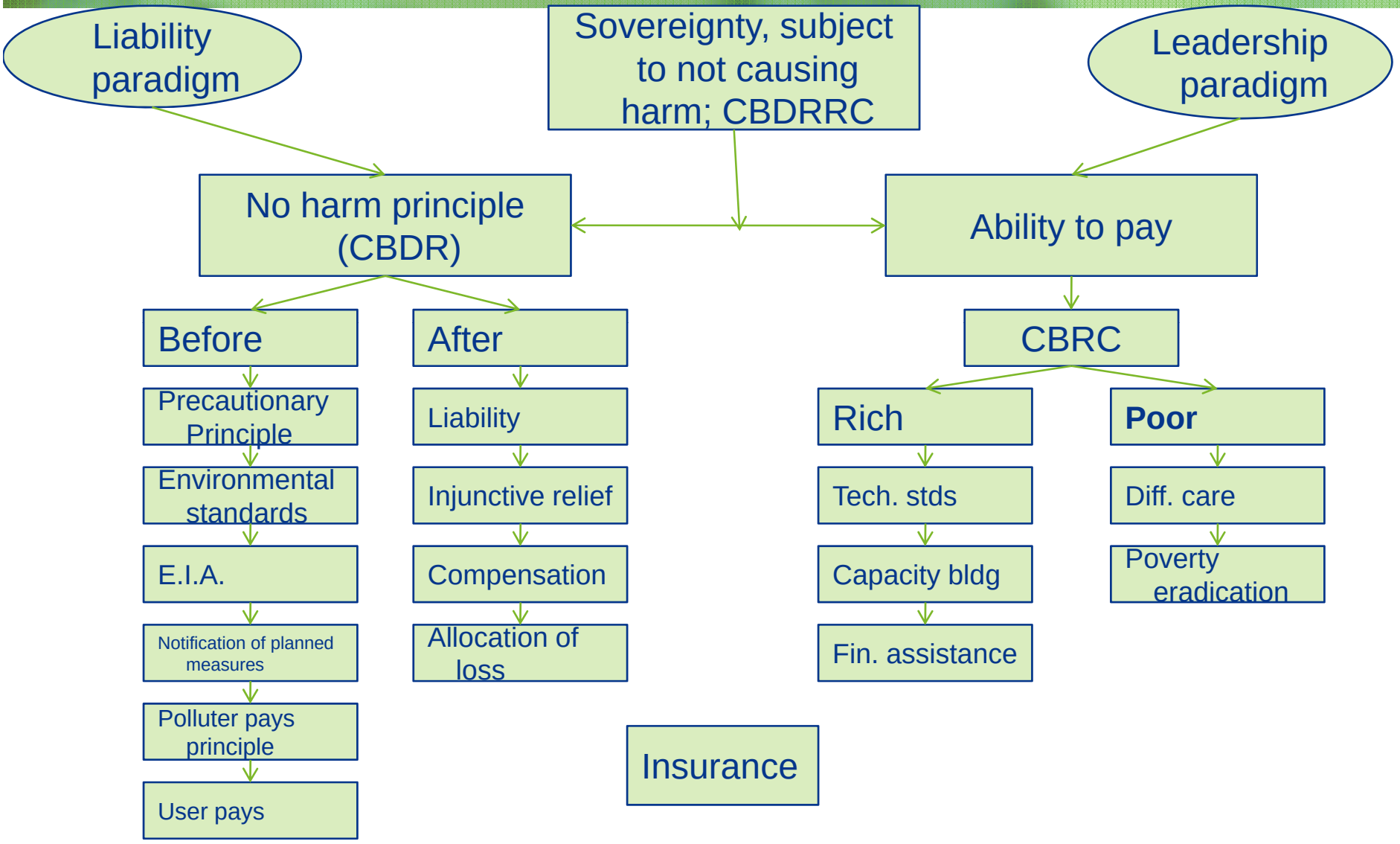
Potential legal actions

Nature of action	Country	Description	Suggested by:
Advisory opinion	Small island states	Request ICJ to give an advisory opinion	Gillespie 2004
UNCLOS	DCs/EU	Failure to ratify the Kyoto Protocol amounts to violation of UNCLOS (#194(2) no harm; #235 state responsibility)	Burns 2004; Doelle 2004
Violation of no harm principle	SIDS	Tuvalu could sue the US before the ICJ on grounds of no harm principle	Jacobs 2005
Disclose info	USA	Companies should disclose info on emissions	Hancock 2005

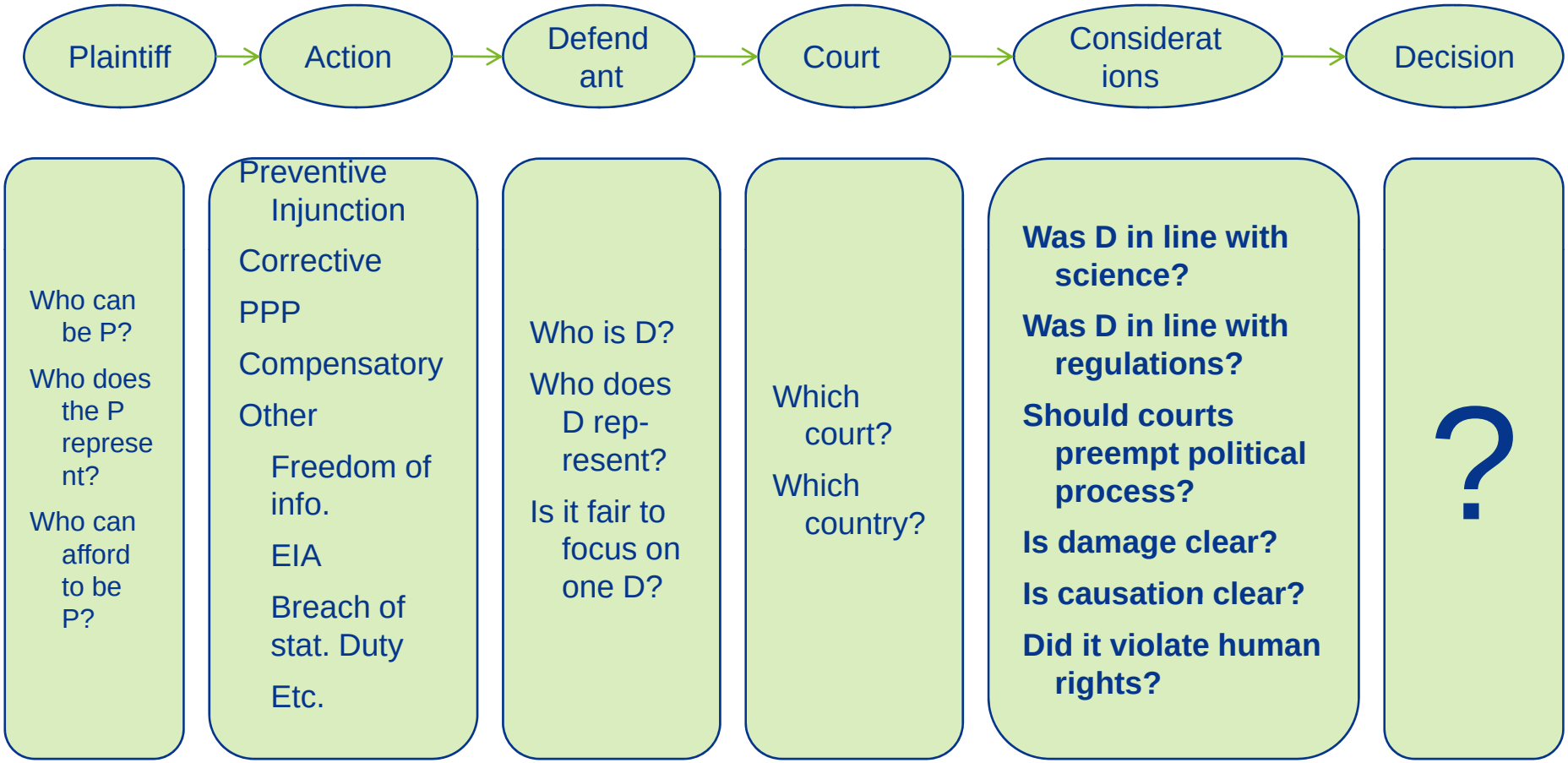
Types of liability

- General
- Product (which causes harm)
- Environmental liability
- Professional liability (to shareholders who suffer)
- Political risk liability (unexpected impact of carbon tax)
- Personal and commercial vehicle liability arising from road accidents caused by climate change

Legal options: No harm



The process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Should courts preempt political process?
Is damage clear?
Is causation clear?
Did it violate human rights?
?

Goals of liability

- Deterrence
- Correction – polluter pays principle
- Compensation

Faure and Peeters forthcoming: Argue that deterrence and correction more likely than compensation; compensation needs to be arranged through insurance and disaster funds – more equitable

Drawbacks of liability

- Takes too long; expensive
- Limited to few defendants
- Courts may prefer regulatory over judicial action – defendants should not be held accountable for legal acts/acts in accordance with the law - immunity?
- If courts accept – can have a destabilizing effect on energy structures.
- Damage claims for compensation not successful in the US
- Procedural inquiries more successful
- Injunctive relief – most likely to be successful

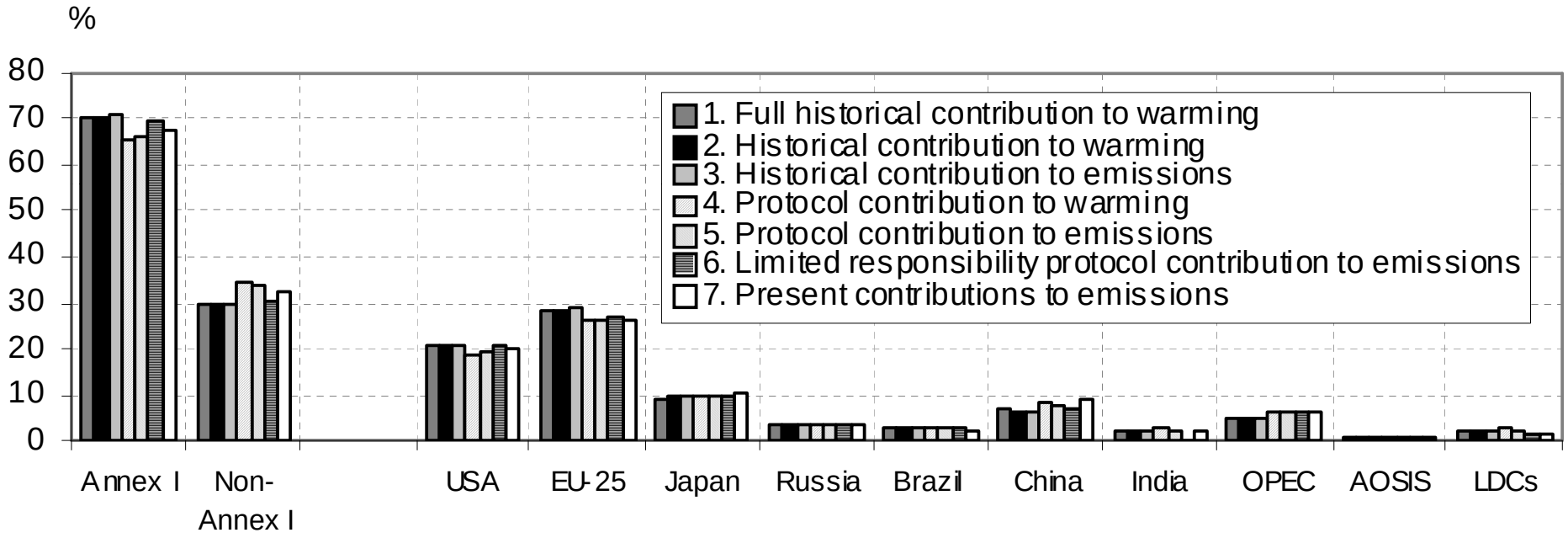
Avoiding liability/Evaluating responsibility: Scenarios

	Choices in constructing CBDR scenarios	
Basic needs	Full responsibility, limited responsibility	
Causal attribution	Producer-based	
Gas mix	CO_2, all GHGs [CO_2, CH_4, N_2O]	
Indicator	GWP-weighted cumulative GHG emissions, temperature increase	
Sectors	All anthropogenic emissions (incl. LULUCF), Energy and Industry only	
Timeframes	*Attribution start date*	1750, 1900, 1950 and 1990
	Attribution end date	1990, 2005, 2050 and 2100
	Evaluation date	2005, 2050, 2100, 2500

Overview of CBDR scenarios

Sc	Name	Description
1	Full historical contribution to warming	*including all GHG emissions from 1750; indicator: temperature change; full responsibility*
2	Historical contribution to warming (default case)	*including all GHG emissions from 1900; indicator: temperature change; full responsibility*
3	Historical contribution to emissions	*including all GHG emissions from 1900; indicator: cumulative emissions; full responsibility*
4	Protocol contribution to warming	*including all GHG emissions from 1990; indicator: temperature change; full responsibility*
5	Protocol contribution to emissions	*including all GHG emissions from 1990; indicator: cumulative emissions; full responsibility*
6	Limited responsibility protocol contribution to emissions	*including all GHG emissions from 1990; indicator: cumulative emissions; limited responsibility*
7	Present contributions to emission levels	*including all GHG emissions for 2005; indicator: cumulative emissions; full responsibility*

Contributions using a capacity responsibility index



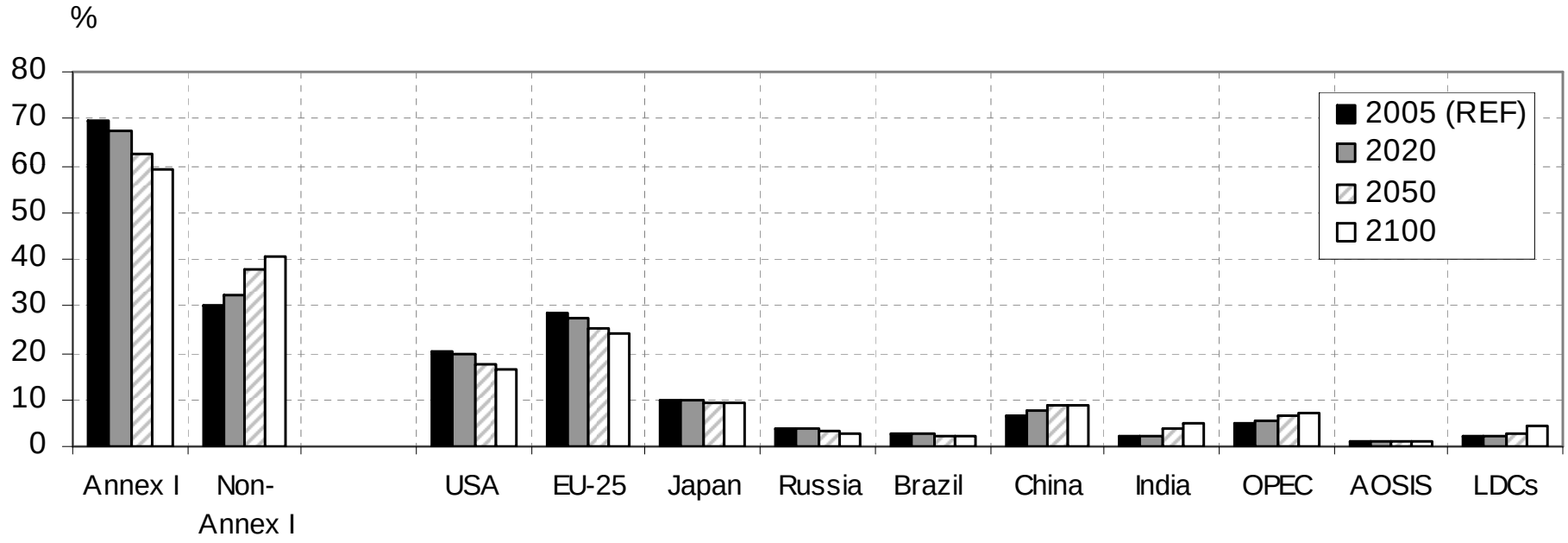
Contributions % using a capacity-responsibility index

	Country	Sc. 1	Sc. 2	Sc. 3	Sc. 4	Sc. 5	Sc. 6	Sc. 7
Annex I		**70**	**67**	**70**	**70**	**65**	**66**	**69**
	Australia	1.6	1.9	1.6	1.6	1.8	1.7	1.9
	Canada	2.5	2.6	2.6	2.6	2.5	2.5	2.7
	Japan	9.6	10.3	9.7	9.8	9.7	10.0	10.2
	New Zealand	0.3	0.2	0.3	0.3	0.2	0.2	0.2
	Russia	4.1	3.3	4.1	3.9	3.7	3.5	3.9
	Ukraine	0.9	0.5	0.9	0.9	0.8	0.7	0.7
	USA*	20.7	20.0	20.4	20.8	19.0	19.5	21.0
EU-25		**28**	**26**	**28**	**29**	**26**	**26**	**27**
EU-15		**26**	**24**	**26**	**26**	**24**	**24**	**25**
	France	4.2	3.8	4.2	4.3	3.8	3.9	3.9
	Germany*	6.1	5.7	6.2	6.3	5.6	5.7	5.9
	Italy	3.1	3.3	3.2	3.2	3.2	3.2	3.3
	Netherlands	1.2	1.3	1.3	1.3	1.3	1.3	1.3
	Spain	1.8	2.1	1.8	1.9	1.9	1.9	2.0
	UK	5.1	4.2	4.9	5.1	4.2	4.2	4.3

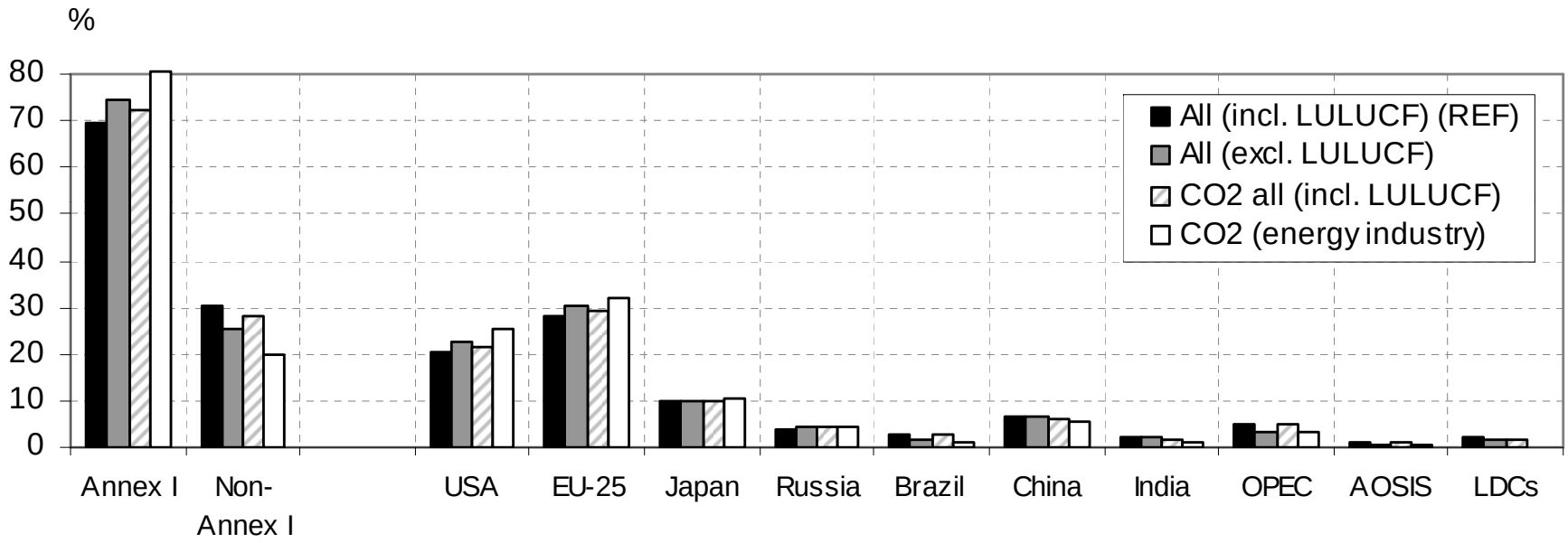
Contributions % using a capacity-responsibility index

	Country	Sc. 1	Sc. 2	Sc. 3	Sc. 4	Sc. 5	Sc. 6	Sc. 7
Non-Annex I		**30**	**33**	**30**	**30**	**35**	**34**	**31**
Rest-OECD		**3.7**	**4.4**	**3.7**	**3.7**	**4.0**	**4.1**	**4.1**
	Mexico*	1.8	1.9	1.8	1.7	1.9	1.9	1.9
	Turkey	0.5	0.6	0.5	0.5	0.6	0.6	0.5
Brazil, China, India		**21**	**23**	**21**	**21**	**23**	**22**	**20**
	Brazil	**2.7**	**2.2**	**2.8**	**2.6**	**2.9**	**2.7**	**2.9**
	China*	**7.1**	**9.5**	**6.7**	**6.7**	**8.1**	**8.0**	**7.1**
	India	**2.2**	**2.0**	**2.1**	**2.1**	**2.7**	**2.1**	**0.5**
OPEC		**4.9**	**6.0**	**5.0**	**4.9**	**5.9**	**5.9**	**6.0**
	Indonesia*	2.0	2.1	1.9	1.9	2.1	2.3	2.4
	Nigeria	0.4	0.4	0.4	0.4	0.6	0.5	0.4
	Venezuela	0.5	0.4	0.6	0.5	0.6	0.5	0.6
AOSIS		**0.8**	**0.9**	**0.9**	**0.9**	**0.9**	**1.0**	**1.0**
	Cuba*	0.1	0.1	0.1	0.1	0.1	0.1	0.1
	Maldives	0.0	0.0	0.0	0.0	0.0	0.0	0.0
LDC		**2.4**	**1.8**	**2.4**	**2.3**	**2.6**	**2.2**	**1.7**
	Afghanistan	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	Congo*	0.3	0.3	0.3	0.3	0.4	0.0	0.0
Rest World		**9.0**	**8.4**	**9.1**	**8.9**	**10.0**	**9.3**	**8.9**
	Argentina	0.6	0.4	0.6	0.5	0.7	0.6	0.6
	South Africa*	0.5	0.7	0.6	0.6	0.6	0.6	0.7

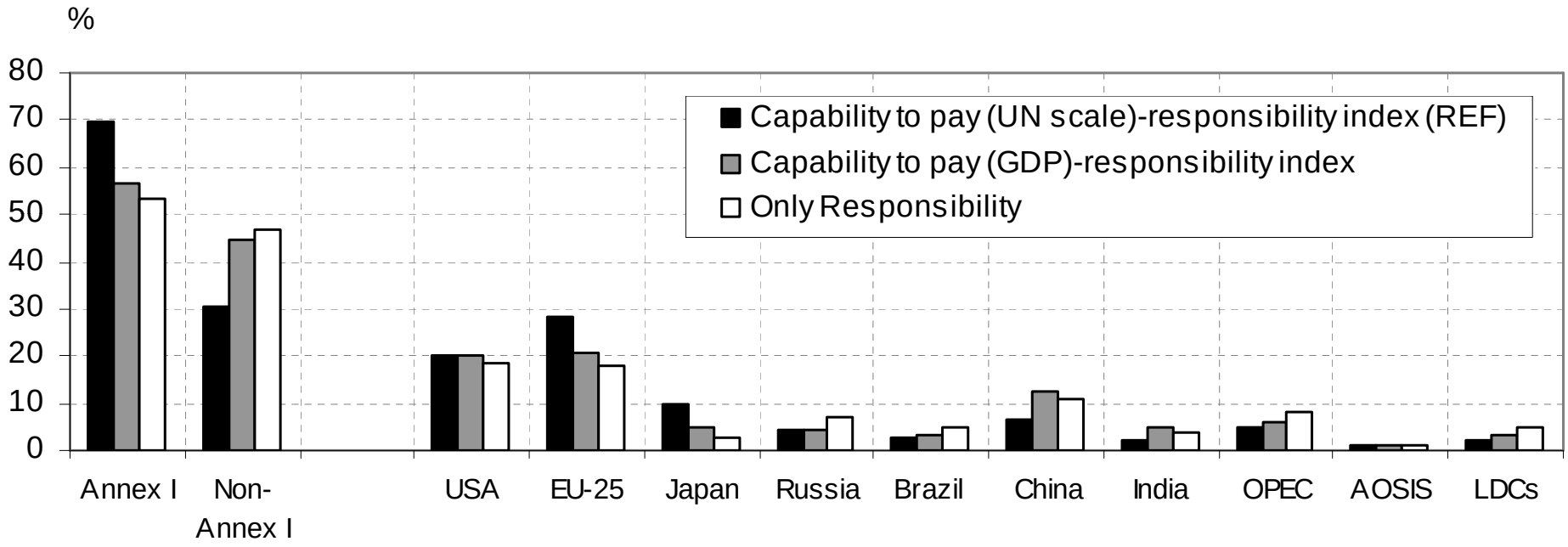
Impact of end-date on contributions in CBDR sc. 2



Impact of GHG mix on contributions in CBDR Sc-2



Impact of capacity index on contributions in Sc-2



Conclusions

- Next steps to explore legal avenues; at different courts/ foras on different grounds simulatenously
- Injunctive relief is more likely to work than compensatory relief; nuisance easier than negligence
- Relief will depend on regulation and the political process;
  - if actors have acted legally – it may be difficult to hold them liable;
  - if such legal action has been based on global consensus, it may be even more difficult;
  - if defendant comes with dirty hands – there will be greater problems.