THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN THE INTERNATIONAL CLIMATE CHANGE LEGAL FRAMEWORK

Background, New Developments and Challenges of the Principle of Common But Differentiated Responsibilities in the Climate Regime

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1 Introduction

The presence of disparities between States on the one hand and ecological and economic interdependence on the other has given rise to a number of challenges in international cooperative efforts. In the realm of international environmental cooperation, the challenge is one of integrating diverse States into environmental treaty regimes.\footnote{L. Rajamani , ‘The Nature, Promise, and Limits of Differential Treatment in the Climate Regime, in Ole Kristian Fauchald & Jacob Werksman (Eds.), Year Book of International Environmental Law, Oxford University Press. vol. 16, p. 82(2005) .} For now over three decades of environmental dialogue, countries have created a conceptual legal framework, arrived at a range of different burden-sharing arrangements, and deployed various principles to integrate different States into international environmental regimes.\footnote{Id.} The Principle of Common but Differentiated Responsibilities (hereinafter referred to as CBDR) is one of the most effective principles in the international environmental law legal regime.

The principle of common but differentiated responsibility primarily entails two elements: common responsibility and differentiated responsibilities. These two elements are explained below.

Common responsibility describes the shared obligations of two or more States towards the protection of a particular environmental resource. Common responsibility is likely to apply where the resource is shared, under the control of no state, or under the sovereign control of a state, but subject to a common legal interest.\footnote{Philippe Sands, Principles of International Environmental Law (2nd ed, Cambridge Univ. Press 2003) .} The concept of common responsibility evolved from an extensive series of international laws governing resources labelled as ‘common heritage of mankind’ or of ‘common concern.’\footnote{Id. at 217.}

The CBDR principle has been applied in several treaties, The 1952 Tuna Convention, \textit{inter alia} categorizes tuna and fish as being of “common interest of mankind and the
conservation of these species is aimed at serving common interest of mankind.\(^5\) Under the Outer Space Treaty, the outer space and the moon are referred to as the “province of all mankind”\(^6\). The preamble to the Ramsar Convention categorises waterfowls as an “international resource”\(^7\). The World Heritage Convention refers to the “World Heritage of mankind as a whole,” and imposes a duty on the international community to protect it.\(^8\)

Although state practice is inconclusive as to the precise legal nature of each formulation, certain legal responsibilities are attributable to all States with respect to these environmental media and natural resources under treaty or customary law.\(^9\) While the extent and legal nature of that responsibility will differ for each resource and instrument, the responsibility of each state to prevent harm, in particular through the adoption of environmental standards and international environmental obligations, can also differ.\(^10\)

A distinction should be drawn between the concepts of “common interest”, “common concern”, “common heritage of mankind” and common responsibility under CBDR. While the former refer to collective responsibility to which state sovereignty must give way to some extent and were originally developed to deal with global common issues, such as the use of deep seabed resources and the utilization of the outer space, common responsibility under the CBDR on the other hand goes a step further to include perspectives on states’ historical contributions to global environmental degradation and incorporates fairness and justice elements to be taken into account when devising relevant legal commitments.\(^11\) It follows from the above that common responsibility under CBDR is based on the principle of solidarity of fair sharing of both the effort to

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\(^10\) *Id.* at 218-219.

\(^11\) *Id.*
protect a resource and of the enjoyment of the accruing benefits. Common responsibility under CBDR was a response to the voices mainly coming from the developing world demanding fairer rules to international environmental cooperation.

The second element is differentiated responsibility which entails the need to take into account the different circumstances, particularly each State’s contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat. Differentiated responsibility of States for the protection of the environment is widely accepted in treaty and other State practices. It translates into differentiated environmental standards set on the basis of a range of factors, including special needs and circumstances, future economic development of countries, and historic contributions to the creation of an environmental problem.

Differentiated responsibility therefore aims to promote substantive equality between developing and developed States within a regime, rather than mere formal equality. The rationale is to ensure that developing countries can come into compliance with particular legal rules over time – thereby strengthening the regime in the long term. The next paragraphs illustrate the application of Differentiated responsibilities in treaties, soft law and international case law among others.

Differentiated responsibility has been enacted in a number of treaties and it is usually mentioned alongside common responsibility. One of the aims of the 1982, UNCLOS is to inter alia create “a just and equitable international economic order which takes into account the interests and needs of developing countries. The international Undertaking

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12 Id.
13 Id.
14 Id. at 219.
16 Sands, supra note 3 at 218.
17 Id.
on Plant Genetic Resources of 1983 after declaring plant genetic resources to be a “heritage of mankind,” calls upon parties to cooperate in establishing or strengthening the capabilities of developing countries with respect to plant genetic resource activities.\textsuperscript{19}

The preamble to the 1987 \textit{Montreal Protocol on Substances that Deplete the Ozone Layer} requires “special provision to meet the needs of developing countries, including the provision of additional financial resources and access to relevant technologies. In addressing the special needs of developing countries, the protocol grants them a ten-year grace period for compliance and it stresses that their achievement of the goals set by the protocol is dependent on financial cooperation and technology transfer from developed countries.\textsuperscript{20}

The \textit{United Nations Framework Convention on Climate Change} of 1992 which is the main focus of this study is dominated by provisions on CBDR. It begins by referring to climate change as “a common concern of humankind.”\textsuperscript{21} The preamble in no uncertain terms calls for cooperation by all countries in accordance with their common but differentiated responsibilities. The commitments under the Convention are subject to CBDR.\textsuperscript{22} Economies in transition are also subjected to differential treatment.\textsuperscript{23} The 1997 Kyoto Protocol which is the implementing Protocol to the FCCC also reiterates CBDR. Accordingly, developed countries take up certain commitments to reduce greenhouse gas emissions, economies in transition have lesser commitments and developing nations make no commitments at all under the Protocol.\textsuperscript{24}

\begin{footnotes}
\item[20] \textit{Montreal Protocol on Substances the Deplete the Ozone Layer}, 16 September 1987, 26 I.L.M 154 (entered into force 1 January 1989), as amended by the \textit{London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer}, June 29, 1990, UNEP/OZ.L.Pro.2.3, art 5(1) [hereinafter \textit{Montreal Protocol}]. Arts. 5, 10, 10A.
\item[22] \textit{Id.} art. 4(1), 4(2).
\item[23] \textit{Id.} Art. 4(6).
\end{footnotes}
Under the *United Nations Convention to Combat Desertification* (UNCCD), desertification and drought are recognized as having a global effect. In addressing these problems, the Convention calls for “full consideration of the special needs and circumstances of affected developing countries particularly the least among them.”

The *Convention on Biological Diversity* in its preamble notes that “conservation of biological diversity is a common concern of humankind.” On the basis of CBDR, it calls for special provision to meet the needs of developing countries. It mandates all parties to cooperate in the provision of financial and other support to developing countries for in- and ex-situ conservation. Differentiation is articulated in clearer terms under Article 20 thus: developed countries must provide financial resources to developing countries to enable the latter to implement the *Convention*. It further provides in Article 20(4) that developing countries’ ability to meet their obligations depends on developed countries implementing their own commitments on financial resources and technology transfer.

The International *Treaty on Plant Genetic Resources for Food and Agriculture*, while recognizing that “plant genetic resources for food and agriculture are a common concern of all countries,” enacts differentiation by imposing certain responsibilities on developed countries for the benefit of developing countries and economies in transition. Hence, international cooperation is to be directed to establishing or strengthening the capabilities of developing countries and economies in transition. In addition, parties are required to promote the provision of technical assistance to developing countries and economies in transition.

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27 Id. arts. 8(m) and 9(e).
29 Id. art. 7.2(a).
30 Id. art.8.
The Convention on Persistent Organic Pollutants (POPs),\textsuperscript{31} in its preamble makes mention of the respective capabilities of developed and developing countries and the common but differentiated responsibilities of State and makes provision for exceptions from some obligations and requires that the conference of the Parties takes due account of the special circumstances of the developing country Parties and Parties with economies in transition” in deciding whether to grant the exceptions.\textsuperscript{32} Under Article 12(12), parties are required to provide timely and appropriate technical assistance” to developing and transitioning countries to assist them to meet their obligations under the Convention and under Article 13(2) there are similar requirements for financial assistance. The 1996 Protocol to the London Convention obliges developed countries to transfer technology for the benefit of “developing countries and countries in transition to market economies, on favourable terms.”\textsuperscript{33}

CBDR, is also enshrined under the WTO, agreements, here the principle manifests itself in terms of what is referred to as “special and differential treatment” provisions. These provisions grant developing countries longer time periods to implement commitments as well as provisions that allow developed countries to treat developing countries more favourably to increase their trading opportunities.\textsuperscript{34} There are also provisions which require technical assistance and technology transfer from developed to developing countries. Under the GATT for example, there is enshrined in the “Enabling Clause” a system of preferences under which “parties may accord differential and more favourable treatment to developing countries, without according that treatment to other contracting

\textsuperscript{31} Stockholm Convention on Persistent Organic Pollutants, 22 May 2001 (entered into force 17 May 2004). 8

\textsuperscript{32} Id. art. 4(7).


parties.”\textsuperscript{35} When granting concessions, developed countries should not demand that developing countries reciprocate.\textsuperscript{36}

CBDR under the TRIPS inter alia takes the form of granting extra implementation time to developing countries\textsuperscript{37} and indefinitely delaying implementation for the least developed countries.\textsuperscript{38} Developed countries are obliged under the TRIPS to provide incentives to “enterprises and institutions in their territories” for technology transfer to developing countries “in order to enable them to create a sound and viable technological base.”\textsuperscript{39} Developing countries are at liberty under the SPS Agreement to request time-limited exemptions from their obligations, on the other hand, developed countries are required to consider providing technical assistance to exporting developing countries to allow them to meet any SPS standards set by the importing developed country.\textsuperscript{40}

Therefore, CBDR has been accorded a place in the international economic system.

Differentiated responsibility has also been expressed in soft law. Under the Johannesburg Plan of Implementation (JPOI), CBDR was stated in no uncertain terms thus: The implementation of Agenda 21 and the achievement of the internationally agreed development goals, including those contained in the Millennium Declaration as well as in the present plan of action, require a substantially increased effort, both by countries themselves and by the rest of the international community, based on the recognition that each country has primary responsibility for its own development and that the role of national policies and development strategies cannot be overemphasized, taking fully into

\textsuperscript{35} Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903, 28 November 1979, B.I.S.D. 203, para. 1.

\textsuperscript{36} World Trade Organization, General Agreement on Tariffs and Trade 1947, art. XXXVI(8).

\textsuperscript{37} World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), art. 65:2.

\textsuperscript{38} Id. art. 66:1.

\textsuperscript{39} Id. Art. 66:2

\textsuperscript{40} World Trade Organization, Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), arts. 9.2 and 10.3. 9.
account the Rio principles, including, in particular, the principle of common but differentiated responsibilities.\textsuperscript{41}

The implication of the above provision is that CBDR is one of the guiding principles for the implementation of Agenda 21.

The 1995, Copenhagen Declaration also enunciates CBDR, it provides that “the formulation and implementation of strategies, policies, programmes and actions for social development are the responsibility of each country and should take into account the economic, social and environmental diversity of conditions in each country.”\textsuperscript{42} Under Commitment 5 parties are required to cooperate to assist developing countries at their request, in their efforts to achieve equality and equity and the empowerment of women. Commitment 7 calls for support for the “the domestic efforts of Africa and the least developed countries to implement economic reforms, programmes to increase food security, and commodity diversification.”

The 1972 Stockholm Declaration in its principle 23, provides that :Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.\textsuperscript{43}

The 1992 Rio Declaration provides that the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable,
shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.\(^{44}\)

It is evident from the above provisions that the underlying rationale for CBDR is to promote distributive equity between developing and developed countries. CBDR acts as an incentive for developing countries’ compliance with their obligations under a given international instrument.\(^{45}\)

Finally, differentiated responsibility has been expressed in international case law, as demonstrated below. In the *Shrimp/Turtle* case,\(^{46}\) which involved an import ban imposed by the United States on Shrimp not caught with US-approved Turtle Excluder Devices (TEDs) in order to protect certain species of sea turtle whose existence was being threatened by commercial shrimp harvesting. The issue was whether the ban was a protectionist measure designed to support the American shrimp industry. The principle of CBDR was implicit in the language of the appellate body, it stated interalia that: “We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.” Differential treatement here can be inferred from the appellate panel’s use of the word “appropriateness.”

CBDR was however expressly stated by the WTO Panel in the same case to the effect that States have common but differentiated responsibilities to conserve and protect the environment.\(^{47}\)


\(^{45}\) Hepburn and Imran., *supra.* note 34.


CBDR was also invoked by the Appellate Body in the *Asbestos case*.\(^{48}\) In determining whether a trade measure was necessary "to meet a country’s health policy goals, the appellate body defined “reasonably available alternatives” and inter alia concluded that reasonably available alternatives are measures that a country could reasonably be expected to employ."\(^{49}\) It therefore follows from this observation that if a proposed alternative is beyond the means of a developing country, that country does not have to implement it but may adopt the trade measure in dispute as a "necessary" one. This in effect is differential treatment.\(^{50}\)

Having given the background of the principle of CBDR, this study will then focus on the principle of CBDR in the Climate Change Legal Framework. The remainder of this chapter deals with the research questions, the objectives, justification of the study, methodology and scope. Chapter two is the main thrust of this study, it describes the principle of CBDR in the Climate change legal framework, chapter three examines the challenges of CBDR in the Climate Regime, chapters four and five deal with recommendations and conclusions respectively.

### 1.1 Objectives and research questions

This study set out to achieve the following objectives: to examine how the principle of CBDR is applied in the international climate change legal framework, to examine the origin and content of the principle of CBDR, to explain how the principle of CBDR is applied in the international climate change legal regime, to examine new developments as regards the principle of CBDR, to assess the challenges of the Principle of CBDR in the Climate Regime, to make recommendations for the effective application of the principle of CBDR in the Climate Regime.

To achieve the above objectives, the study was guided by the following research questions: how is the principle of CBDR applied in the international climate change legal

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\(^{49}\) *Id.* para. 69.

\(^{50}\) *Id.* para. 170.
framework?, What is the origin and content of the principle of CBDR?, how is the principle of CBDR applied in the international climate change legal framework?, what are the new developments as regards CBDR in the Climate Regime?, what are the challenges of the Principle of CBDR in the climate change regime?, how can CBDR be applied effectively and efficiently in the Climate Regime?.

1.2 The importance and justification of the study
There is limited literature on this principle in a specific legal regime. This study aims to examine how the principle of CBDR is applied in the Climate Change Legal Framework. This study is further justified by the evolving nature of the principle of CBDR in the Climate regime. The thesis highlights the new developments of CBDR.

1.3 Methodological overview
The study relied mainly on the qualitative method to examine the principle of CBDR as applied in general environmental law. This study relied on primary and secondary sources of information. Primary sources included materials from the library on climate change. Library text books provided information on the theories of the principle of common but differentiated responsibilities. Internet research provided access to recent publications on the principle of CBDR. Additionally, interviews with some law professors were conducted to get their views on the principle of CBDR.

2 The principle of CBDR in the international climate change legal framework
2.1 Common responsibility in the climate regime
Common responsibility in general has already been discussed in details in chapter one. Suffice it to mention here that Common responsibility in the Climate regime is rooted in the principle of cooperation which inter alia states that States are obliged, in the spirit of solidarity, to cooperate in preventing transboundary pollution. The common responsibility

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primarily involves an obligation to cooperate to conserve, protect and restore the health and integrity of Earth’s ecosystem.\textsuperscript{52}

The 1992 FCCC echoes this common responsibility in no uncertain terms thus: \textit{The Parties to this Convention, Acknowledging} that change in the Earth’s climate and its adverse effects are a common concern of humankind.\textsuperscript{53} According, the FCCC aims to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.\textsuperscript{54} To achieve this objective the principle of, common responsibility in the climate change regime incorporates states’ historical contributions to global environmental degradation and embraces fairness and justice elements to be taken into account when devising relevant legal commitments.\textsuperscript{55} This results in differential treatment which is discussed in the next subsections.

\textbf{2.2 Differentiated responsibility in the climate regime}

In the Climate Regime, differentiated responsibility derives from the differing contributions of states to climate change and the differing capacities of states to take remedial measures. At the Rio, parties acknowledged the contributions of industrial countries to the global crisis.\textsuperscript{56} It is against this background that some scholars have deduced that the legal basis for the transfer of technology and financial resources from the industrial to developing countries under the principle of CBDR is entitlement rather than need.\textsuperscript{57}

\textsuperscript{52} Principle 7 of the Rio Declaration 1992.
\textsuperscript{53} UNFCCC, Para 1.
\textsuperscript{54} Article 2 FCCC, preamble to the Kyoto Protocol.
\textsuperscript{55} Sands, \textit{supra} note 3, at 218-219.
2.3 Arguments for CBDR in the climate regime

2.3.1 The equity and the polluter pays principles

The argument advanced by developing country parties is that owing to the fact that industrial countries bear the overwhelming responsibility for historical GHG emissions they should bear the primary burden of averting climate change.

In terms of per capita entitlements. Proponents of this school of thought argue that the most important criteria for deciding the rights to environmental space is the per capita since this is a direct measure of human welfare on ground that the atmosphere is a common heritage of humankind, equity has to be the fundamental basis for its management.\(^{58}\)

The notion of ‘carbon debt’ is also related to the per capita argument. According to the notion of carbon debt, those countries and populations that use more than their fair share of the atmosphere, and contribute more to the damaging effects of global warming, are running up a debt to those countries that use less than their fair allocation.\(^{59}\)

It is on the basis of the foregoing proposition that developing countries are unanimous in arguing that the debt industrialized countries owe to the global community for climate, erases the moral legitimacy to keep holding poor developing countries hostage to their own much smaller, but still unpayable, financial debts.\(^{60}\) In addition proponents of this school of thought also argue that it provides moral legitimacy to claims for significant new resources and technology from industrial countries to help poor countries affected by the increasingly volatile and uncertain global environment.\(^{61}\)

2.3.2 The economic and capacity argument

Vulnerability to Climate Change differs from country to country.\(^{62}\) Impacts of climate change are a product of the degree and nature of physical change, the degree to which the society depends on the natural resources affected and its institutional and social


\(^{59}\) Who owes Who: Climate Change, Debt, Equity and Survival (Christian Aid, 1999).


\(^{61}\) Id.

\(^{62}\) Rajamani, supra note 56, at 178-179.
capabilities for handling change. In hotter climates and for developing countries with economies that depend more heavily on natural resources, the impacts are widely expected to be adverse partly because institutional and social structures tend to be weaker and hence less able to cope with change. Developing countries also have fewer financial resources for investing in robust infrastructure that are resilient to the adverse effects of Climate Change.

Accordingly, capacity to take remedial measures is one of the criteria for differentiating between countries under the CBDR principle. Under the Rio Declaration, industrial countries’ responsibility is premised on their superior technologies and financial resources and in the FCCC it is based on their respective capabilities.

The capacity criterion in the CBDR principle builds on the polluter pays principle which inter alia requires that the costs of pollution should be borne by the person or persons responsible for causing the pollution. The capacity criterion is closely linked to the past, current, and future contributions criterion.

However the validity of this argument is in question given the fact that greenhouse gas emissions of developing country parties are rapidly increasing and are expected to surpass emissions of the United States and other [developed] counties as early as 2015. In fact, developing world emissions began to outpace developed emissions in 2005, and they are projected to continue increasing seven times faster than in the developed world. China

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63 Id.
64 Id.
65 Id.
66 Id. at 148
67 Rio Declaration, Principle 7, FCCC article 3.
70 Rajamani, supra note 56 at 149.
alone now out-emits the U.S., and its emissions growth through 2030 is projected to be nine times higher than that of the U.S.\textsuperscript{72}

In effect, any reduction in emissions from developed nations would be rendered moot by burgeoning emissions from developing nations even more so if developed-nation constraints shift economic activity to exempted nations.\textsuperscript{73}

2.4 Arguments against CBDR in the climate regime

2.4.1 The fairness argument

Developed countries led by the US argue that developing countries would have an unfair economic advantage if they did not face the same restrictions as annex 1 parties. The unfairness would manifest itself through export of jobs and industries to developing nations and the climate change treaty would prove ineffective without developing country participation.\textsuperscript{74}

The views of the US are express in no uncertain terms in the Byrd-Hagel Resolution of the 1997 which inter alia forbids the United States from signing any legal agreement regarding the FCCC that would ‘mandate new commitments to limit or reduce greenhouse gas emissions for Annex I countries, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for developing country Parties within the same compliance period.\textsuperscript{75}

The Byrd-Hagel Resolution calls for a fair sharing of the burden which requires binding targets for the developing world that begin at the same time as the industrial world but

\textsuperscript{72} Id. Figs. 83 and 84. 
\textsuperscript{74} Paul G. Harris, OCEES Research Paper, Understanding America’s Climate Change Policy: Realpolitik, Pluralism and Ethical Norms (1998), 15.
\textsuperscript{75} Senate Resolution 98, 25 July 1997.
incorporates flexibility for developing countries with regards to targets timing and breadth of commitments.\textsuperscript{76}

The Byrd-Hagel Resolution represents the official U.S. policy on Climate Change and serves as the overarching guidelines for discussing any new climate treaty. The Senate meant for its resolution to apply to all future global warming negotiations.\textsuperscript{77}

Therefore, the Climate Regime is unfair to developed countries to the extent that the UNFCCC and the Kyoto Protocol thereto exempt 77 percent of all countries from any obligations. Countries like China, India, Mexico, and Brazil are completely unfettered by the Treaty. This gives them a competitive advantage of cheap labour, lower production costs, and lower environmental, health and safety standards. Hence these countries will be free to develop and pollute all they want, while the economy of developed countries goes into deep freeze.\textsuperscript{78}

\section*{2.5 CBDR in the climate regime}

CBDR in the climate regime will be discussed under three main themes. First, provisions that differentiate between industrial and developing countries with respect to the central obligations contained in the treaty, such as emission reduction targets; second provisions that differentiate between industrial and developing countries with respect to implementation, such as delayed compliance schedules, permission to adopt subsequent base years, delayed reporting schedules, and soft approaches to non-compliance, and, third, provisions that grant assistance, intera alia financial and technological.

The next sections give a detailed examination of differential treatment in the climate regime on the basis of the three themes above mentioned.

\textsuperscript{76} Id.
\textsuperscript{77} S. Res. 98, 105th Cong., 1st Sess., emphasis mine.
\textsuperscript{78} Benito Muller, Congressional Climate Change Hearings: Comedy or Tragedy? A Prime for Aliens (Oxford Institute for Energy Studies, 2000).
2.5.1 Provisions that differentiate between countries with respect to the central obligations of the treaty

The central obligations of a treaty have been defined to mean those obligations which when executed, fulfill the purpose(s) or objective(s) of the treaty.\(^79\) In the context of the climate regime, the FCCC aims to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.\(^80\)

This goal is to be achieved through mitigation which is a preserve of industrial countries. Accordingly, the FCCC requires industrial countries to undertake policies and measures on the mitigation of climate change and to communicate detailed information on such policies and measures with the aim of returning by 2000, individually or jointly, to the 1990 levels of anthropogenic emissions of Co2 and other GHGs.\(^81\) Again this obligation falls on industrial countries and from the use of the word ‘shall’ it is evident that it is mandatory unlike the obligation to mitigate emissions which has been interpreted as an ‘aim’ and a ‘quasi-target and ‘quasi-timetable.\(^82\)

Similarly, under the Kyoto Protocol, the main obligations are exclusive to industrial countries. Industrial countries are required under Article 3 of the Kyoto Protocol to individually or jointly ensure that their aggregate anthropogenic CO2 equivalent emissions of certain GHGs\(^83\) 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 2008-12.\(^84\) Like the FCCC, the Kyoto Protocol uses an obligatory language by adopting the phrase ‘Parties shall’.\(^85\) Furthermore, under

\(^{79}\) Rajamani, *supra* note 56, at 191.
\(^{80}\) UNFCCC art. 2. Preamble to the Kyoto Protocol.
\(^{81}\) UNFCCC art. 4(2)(a) and (b) FCCC.
\(^{83}\) Annex A to the Kyoto Protocol.
\(^{84}\) Kyoto Protocol art. 3(1).
\(^{85}\) *Id.*
article 3(2), parties are required by 2005 to have made demonstrable progress in achieving the commitments under the Protocol.

The exclusion of developing countries from the obligations and commitments under both the FCCC and the Kyoto Protocol is a clear demonstration of differential treatment under the climate regime. In addition, the Kyoto Protocol in its Article 6(2) makes provision for industrial countries to advance commitments in subsequent periods. Accordingly, the Protocol states that ‘commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol.’

In terms of implementation, the Kyoto Protocol puts in place a mechanism for realizing Annex I commitments. The Protocol enjoins Annex I countries to establish national systems for the estimation of anthropogenic emissions by sources and removals by sinks of GHGs. It also requires them to communicate as part of their national inventories and national communications information relevant for the purposes of ensuring compliance with their mitigation commitments. This information is then reviewed by Expert Review Teams.

The Kyoto Protocol creates three mechanisms for industrial countries to meet their mitigation commitments, of these three mechanisms only the Clean Development Mechanism (hereinafter CDM) is applicable to developing countries. Article 6 provides for Joint Implementation which is intended for Parties included in Annex I and Emissions Trading described in Article 17 is restricted to ‘Parties included in Annex B’.

The origin of CDM can be traced to a Brazilian Proposal for a Clean Development Fund that sought to impose financial penalties on Annex I parties for falling into non-compliance, and to recycle the funds to non-Annex I Parties for the purpose of

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86 Id. art. 3(9).
87 Id. art. 5.
88 Id. Art. 7(1) and (2).
89 Id. art. 8.
90 Id. art. 6(1).
addressing climate change. In the course of the negotiations Brazil’s Clean Development Fund underwent a metamorphosis and emerged as the CDM, which would give industrial countries some flexibility in meeting their targets and involve developing countries in emissions mitigation efforts.

CDM signifies the involvement of developing countries in the mitigation endeavour. The participation of developing countries in the CDM aims to further Annex I Protocol commitments as well as further non-Annex I FCCC commitments. The underlying rationale for CDM as stated in Article 12(2) of the Kyoto Protocol is to ‘assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.’ The obligations of the developing countries is defined under the FCCC to include inter alia sustainable development which is to be attained by their participation in the CDM’s emissions reductions thereby contributing to the ultimate objective of the FCCC. On the other hand, industrial countries’ participation in the CDM is in furtherance of their Protocol targets.

It is evident from the distinction between the FCCC and the Kyoto Protocol Commitments that the CBDR is at play with the heaviest responsibility lying on industrial countries even under CDM whose purpose as indicated above is to inter alia further Annex I commitments.

2.5.2 Provisions that differentiate between countries with respect to the implementation of the treaty

The relevant provisions are discussed in six categories. The first category is provisions that provide a context of differential treatment to implement which are contained in the

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93 UNFCCC art. (3)(b).
preambular and operational provisions. Differential treatment can be deduced from the preamble to the FCCC. The preamble inter alia affirms the contribution of industrial countries to the GHG by observing that the ‘largest share of historical and current global emissions of greenhouse gases has originated in developed countries’. It further notes that the ‘global nature of climate change calls for…widest possible participation by all countries…in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.’ Accordingly, developed countries are called upon to take immediate action, ‘as a first step towards comprehensive response strategies at the global, national and where agreed, regional levels.’

It is submitted that the CBDR principle is the result of a compromise between industrial and developing countries. Developing countries had sought inclusion of the ‘main responsibility principle,’ part of GA Resolution 44/228 convening UNCED, and a direct emanation of the polluter pays principle, which posits that since the climate problem results primarily from the profligate lifestyles, of industrial countries, they should bear the main responsibility for combating it. Instead the preamble contains the CBDR principle which, at least in the Preamble, does not specify on what basis differentiation is to be made between countries capability and/or culpability.

In the Preamble, developing countries enjoy favourable treatment. It provides that ‘per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.’ The reference to ‘per capita emissions’ originated in an Indian proposal that the FCCC should promote the convergence of GHG emissions at a common per capita level.

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94 Preamble to the UNFCCC, para 3.
95 Id. para 6.
96 Id. para. 18.
97 Rajamani, supra note 56, at 194.
99 UNFCCC Preamble, supra note 94.
The reference to the emissions growth was originally proposed as a principle and couched in mandatory terms.\textsuperscript{101} Nevertheless, the acknowledgement that ‘per capita’ vision has some place in the galaxy of possible ideological visions to tackle the climate change problem is significant. The acknowledgement that emissions from developing countries will grow is also significant. In the context of the ultimate objective of the FCCC, ‘stabilization of the greenhouse gas concentration in the atmosphere’,\textsuperscript{102} such an acknowledgement can be interpreted as recognition, broadly, of what has come to be known as the ‘contraction and convergence’ vision.\textsuperscript{103} This vision envisages as a first step convergence over time in per capita GHG emissions or entitlements, such that emissions from developing countries will grow, while those from industrial countries will decrease. After convergence, all countries would contract their GHG emissions equally until the necessary contraction limit is reached. No inflation of National Budgets in response to the rising populations would be permitted after an agreed set date.\textsuperscript{104}

Further, the preamble underlines the importance of social and economic development to developing countries. It acknowledges that ‘environmental standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries’,\textsuperscript{105} and climate response measures should take into account ‘the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty.’\textsuperscript{106}

The next set of provisions are the preambular provisions, a number of operational provisions of the FCCC contain references to the special needs and particular circumstances of developing countries. It has been observed that a lot of controversy surrounds the

\begin{flushleft}
\textsuperscript{101} Id. art. II(I) stating that ‘the net emissions of developing countries must grow’.
\textsuperscript{102} UNFCCC art. 2.
\textsuperscript{103} John Broad, Third World Network, Contraction and Convergence (1999).
\textsuperscript{104} Id.
\textsuperscript{105} UNFCCC preamble para. 18.
\textsuperscript{106} Id. para.21.
\end{flushleft}
provision containing the CBDR principle and highlighting industrial countries’ leadership.\textsuperscript{107}

Article 3 of FCCC provides for the Principles. It proceeds by stating that ‘Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.’\textsuperscript{108} It then calls upon industrial countries to ‘take the lead in combating climate change and the adverse effects thereof’.\textsuperscript{109} It further stresses that ‘full consideration’ be given to ‘specific needs and special circumstances of developing country Parties’.\textsuperscript{110}

Article 3 was opposed by developed countries on grounds that it could, as an operational rather than a preambular provision,\textsuperscript{111} introduce a note of uncertainty into the context of the FCCC obligations. The US delegation was concerned that this Article could create specific commitments beyond those set out in Article 4, introduced various amendments to circumscribe the legal potential of Article 3: a chapeau was added, specifying that the principles were to ‘guide’ the parties in their actions under the FCCC; the term ‘States’ was replaced by ‘Parties’; and the term ‘inter alia’ was added to the chapeau to indicate that the Parties may take into account principles other than those listed in Article 3 in implementing the FCCC.\textsuperscript{112} It has been noted that these three modifications were intended to forestall arguments that the principles in Article 3 are part of customary international law and bind states generally.\textsuperscript{113} Instead the principles clearly apply only to

\textsuperscript{107} Rajamani \textit{supra} note 56, at 196.
\textsuperscript{108} UNFCCC art.3(1).
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} UNFCCC.art. 3(2).
\textsuperscript{111} Developing countries argued that an article on general principles would guide the parties in implementing and developing the Convention. Industrial countries however questioned the inclusion of this article. The US in particular opposed its inclusion and argued that if it merely stated the intentions of the parties or provided a context for interpreting the Convention’s commitments, it served the traditional functions of the preamble and placing them in the operative part of the Convention would be necessary and even misleading. See Rajamani supra note 56 at 196 and Daniel Bodansky \textit{supra} note 82 at 502.
\textsuperscript{112} Sands, \textit{supra} note 69 at 53-66.
\textsuperscript{113} Bodansky, \textit{supra} not 82 at 502.
the parties and only in relation to the FCCC, not as general law. The United States also removed any reference to the term ‘principles’ in the FCCC. As a result, the term appears only in the title of Article 3 and, at the suggestion of the United States, a footnote was added stating that ‘titles of articles are included solely to assist the reader.’

The notions of ‘common but differentiated responsibility and respective capabilities’ and ‘industrial countries leadership’ are couched in discretionary and guiding rather than prescriptive language and apply only to parties in relation to the FCCC. While these notions are neither legally binding nor indeed, as some claim, customary international law, they still constitute a significant force within the climate regime. The notion of common but differentiated responsibilities has significant legal implications. It is the context within which international environmental law functions, such that this principle, inter alia, forms the foundation of the burden-sharing arrangements crafted in different environmental treaties. And it is part of the conceptual apparatus of the climate regime such that it forms the basis for the interpretation of existing obligations and the elaboration of future international legal obligations within the regime. It is in short, the overarching principle guiding the future development of the climate regime.

Under CBDR, the limited capacity of developing countries-as a whole-to respond to climate change is recognized in that they are recipients of financial assistance and technology transfer, their particular concerns and needs are taken into account in improving their capabilities in research and systematic observations, they are the particular focus of efforts to develop and implement education and training programmes,

\[\text{\footnotesize\textsuperscript{114} Id.}\]
\[\text{\footnotesize\textsuperscript{115} Id.}\]
\[\text{\footnotesize\textsuperscript{116} Rajamani, supra note 56 at 196 notes that the principles contain guiding, rather than prescriptive language. For example, Parties ‘should’ rather than ‘shall’ protect the climate system. See art.3 FCCC.}\]
\[\text{\footnotesize\textsuperscript{117} Rajamani, supra note 56 at 197.}\]
\[\text{\footnotesize\textsuperscript{118} Id.}\]
\[\text{\footnotesize\textsuperscript{119} UNFCCC art. 4(3) and art. 11(5).}\]
\[\text{\footnotesize\textsuperscript{120} Id. art. 4 (5).}\]
\[\text{\footnotesize\textsuperscript{121} Id. art.5(c).}\]
strengthen national institutions, and train experts;\textsuperscript{122} and they are provided with assistance by the FCCC Secretariat in the compilation and communication of information.\textsuperscript{123}

CBDR recognizes the special needs and circumstances of certain categories of countries. Industrial countries are required to assist the ‘developing country Parties that are particularly vulnerable to the adverse effects of climate change’ in meeting costs of adaptation to adverse effects.\textsuperscript{124}

Parties are required to give full consideration to what actions are necessary to meet the specific needs and concerns of developing countries arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on a variety of groups of countries ranging from ‘small island countries’ to ‘countries whose economies are highly dependent on income generated from fossil fuels’.\textsuperscript{125} Parties are to take full account of the specific needs and special situations of ‘least developed countries’ in actions with respect to funding and transfer of technology.\textsuperscript{126} These particular groups of developing countries find mention in Article 3(14) and 2(3) of the protocol that require Parties to implement the Kyoto commitments in such a way as to minimize adverse social, environmental, and economic impacts on developing countries, in particular the groups identified in Article 4(8) and (9) FCCC.\textsuperscript{127}

Parties are required to consider actions such as establishment of funding, insurance and technology transfer.\textsuperscript{128} A specific reference is also made to particular continents, for instance, cooperation is urged in developing and elaborating appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection

\textsuperscript{122} Id. art. 6(b)(ii).
\textsuperscript{123} Id. art. 8(c).
\textsuperscript{124} Id. art. 4(4).
\textsuperscript{125} Id. arts. 4(8) and 4(10).
\textsuperscript{126} Id. art. 4(9).
\textsuperscript{127} Kyoto Protocol art. 3(14). See also art.2(3) Kyoto Protocol.
\textsuperscript{128} Id.
and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods.\textsuperscript{129}

The special circumstances and needs of Economies in Transition (EITs) are recognized both under the FCCC and the Kyoto Protocol. Articles 4(6) and 3(6) of the FCCC and the Kyoto Protocol respectively enunciate that in the implementation of their commitments the ‘Parties included in Annex I undergoing the process of transition to a market economy’ are to be allowed ‘a certain degree of flexibility.’

Article 4(10) FCCC has been interpreted to apply to some industrial countries.\textsuperscript{130} It requires Parties ‘to take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change’.\textsuperscript{131} Since developing countries that are highly dependent on fossil fuels are already entitled to special consideration under Article 4(8), Article 4(10) is unique in as far as it could be interpreted to apply to industrial countries that produce fossil fuel (such as Australia, Russia, and the United States).\textsuperscript{132} It is however unlikely that these countries will enjoy such special consideration in mitigation of their responsibilities under the regime.

The Second category deals with language permitting flexibility. Differential treatment in both the FCCC and the Kyoto Protocol can be inferred from language permitting flexibility and hence, differentiate treatment in implementation.

Under Article 4 of the FCCC, Parties are required to fulfil commitments ‘taking into account’ a series of considerations including their common but differentiated responsibilities and their specific national and regional development priorities, objectives,

\textsuperscript{129} UNFCCC art. 4(1)(e) FCCC.
\textsuperscript{130} Daniel Bodansky, supra note 82 at 531.
\textsuperscript{131} UNFCCC art. 4(10).
\textsuperscript{132} Daniel Bodansky supra note 82 at 531.
and circumstances. Further, Parties are required to take climate considerations into account ‘to the extent feasible’ in their relevant social, economic and environmental policies and actions. In choosing the information to be submitted in their national communications, again, Parties have some leeway. Parties are required to submit national inventories of anthropogenic emissions by sources and removals by sinks of all GHGs not controlled by the Montreal Protocol, ‘to the extent its capacities permit’. Parties can submit any other information ‘the Party considers relevant to the achievement of the objective of the Convention and suitable for inclusion in its communication, including, if feasible, material relevant for calculations of global emissions trends.’

The rationale for such flexible language is to provide developing countries with flexibility in implementation. However, industrial countries are also permitted flexibility in the implementation of their technology transfer commitment. Article 4(5) requires industrial countries to take ‘all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how’. This language is reiterated in Article 10(c) of the Protocol.

The use of the phrase ‘as appropriate’ in the FCCC reflects flexibility to the COP or Parties, in taking particular actions. The phrase ‘respective capacities’ is used to signify flexible language.

Article 2 of the Protocol requires Parties to initiate policies and measures to achieve their mitigation commitments, but these can be done ‘in accordance with (its) national circumstances’. The mitigation commitments however are couched in mandatory

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133 UNFCCC art. 4(1).
134 Id. art. 4(1)(f).
135 UNFCCC art. 12(1)(a).
136 UNFCCC art. 12(1)(c).
137 Id. Arts. 4(8) and 6(a).
138 Id. art. 6(a).
139 Id. art. 2(1).
language, Parties ‘shall…(GHGs)…do not exceed their assigned amounts….’ 140 Parties have to reach their mitigation targets in the 2008-12 commitment period and make ‘demonstrable progress’ towards this aim by 2005. 141

Under article 10 of the Protocol, Parties are required ‘taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention shall…’ 142

The precise implication of the term CBDR is yet to be determined. The reference to ‘specific national and regional development priorities, objectives and circumstances’ is uncertain in its import. There are neither standards to judge the legitimacy of national and regional development priorities or objectives, nor are there methods to determine which circumstances might be relevant. 143

Developing countries pushed for the use of language providing a context of differential treatment within Article 10 containing commitments for all Parties. Hence the phrases reminiscent of the Berlin Mandate, ‘without introducing any new commitments for Parties not included in Annex I…’ and the language referencing the FCCC commitments on financial assistance and technology transfer, and linking developing countries’ implementation to industrial countries’ performance. 144

The sub-paragraphs of Article 10 of the Protocol also contain language providing significant flexibility to developing countries in implementation. All Parties are required to formulate

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140 Id. art. 3(1).
141 Id. art. 3(2).
142 Id. Chapeau, art. 10.
143 See Rajamani supra note 56.
144 Technical Paper, supra note 91 at 56-9.
‘where appropriate and to the extent possible national and where appropriate regional programmes…’\(^{145}\) Non-Annex I Parties are asked to include in their national communications ‘as appropriate, information on programmes which contain measures the Party believes contribute to addressing climate change.’\(^{146}\)

Suffice it to trace the negotiating history of Article 10 of the Protocol. Developing countries argued that advancing the implementation of existing commitments would need to be coupled with similar advances in the implementation of financial commitments by industrial countries.\(^{147}\)

A proposal for the creation of a specific fund was discussed at length, but eventually discarded. Article 10 was however placed immediately prior to the article on the financial mechanism as a reflection that the two articles were linked: advancing commitments for developing countries would require increased financial support.\(^{148}\)

Flexible language is also used in Article 11 on the Protocol on financial mechanism. It provides that the implementation of the existing commitments shall ‘take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among developed country Parties’.\(^{149}\)

It is submitted that flexibility here can be inferred from the lack of precision. For instance, no rules exist to guide what constitutes an adequate and predictable flow of funds; and, no formula exists to determine what might be an appropriate sharing of the burden.\(^{150}\)

The COP serving as the Meeting of Parties (MOP) is mandated under Article 13(4) of the Protocol to keep under regular review the implementation of this Protocol, and make

\(^{145}\)Kyoto Protocol art. 10(a).
\(^{146}\)Id. art. 10(b)(ii).
\(^{147}\)Technical Paper, supra note 91 at 71.
\(^{148}\)Id. at 72.
\(^{149}\)Kyoto Protocol art. 11(2).
\(^{150}\)Rajamani, supra note 56 at 201.
decisions necessary to promote its effective implementation. In performing some of its mandated actions, as for instance with regard to exchange of information on response measures adopted by the Parties the COP/MOP is required to take into account ‘the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under this Protocol’.

The third category is provisions that permit flexible time frames for implementation or delayed compliance schedules. The climate regime provides for time-dependent commitments. The first commitment period for Annex I countries was set for 2008-12, a period of ten years after the adoption of the Kyoto Protocol. In the interests of fairness, it is worth keeping this in mind in determining commitment periods for developing countries’ commitments.

The fourth category consists of provisions that grant permission to adopt subsequent base years. Under Article 4(6) FCCC, EITs are given ‘certain degree of flexibility’—including with regard to the historical level of... (GHGs) ‘Chosen as a reference’ read with Article 3(5) of the Protocol provides certain EITs. The issue of base years for these countries is one that has significant consequences for the effectiveness of the regime. The concern over ‘hot air trading’ has haunted the climate negotiations since the adoption of the Kyoto Protocol. The term ‘hot air’ was coined in the context of surplus emissions credits from Russia and Ukraine. Emissions from these countries are 30% below their 1990 levels due to economic restructuring. Stabilization targets for these countries imply that they have vast quantities of unused emissions credits that they could trade or bank. Figures from the FCCC Secretariat indicate that if all EITs trade their surplus air, the effort required by

151 Kyoto Protocol art. 13(4) (c) and (d).
153 See Rajamani, supra note 56 at 201 observing that those whose base year or period was established pursuant to Decision 9/CP.2 of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Others who had not yet submitted their first national communication under Article 12 FCCC could choose a different base year if they so desire. Article 3(5) Kyoto Protocol.
154 Rajamani, supra note 56 at 202.
155 Id.
156 Id.
Annex B Parties will go down from 5.2% to 3%.\textsuperscript{157} Although at the time, the flexibility provided to certain EITs was expected to be exercised to favour adoption of base years subsequent to 1990, it was clear that earlier baselines could be adopted as well.\textsuperscript{158} For instance Bulgaria chose 1988, Hungary 1985-7, Poland 1988, Romania 1989, and Slovenia 1986.\textsuperscript{159}

The fifth category is provisions that provide for delayed reporting schedules. The FCCC differentiates between industrial and developing countries both with respect to the required content of national communications (developing countries objected to the term reporting, as it appeared burdensome and intrusive\textsuperscript{160}) and the time frame within which the communication is to be submitted. All parties are to communicate information on their national inventory of GHG emissions and removals to the extent their capabilities permit, as well as on the steps taken or planned to implement the FCCC.\textsuperscript{161} Annex I countries are also required to submit a detailed description of their policies and measures to implement their specific commitments, and an estimate of the effect of these measures and policies on their sources and sinks.\textsuperscript{162} Annex II countries are required to report on their transfers of financial resources and technology.\textsuperscript{163}

Developing countries are given considerable latitude in time to submit their initial reports. While industrial countries have six months to submit their initial reports, developing countries have three years and LDCs can submit their initial reports at their discretion.\textsuperscript{164} Finally, developing countries are entitled to full financial support in preparing their reports, and can receive technical assistance on request.\textsuperscript{165}

\begin{footnotes}
\item[158] Rajamani, supra note 56 at 202.
\item[159] Information on National Greenhouse Gas Inventory Data from Parties Including in Annex I to the Convention for the period 1990-2002, including the status of reporting, Executive Summary, FCCC/CP/2004/5(2004) at 16.
\item[160] Bodansky supra note 82 at 544.
\item[161] UNFCCC art. 12(1) (a) and (b).
\item[162] Id. art. 12(2).
\item[163] UNFCCC art. 12(2), (3), and (4) FCCC.
\item[164] Id. art. 12(5).
\item[165] Id. art.12(7).
\end{footnotes}
The Six categories are provisions that deal with compliance procedures. CBDR is also reflected in the compliance procedures of the climate regime. The rationale for compliance procedures in the context of environmental treaties, is to assist defaulting states return to compliance rather than to punish them for non-compliance, but these procedures, nevertheless, range from the coercive to the facilitative.\textsuperscript{166}

The Kyoto Protocol compliance committee whose objective is to \textit{inter alia} facilitate, promote and enforce compliance with Protocol Commitments\textsuperscript{167} is arguably the most rigorous of its kind,\textsuperscript{168} for the enforcement branch of the compliance committee has the power to impose penal consequences for non-compliance.\textsuperscript{169} Rigorous as this system is, in keeping with the nature and extent of differential treatment offered to developing countries in the climate regime, it contains a soft approach to non-compliance by developing countries.\textsuperscript{170}

In the decision authorizing the creation of the compliance committee, parties included implicit and explicit norms of differential treatment. Of the two branches of the compliance committee, only the facilitative branch applies to developing countries.\textsuperscript{171} The facilitative branch, which is empowered to provide financial and technical assistance, and/or advice, is required to do so taking into account the principle of common but differentiated responsibilities and respective capabilities.\textsuperscript{172} In addition, listed among the consequences that the facilitative branch can apply is the ‘formulation of recommendations…taking into account Article 4, paragraph 7, of the Convention’\textsuperscript{173} -a

\begin{itemize}
\item \textsuperscript{167} Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, in Report of the Conference of the Parties on its Seventh Session Addendum, Part Two: Action Taken by the Conference of the Parties, Volume III, FCCC/CP/2001/13/Add.3(2002).
\item \textsuperscript{168} Geir Ulfstein and Jacob Werksman, ‘The Kyoto Compliance System: Towards Hard Enforcement,’ in Implementing the Climate Regime (Olav Schram Stokke et al. eds., 2005), 59.
\item \textsuperscript{169} Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, supra note 167 at section XV.
\item \textsuperscript{170} Rajamani, supra note 56 at 203.
\item \textsuperscript{171} Procedures and Mechanisms, supra note 167. section V, paragraph 4. The mandate of the facilitative branch extends generally to ‘promoting compliance by Parties with their commitments under the Protocol’, id. section IV, paragraph 4.
\item \textsuperscript{172} Id. section IV, paragraph 4.
\item \textsuperscript{173} Geir Ulfstein supra note 168. Id. section XIV, paragraph d.
\end{itemize}
provision stressing the centrality of financial assistance and technology transfer to the
environmental compact between developing and industrial countries.

The inclusion of the CBDR principle in the decision text on the compliance system is an
outcome of intense negotiations. Several industrial countries including Australia and the
United States opposed the introduction of CBDR principle in this context. Australia noted
that ‘it is not obvious to us what role such principles could play in a compliance system for
the Kyoto Protocol’.

The United States Argued that: “[i]t is unclear whether Parties supporting reflection of
the principle of ‘common but differentiated responsibilities’ in the compliance context are
seeking a recognition that Parties may have different substantive obligations or whether
they mean that Parties with the same type of obligations might be treated differently in
terms of non-compliance procedures/consequences because of that principle. In our view,
Parties that have undertaken the same type of obligation should be treated the same in terms
of non-compliance.”

On the other hand, most developing countries including the AOSIS, China, Republic
of Korea, Saudi Arabia, and South Africa, advocated inclusion of the CBDR principle in the text on compliance, and in the design of the compliance system. China in particular stressed the need for the CBDR principle to ‘be acknowledged as a cornerstone of
the system’.

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175 Id. at 66.
176 Id. at 45.
177 Id. at 15.
178 Procedures and Mechanisms, supra note 163 at 2.
179 Id.
180 Id.
181 id.
In constructing the compliance system such that only the facilitative branch pertains to developing countries, Parties ensured that the divergence in substantive obligations between industrial and developing countries is reflected in the design of the system.

The reference to CBDR, however, occurs in the text relating to the facilitative branch. The facilitative branch has overarching mandate to facilitate compliance with commitments, whether of developing or industrial countries. The CBDR principle, placed in this context, may well permit differential appreciation of broadly similar situations of potential non-compliance by industrial and developing countries. It may also permit differential approaches to facilitation in this context. The additional reference to Article 4(7) FCCC substantiates this point.\(^{182}\)

The challenge to such compliance committee and its differential treatment is if developing countries take on mitigation commitments, assuming they do so without including themselves in Annex I, will they only be subject to the facilitative branch? The decision, if applied as currently drafted, would only permit the compliance committee to facilitate and promote (but not enforce) developing country compliance with mitigation commitments. Much depends however on the nature and form that future commitments take. More broadly, it remains to be seen how, given the lack of clarity on the precise meaning of CBDR in the context of the compliance system the principle will be operationalised.\(^{183}\)

### 2.5.3 Provisions that grant assistance

The various forms of assistance under the climate regime are based on CBDR. The assistance envisaged under the climate regime includes: Financial assistance, technology transfer, capacity building as well as other forms of assistance. These forms of assistance are explained below.

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\(^{182}\) Rajamani, *supra* note 56 at 204.

\(^{183}\) *Id.* at 205.
First is financial assistance which is further subdivided into Costs and activities eligible for financial assistance and Multilateral funds/funding mechanisms.184 The costs and activities that are eligible for financial assistance take three forms. First, costs in fulfilling reporting obligations; second, costs in complying with more general commitments such as with respect to mitigation, education, and awareness; and third, costs incurred in adapting to the adverse effects of climate change.

Article 4(3) FCCC requires certain industrial countries to provide ‘new and additional financial resources’ to meet the ‘agreed full costs’ incurred by developing countries in complying with their reporting obligations.185 For general commitments under Article 4(1), certain industrial countries are required to provide financial resources ‘to meet the agreed full incremental costs…’ By way of qualification Article 4(3) further provides that ‘[t]he implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties’.186

It should be noted that this provision is constructed in mandatory rather than obligatory language (Developed Country Parties…shall provide’187). The United States had argued initially that financial assistance should be voluntary rather mandatory,188 as well created a precedent the developing countries were not about to ignore.189 The contributions under the FCCC were made mandatory. The level of funding however was left unspecified and each industrial country can determine for itself the size of its financial contribution.

Numerous terms merit elaboration. The term ‘new and additional financial resources,’ nowhere defined, is intended to address the developing country concern that existing

184 Id.
185 UNFCCC art. 4(3).
186 Id.
187 Id. see Rajamani supra note 546 at p.205.
188 Bodansky supra note 82 at 525.
development aid will be diverted to climate activities.\textsuperscript{190} ‘Additional’ therefore implies additional to Overseas Development Assistance (ODA). At UNCED developing countries obtained a commitment of 0.7\% of GNP from industrial countries. At the parallel climate negotiations they ensured that the financial resources provided for climate activities would be additional to such ODA.\textsuperscript{191}

The terms ‘agreed full costs’ and ‘agreed full incremental costs’ are also left undefined. These terms and their placement in this article however are a reflection of the industrial countries’ reluctance to underwrite indeterminate costs. Industrial countries were willing to underwrite developing countries’ reporting obligations as the costs involved are determinate, but they were unwilling to underwrite the implementation of more general commitments under Article 4(1) and elsewhere, as these were indeterminate and could cover, for instance, costs that developing countries might incur in converting from coal to nuclear plants.\textsuperscript{192} The term ‘incremental’ implies something added. However, to determine what might be added, it is essential to establish a benchmark or a baseline. Since no such baseline is available, the focus of this provision is on the term ‘agreed’ such that whatever the nature of the cost an agreement would have to be entered into between industrial and developing countries to ensure that it is covered.

The third category of costs that industrial countries agreed to cover, at the insistence of the Alliance of Small Island States (AOSIS), are adaptation costs. Article 4(4) FCCC requires certain industrial countries to ‘assist developing country Parties that are particularly vulnerable to the adverse effects’ of climate change in meeting the costs of adaptation to those adverse effects.’ Although this provision is also formulated in mandatory terms (‘Developed Country Parties…shall’), it can be distinguished from the commitment in Article 4(3). In the former, Parties are required to ‘provide’, in the latter Parties are required to ‘assist’. Article 4(4) however does not specify the extent of ‘assistance’ available. It clearly does not cover full costs, and it is unclear whether it

\textsuperscript{190} Bodansky \textit{supra} note 82 at 526, Rajamani \textit{supra} note 54 at 206.
\textsuperscript{191} Rajamani \textit{supra} note 56 at 206.
\textsuperscript{192} Bodansky \textit{supra} note 82 at 526.
covers ‘full incremental costs’ or merely costs as agreed. And additional concern with respect to adaption costs is in proving causality. It might be difficult for members of AOSIS to prove that the adverse effects suffered are indeed linked to climate change and are not merely the by-product of a naturally changing climate.\textsuperscript{193}

In terms of multilateral funds/funding mechanisms; Article 11 FCCC provides for financial mechanism and defines addresses a financial mechanism by setting forth the mechanism’s general characteristics and governance.

The views of developing and developed countries as regards financial mechanism differ significantly. On the one hand, developing countries have advocated a new financial mechanism that would operate under the authority of the COP, and on the other hand industrial countries have been insistent on their desire to channel financial assistance through the existing GEF.\textsuperscript{194}

The justification for the developing countries’ stand is that the provision of financial assistance to developing countries under the FCCC is an obligation, not an act of charity, and therefore donor countries do not have a right to control the financial mechanism, which would be the case if existing institutions are co-opted into the process, as these existing financial institutions are dominated by industrial countries.\textsuperscript{195}

Developing countries opposed in particular the use of the GEF as its decision-making was neither transparent nor democratic.\textsuperscript{196} Article 11 reflects a compromise: it defines a financial mechanism accountable to the COP, but whose operation is entrusted to one or more existing international entities. The financial mechanism is required to have equitable and balanced representation of all Parties within the transparent system of governance.

\textsuperscript{193} Rajamani, supra note 56 at 207.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Bodansky, supra note 82 at 538-9.
Article 11 is to be read in conjunction with Article 21(3) which entrusts the GEF with the operation of the financial mechanism on an interim basis. Article 21(3) also requires the GEF to be appropriately restructured and its membership made universal to enable it to fulfil the requirements of Article 11.

The GEF, created in 1991, was restructured in 1994 in response to this mandate. The Restructured GEF consists of an Assembly, a Council, and a Secretariat. The Assembly, with policy and implementation review functions, consists of representatives of all participants, while the Council, with operational and decision-making functions, consists of thirty-two members—sixteen from developing countries, fourteen from industrial countries, and two from EITs. 198

The voting system moved from one dollar one vote to a double-weighted majority representing both a 60% majority of the total number of participants and a 60% majority of the total contributions. 199 The Restructured GEF has operated the financial mechanism of the FCCC ever since. Developing countries have, however continued to express dissatisfaction with the GEF. This dissatisfaction is reflected, for instance, in the fact that developing countries ensure that the COP refers to the GEF as ‘an operating entity’ of the financial mechanism, 200 rather than formally acknowledging it as the operating entity of the Conventions’ financial Mechanism. 201 In general, developing countries are concerned with what they perceive as the continued domination of the donor countries and the World Bank, 202 and in particular they are concerned with the length of the GEF project cycle, the extent of bureaucracy involved in it, and the complicated nature of

199 Rajamani, supra note 56 at 207.
200 Decision 8/CP. 10, Additional Guidance to an Operating Entity of the Financial Mechanism, in Report of the Conference of the Parties on its Tenth Session at 19.
project approval process\textsuperscript{203} requiring strict adherence to global-local distinctions and arcane definitions of ‘incremental costs.’\textsuperscript{204}

At COP-7, after a few years of negotiation, Parties agreed to create a series of funds that would address some of these concerns. Three funds were created as a result of the Bonn Agreement and Marrakesh Accords, 2001. First is the Special Climate Change Fund to finance activities in adaptation; technology transfer; energy, transport, industry, agriculture, forestry, and waste management; and activities to assist fossil-fuel dependent developing countries to diversify their economies\textsuperscript{205}, second is Least Developed Countries Fund to support a work programme for LDCs including on adaptation,\textsuperscript{206} third, Kyoto Protocol Adaptation Fund to finance concrete adaptation projects and programmes in developing country Protocol Parties.\textsuperscript{207}

The special Climate Change Fund,\textsuperscript{208} the LDCs Fund,\textsuperscript{209} and the Kyoto Protocol Adaptation Fund\textsuperscript{210} are to be operated by ‘an entity’ entrusted with the operation of the financial mechanism of the Convention. The identity of the ‘entity’ was deliberately left unspecified.\textsuperscript{211} On the Special Climate Change Fund, in its initial guidance to the GEF, the COP requested the GEF to adopt ‘streamlined procedures’ and to ensure financial separation of this fund from others.\textsuperscript{212} In its further guidance, the COP requested the GEF to ensure ‘expedited access’, and to mobilize resources to operationalize the Fund ‘without delay’.\textsuperscript{213}

\textsuperscript{204} Argarwal, \textit{supra} note 202.
\textsuperscript{206} \textit{Id.} at 38.
\textsuperscript{207} \textit{Id.} at 39.
\textsuperscript{209} \textit{Id.}
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} Rajamani, \textit{supra} note 56 at 208.
On the LDCs Fund, in its initial guidance, the COP requested the GEF to ‘ensure the speedy release and disbursement of funds and timely assistance for the preparation of national adaptation programmes of action.’\(^\text{214}\) In its further guidance, Parties requested the GEF to ensure ‘a country-driven approach, in line with national priorities,’ and to take into account ‘guidelines for expedited support.’\(^\text{215}\)

The second form of assistance is technology transfer. Article 4(5)FCCC requires certain industrial countries to promote, facilitate and finance the transfer of environmentally sound technologies and know-how to developing country Parties to enable them to implement the provisions of the FCCC.\(^\text{216}\) The provision however is ambiguous in some respects, and contains phrases that provide significant flexibility to industrial countries in implementing their technology transfer commitments.

The ambiguity in this article relates to the identification of the donors and recipients of technology transfer. While it is clear that Annex II Parties are donors and developing countries are recipients, the position of the EITs is less clear.\(^\text{217}\) According to Article 4(5), the parties responsible for technology transfer are ‘developed country Parties and other developed country Parties included in Annex II’. This appears to indicate that Annex I and Annex II Parties are responsible for technology transfer i.e. EITs are responsible for technology transfer as well. However, Article 4(5) identifies the recipients of technology transfer as ‘other Parties, particularly developing country Parties’. The term ‘other’ here refers to Parties other than ‘developed country Parties and other

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\(^{214}\) Decision 8/CP.8, in Report of the Conference of the Parties on its Eighth Session at 19.


\(^{216}\) See Rajamani supra note 56 at 209 observing that developing countries consider the transfer of technology to be a precondition to their implementation of the Convention. The text of Article 4(7)FCCC supports this belief. However, considerable controversy exists on the terms under which technology is to be transferred from developed to developing countries. Chapter 34 of Agenda 21 provides that access to environmentally sound technologies should be promoted on ‘favourable terms, including on concessional and preferential terms’. Agenda 21, Chapter 17, A/CONF.15/26/Rev.1 (Volume. II) (1992). No consensus exists on what the phrases ‘concessional’ and ‘preferential’ mean in practice.

\(^{217}\) Id. at 209.
developed country Parties included in Annex II.\textsuperscript{218} Presumably those developed country Parties (not in Annex II) that are not donors can be recipients of technology transfer. It appears then that EITs can be considered both recipients and donors of technology transfer.

Article 4(5) of FCCC by way of permitting flexibility to industrial countries in their implementation requires industrial countries to ‘take all practicable steps’ to promote, facilitate, and finance ‘as appropriate’ the access to and transfer of technology.

The Buenos Aires Plan of Action set in motion a consultative process aimed at achieving agreement on a framework for meaningful and effective actions to enhance implementation of Article 4(5).\textsuperscript{219} Parties prepared a draft framework for technology transfer in the lead-up to COP-6.\textsuperscript{220} The framework contained in directives grouped around five themes: needs assessments, technology information, enabling environments, capacity building, and mechanisms for technology transfer.\textsuperscript{221} This framework was adopted at Marrakesh and is directed at breathing life into the technology transfer requirements of the FCCC.\textsuperscript{222}

The third form of assistance is capacity building. The FCCC is dominated by provisions on the necessity of meeting the specific needs and concerns of developing countries,\textsuperscript{223} implicitly recognizing that the ability of a country to adapt to climate change and to mitigate GHG emissions depends upon the resources of its people and institutions.\textsuperscript{224}

\begin{enumerate}
\item[218] First sentence of Article 4(5).
\item[221] Id.
\item[223] UNFCCC art. 3(2), 4(8), and 4(9).
\end{enumerate}
Capacity building refers to initiatives to develop and improve national, sub-regional, and regional capacities and capabilities for sustainable development.\textsuperscript{225}

While the Buenos Aires Plan of Action did not contain a specific decision on capacity building, several decisions taken at COP-4, particularly on technology transfer\textsuperscript{226} and adverse effects,\textsuperscript{227} contained detailed references to the need for capacity building in developing countries. COP-5 crystallized the ambition resonating through these decisions, and urged that elements of a draft framework for capacity-building activities, both in developing countries and EITs, were developed at COP-6 and adopted at Marrakesh. Although the utility of capacity building is recognized in other environmental treaties, the climate regime is unique in having negotiated a framework for capacity building in developing countries and EITs.\textsuperscript{228}

Finally, the climate regime recognizes that developing countries need financial assistance in participating in the negotiations, and that such participation is critical to an effective outcome.\textsuperscript{229} GA resolution 45/212 established a special voluntary fund in 1990 ‘to ensure that developing countries, in particular the least developed among them, as well as small island developing countries, are able to participate fully and effectively in the negotiating process’.\textsuperscript{230} Such negotiation assistance has proven effective in bringing a large number of countries to the table and therefore in representing a wider range of interests.

The climate regime also provides reporting assistance to developing countries. Article 12 (7) FCCC requires the COP to arrange for technical and financial support to developing countries in compiling national communications, and Article 8(c) FCCC

\textsuperscript{225} Id.
\textsuperscript{228} Rajamani supra note 56 at 211.
\textsuperscript{229} Protection of global climate for present and future generations of mankind, GA Res. 45/212 (1990) at paragraph 10.
\textsuperscript{230} Id.
requires the FCCC Secretariat ‘to facilitate assistance to the Parties, particularly developing country Parties on request, in the compilation and communication of information’.

2.6 CBDR at recent climate negotiations

2.6.1 The Copenhagen Accord and CBDR

At Copenhagen, the issues which had implications for the principle of CBDR were: comparability of action, incremental costs and Measurement, Reporting and Verification. The next subsections deal with these issues in detail.

The notion of comparability of action which is a brain child of the United States requires comparability between the mitigation actions of industrialized and developing countries.231 This notion has far reaching implications for CBDR to the extent that it defeats the very essence of differentiation and therefore equity. The other aspect of this notion is for other Annex 1 countries to require comparability between their actions and those of the US.232 Comparability of action can be traced to the Bali Conference.

At the Bali conference, developing countries pushed for what has been dubbed233 ‘a two track’ process to be reflected in the Bali Action Plan with a view to preserving strict differentiation. The ‘two track’ process would take the form of a legally binding Kyoto Protocol track for Annex 1 countries, and a “Long-Term Cooperative Action” (LCA) process for non-Annex 1 countries. According to developing countries, combining these two tracks would be pulling on a string that would unravel the entire architecture of the UNFCCC built around differentiation between the North and the South.234 To resolve this impasse, recourse was had to the ‘schedules approach proposed by Australia’. The schedules approach allowed each country to inscribe its national actions in a schedule.

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232 Id.
233 Id.
234 Id.
with provision for only a soft form of differentiation by action-economy-wide commitments versus a range of national actions-between Annex 1 and non-Annex 1 countries.\footnote{Id.}

The Copenhagen Accord\footnote{UNFCCC, the Copenhagen Accord. Available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf (accessed on 5 October, 2010)} in a bid to reconcile differentiation and comparability allows for two schedules, one which will contain economy-wide emission targets by Annex 1 countries, and the other which will document mitigation actions by non-Annex 1 countries.\footnote{Id. paras. 4 and 5.}

The Copenhagen Accord redefines differentiation through the schedule approach, and allows for comparability by harmonizing downward and making less legally stringent necessary actions by all countries.\footnote{Navroz supra Note 231.}

What is clear from the preceding discussion is that comparability of action has the effect of altering if not fully eroding differentiation and the underlying notion of distributive equity on which differentiation under the climate regime is built.\footnote{Id.} Comparability of action also has far reaching implications for differentiation in terms of Measurement, Reporting and Verification (MRV). These implications are examined below in details.

Measurement, Reporting and Verification (MRV) is one of the consequences of the notion of comparability of action. The critical question here is whether and how developing country actions unsupported by financial aid would be subjected to MRV. It should be recalled that the Bali Action Plan links developing countries’ “nationally appropriate mitigation actions” to provision of finance, technology and capacity support from industrialized countries. The challenge however is whether and how these actions are to be subjected to MRV.

The view of developing countries regarding this issue was expressed by China and India on behalf of the rest of the developing countries to the effect that while actions supported
by international finance would be subject to international MRV, unsupported actions undertaken as part of a development strategy would only be subject to domestic scrutiny.

China further argues that international verification of Chinese emissions target progress would be viewed as an infringement upon Chinese sovereignty. The US insisted that developing countries particularly China also subject their actions to international scrutiny. Under the final compromise, non-Annex 1 countries would report upon their mitigation actions, with provisions for international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected.  

Although it would seem that this approach settles the issue, it leaves a lot to be desired as regards reconciling differentiation and comparability. In addition, whether the compromise will be adopted in domestic politics is still a subject of speculation. An illustration of the challenge posed to differentiated responsibilities by the failure to reconcile differentiation and comparability for example, is that detailed rules will need to allow countries like China and India to claim they have retained control over their carbon destiny, while also allowing the US to claim it now has the right to hold China and India to account, which is inevitably a big hurdle.

While the above mandate is based on the principle of CBDR, it is the issue of Measurement, Reporting and Verification for Nationally appropriate mitigation actions (NAMAs) in developing countries which demonstrates a significant departure from CBDR in its pure form.

The issue of MRV has been dealt with by the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWGLCA). AWGLCA is a new FCCC subsidiary body established under the Bali Action Plan at Cop13. The new Working

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240 Id.
241 Copenhagen Accord para. 5.
243 Jeffrey Ball, Stephen Power, & Guy Chazan, Climate Summit: Divisions Persist on Core Questions as Leaders Arrive–Sharp Disagreements on Reductions, Aid, WALL ST. J., (Dec. 16, 2009), at A16.
Group is responsible for overseeing the process established under the Action Plan to develop a framework for addressing climate change post-2012.

At the eleventh session of AWGLA, the Parties agreed that NAMAs, enabled and supported by finance, technology and capacity-building, should be subjected to Measurement, Reporting and Verification (MRV) at the international level in accordance with guidelines to be adopted by the Conference of the Parties at its XX session. Domestically-funded mitigation actions taken by developing country Parties will be subject to their domestic measurement, reporting and verification. For measurement, reporting and verification of mitigation actions covered by market-based mechanisms, the requirements and rules governing participation in the relevant market-based mechanisms shall apply.

Another contentious issue at Copenhagen which has implications for CBDR was Incremental cost. The complexity of this issue stems from the principle that industrialized countries should pay for the “agreed full incremental cost” of developing countries measures as enshrined in the UNFCCC.

The issue here is that despite the use of the word “agreed” there is no clarity as regards the basis on which incremental costs are to be defined. The result, in practice, has been a bargaining process. There is uncertainty surrounding the cost of incremental costs. The UK for instance puts the figure at $100 billion per year by 2020 as the cost of support for developing country adaptation and mitigation. While many developing countries and analysts place the required figure much higher. Indian and China have consistently demanded that industrialized countries contribute 0.5 to 1% of their GDP for climate mitigation and adaptation. At Copenhagen India and China stated that they did not

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245 Id.

246 UNFCCC Art. 4(3).


anticipate benefiting greatly from these funds, but insisted on them as a matter of principle, particularly on behalf of smaller developing countries.\footnote{249 Bodansky Copenhagen Postmortem \textit{supra} note 242.}

The debate revolves around not only the amount of money, but also on questions of additionality, predictability and governance. Developing countries have invoked differentiated responsibility by inter alia arguing that climate funds should be additional to aid, since these are payments by polluters for past emissions.\footnote{250 \textit{Id.}} But at the same time, as industrialised countries argue, if addressing climate change requires rethinking development practices, aid patterns over time should also reflect climate considerations. Developing countries stress that climate funds should be predictable, and not subject to the vagaries of the market.\footnote{251 \textit{Id.}}

In an attempt to solve this stalemate, “assessed contributions” by all on the basis of a basket of criteria has been considered a useful mechanism\footnote{252 \textit{Id.}}. Under the “assessed contributions” mechanism proposed by Mexico and Norway, all Parties would contribute, but developing countries would be net recipients.\footnote{253 \textit{Id.}}

However, citing differentiated responsibility; developing countries are strongly opposed to contributing funds, even if it is less than they receive. Finally, developing countries strongly argue that climate funds should not be construed as aid, but as a response to historical responsibility for past emissions, and therefore should be governed in substantial part by recipient countries. Of particular contention is that the World Bank, controlled by donors, not be allowed to control these funds. Dispute over all these issues are closely tied to the principle of differentiation.\footnote{254 Navroz \textit{supra} note 231.}
3 Challenges of the principle of CDBR in the climate regime

3.1 Non-participation

The absence of developing countries on the basis of CBDR has been cited to be, “the most serious and intractable shortcoming of the climate regime and particularly the Kyoto Protocol.”255 Indeed US’ absence is largely a function of the absence of developing countries. The United States is reluctant to join Kyoto because it does not include developing country targets. If we can solve the developing country issue, then the issue of US nonparticipation will take care of itself. Three reasons have been advanced for advocating the participation of developing countries.256

First, the developing countries will be the source of the big increases in emissions in coming years according to the Business-as-Usual path (BAU), that is, the path along which technical experts forecast that countries’ emissions would increase in the absence of a climate change agreement.257 China, India, and other developing countries will represent up to two-thirds of global carbon dioxide emissions over the course of this century, vastly exceeding the OECD’s expected contribution of roughly one-quarter of global emissions. Without the participation of major developing countries, emissions abatement by industrialized countries will not do much to mitigate global climate change.258

Second, if a quantitative international regime is implemented without the developing countries, their emissions are likely to rise even faster than the BAU path, due to the problem of leakage.259 Leakage of emissions could come about by relocation of carbon-intensive industries from countries with emissions commitments under the Kyoto Protocol to non-participating countries, or by increased consumption of fossil fuels by non-participating countries in response to declines in world oil and coal prices. Estimates vary regarding the damage in tons of increased emissions from developing countries for every ton abated in an

256 Id.
257 Daniel M. Bodansky, Targets and Timetables: Good Policy But Bad Politics? University of Georgia School of Law research paper series (2007).
258 Frankel supra note 237.
259 Id.
industrialized country. But an authoritative survey concludes “ Leakage rates in the range of 5 to 20 per cent are common.”\textsuperscript{260}

Third, the opportunity for the United States and other industrialized countries to buy relatively low-cost emissions abatement from developing countries is crucial to keep the economic cost low.\textsuperscript{261} This necessitates the participation of developing countries in the international emissions commitments. Such participation will go a long way in increasing the probability of industrialized countries complying with the system of international emissions commitments.

### 3.2 Challenges of emission targets and per-capita approach

Under the current climate regime, the principle of CBDR has been translated in practice into a set of specific, quantitative emission mitigation obligations for industrialised countries and no emission mitigation obligations for developing countries.\textsuperscript{262} Emission targets and timetables inter alia, aim to address the equity concerns of developing countries. However, this approach has been criticised on a number of grounds, first, emission targets represent an economic straitjacket and could impose unacceptable high costs on countries, second from the political standpoint, rich countries would never accept the huge transfer of wealth from them to the poor that is implicit in the per capital formulation.\textsuperscript{263} Third, from a developing country perspective, China and India argue that economy-wide, binding emission targets are unacceptable because they would unduly restrict their national sovereignty.\textsuperscript{264} True, emission targets give countries flexibility as to the choice of national implementing measures. States can implement their targets through a domestic trading scheme, taxes, efficiency standards, and so forth.\textsuperscript{265} But because virtually every aspect of a country’s economy contributes to climate change – not only energy production, but also transportation, manufacturing, and

\begin{itemize}
  \item \textsuperscript{260} International Panel on Climate Change, Third Assessment Report - Climate Change 2001.
  \item \textsuperscript{261} Frankel \textit{supra} note 255.
  \item \textsuperscript{262} \textit{Id}.
  \item \textsuperscript{263} \textit{Id}.
  \item \textsuperscript{264} Daniel M. Bodansky, \textit{Targets and Timetables: Good Policy But Bad Politics?} University of Georgia School of Law research paper series (2007).
  \item \textsuperscript{265} \textit{Id}.
\end{itemize}
even agriculture – an economy-wide target represents, both symbolically and in practice, a constraint on a country’s economy as a whole.\textsuperscript{266}

Inevitably, the challenges highlighted above result in compliance problems in the sense that states will simply not be able to negotiate a series of progressively stricter emissions targets,\textsuperscript{267} and in the absence of effective sanctioning mechanism, states will be unlikely to participate and comply.\textsuperscript{268} The USA’s persistent refusal to ratify the Kyoto Protocol illustrates the challenges of the emissions targets approach.

3.3 Challenges associated with comparability of action

In chapter two, it was indicated that comparability of action poses a challenge to CDBR in the following ways: first it requires comparison of mitigation actions between industrialized countries and developed countries. This has the effect of altering and or eroding differentiation between the North and the South. Second, the requirements of Measurement, Reporting and Verification (MRV) under this notion raises the question of whether and how developing countries actions unsupported by financial aid would be subjected to MRV.

Although this issues seems to have been resolved at Copenhagen by requiring, non-Annex 1 countries to report upon their mitigation actions, with provisions for international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected, the challenge of reconciling differentiation and comparability remains unsolved. Third, is the issue of incremental costs. The challenge here stems from the principle that industrialized countries should pay for the “agreed full incremental cost” of developing countries measures as enshrined in the UNFCCC.\textsuperscript{269} The problem is that despite the use of the “agreed” there is no clarity as regards the basis on

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item UNFCCC art. 4(3).
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which incremental costs are to be defined. There is an urgent need to address these issues and the AWGLCA should continue to consider these issues in its ongoing sessions.

4 Recommendations

4.1 Set targets for developing countries

In chapter three, we established that non-participation of developing countries in emission mitigation premised on CBDR is the main challenge of CBDR. To address the problem of non-participation, it would be imperative to set indexed growth targets for developing countries which will dispel the fear that greenhouse gas emission targets could adversely impact their economic growth.\textsuperscript{270} It is perceived that if developing countries are given targets that, while below business-as-usual, are achievable at a lower cost than the international carbon price, then the potential gains from emissions trading should provide developing countries with an upside incentive to participate.\textsuperscript{271}

However, the challenge is to set developing country targets at a level that will allow them to make more from the sale of surplus emission allowances than it costs to produce those surplus allowances by reducing emissions. Moreover, if emission targets are not fixed but are tied to a country’s GDP, then this will protect developing countries against the downside risk that rapid economic growth will make it costly for them to achieve their targets, since as their economies grow, their permitted emissions will rise as well. By setting indexed emission targets at an appropriate level, developing countries can be enticed to participate.\textsuperscript{272} And so long as developing countries participate, and the US target is set at a relatively moderate level initially, the United States will be willing to join as well.\textsuperscript{273}

\begin{footnotesize}
\begin{enumerate}
\item Frankel, supra note 255, at 15.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
4.2 The need for new formulas for setting targets

Principles of qualitative emission limits and international trading have been cited as the next step after Kyoto.\textsuperscript{274} This approach will promote comprehensive participation and efficiency and will redefine the principle of CBDR.\textsuperscript{275} It should be recalled that these principles are enshrined in the Kyoto Protocol, however, this new approach can be distinguished from Kyoto in the sense that it seeks realistically to bring in all countries and to look far into the future.\textsuperscript{276}

To achieve comprehensive participation and efficiency, new formulas for setting targets have been proposed\textsuperscript{277}. Formulas include allocation of quotas across countries in any given budget period according to a nested sequence of formulas for emissions.\textsuperscript{278} The formula is initially general but becomes specific as the budget period in question draws close. From a decade long perspective, the formula for emission limits would be phrased as cuts from the expected Business as Usual Path (BAU).\textsuperscript{279} According to this approach, the BAU baseline will involve rapid increases in emissions for such countries as China and India. The implication is that, notwithstanding cuts relative to the baseline, there will be growth targets for such countries, not cuts in the absolute levels of emissions as were agreed by the industrialised countries at Kyoto.\textsuperscript{280} Thus the formula for targeted reductions would inter alia include among its determinants the following variables: 1990 emissions, emissions in the year of the negotiation, population, income and others variables such as whether the country in question has resources like coal or hydroelectric power.\textsuperscript{281}

In essence, all countries will be subjected to a uniform formula. Caution should however be taken to ensure that the formula is not too rigid, for the simple reason that no country

\textsuperscript{274} Id. at 17-22.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id.
\textsuperscript{279} Id.
\textsuperscript{280} Id.
\textsuperscript{281} Id.
be it the US or the developing countries will agree to a costly sharp reduction relative to the status quo.\textsuperscript{282}

4.3 Create Incentives for developing countries to join a system of quantitative targets

One of the reasons why developing countries have sought to rely on the principle of CBDR to exempt themselves from commitments is the fear of being asked to undertake large emission cuts. To address this fear, the post 2012 climate regime will have to devise what has been referred to as the “framework of a nested sequence of formulas”\textsuperscript{283} which could include the possibility, that the target for emissions in the limit as the year under consideration approaches infinity puts zero weight on income or past levels of emissions, and complete weight on population. In the very long run, the developing countries would notionally achieve their equity-based demand for equal levels of emissions per capita.\textsuperscript{284}

It is worth considering that by the 22\textsuperscript{nd} century, China could well have caught up with Western countries in income per capita (other Asian countries like Singapore have already done so), in which case the proposal that the emission targets should put all weight on population gives an answer similar to putting all weight on any combination of population or income.\textsuperscript{285} If quantitative emissions commitments are set for developing countries in a very careful way, they can address their concerns, at the same time as addressing the concerns of the rich countries.\textsuperscript{286}

Three principles have been proposed\textsuperscript{287} to guide the formulation of such targets: first, gains from trade, this approach envisages a Kyoto-like system of targets-with-trading which has both environmental and economic advantages for the world and the developing

\textsuperscript{282} Id.
\textsuperscript{283} Id. at 22-32.
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} Id.
countries themselves.\textsuperscript{288} Second is progressivity, one of the reasons why developing countries have often invoked the CBDR principle when it comes to emission targets is for fear of being asked to accept emissions targets that are more stringent than BAU. Dealing with this impasse requires that a reasonably lower bound for developing country emission targets is set which would be the “break even” level. This is the level that leaves them neither better off nor worse off economically than if there had been no treaty at all.\textsuperscript{289} It is a level where they have to make some low-cost reductions from the start, but where sales of emission permits at an intermediate price are sufficient to compensate them for their marginal reduction. The rationale for this approach is to ensure that they fall in the range that is bounded above by BAU and bounded below by the break-even level. As long as the target is above the break-even lower bound, the developing countries benefit economically from the arrangement.\textsuperscript{290} They should therefore be enticed by such an approach to voluntarily join a system of quantitative targets.

Third, protection against inadvertent stringency, poor countries worry that uncertainty surrounding their forecasted economic performance is so great that they cannot now risk adopting an emissions target that would be binding five or ten years in the future.\textsuperscript{291} A response to this concern would be to structure international agreements regarding these countries’ targets so as to reduce the risk of being inadvertently stringent.\textsuperscript{292}

### 4.4 Need to differentiate within the developing countries

As indicated in Chapter two, one of the reasons for America’s refusal to ratify the Kyoto Protocol is the lack of commitments for developing countries on the basis of differentiated responsibilities. This contention is given credence by the fact that Countries with huge populations and fast industrializing economies such as India, China and Brazil enjoy equal treatment with other developing countries thereby affording them an unfair economic advantage over the developed countries. It is submitted that this contention is

\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} Id.
\textsuperscript{292} Id.
legitimate and should be addressed with the urgency it deserves. One of the most feasible solutions to this challenge is to differentiate within developing countries. Recent emission data shows that China and not the US is now the world’s largest emitter of carbon dioxide.293 Against this background, there is need to redefine differentiation so as to allow differentiation within developing countries by apportioning responsibilities and commitments to developing countries with high emission levels.

However, in ensuring differentiation within developing countries, we should not lose sight of the underlying rationale for differential treatment which is premised on historical levels of greenhouse gas emissions whose main responsibility is born by developed countries. For instance by way of comparison the United States has been industrialized for about a century longer than India and China, therefore its cumulative emissions are still higher than that of China, India and Brazil294.

It therefore follows that differentiation within developing countries should aim at allocating obligations and commitments to countries like China but should not aim at equal treatment of these developing countries with developed countries like US.295 The other justification for differential treatment between, developed and developing countries with high emissions such as China and India is what has come to be known as ‘pollution by proxy’296 which means that developed countries have exported their manufacturing and emissions to developing countries.297 To illustrate this view a recent study found that if all the goods imported into the United States in 2004 had been produced domestically America’s carbon dioxide emissions would have been as much as 30 percent higher.298

295 Fred Pearce, Saving the world, plan B, NEW SCIENTIST, Dec. 13, 2003, at 6 (“CO2 and other greenhouse gases linger in the atmosphere for a century or more.”)
296 Pew Centre supra note 294.
297 China Grabs West’s Smoke-Spewing Factories by Joseph Kahn and Mark Landler, (NYT Dec,2007).
Another study established that roughly 23% of the greenhouse gas emissions in China is generated in the production of goods exported to other countries.²⁹⁹

Therefore in light of the foregoing discussion, differentiation within developing countries should not be aimed at requiring developing countries with high emissions to take up similar commitments as the developed countries but it should aim at ensuring equity within developing countries by according differential treatment between developing countries with high emissions levels and those with low emission levels. This will ensure that the principle of CBDR is maintained albeit not in a slightly modified form.

5 Conclusions

Notwithstanding CBDR, there is an increasing demand for global participation both by major industrialized nations and by key developing countries. Such participation is necessary to address the climate change problem effectively and efficiently. The justification for global participation in the climate regime is that the share of global emissions attributable to developing countries is significantly sky rocketing. It is estimated that, developing countries may account for more than half of global emissions by the year 2020, if not before.³⁰⁰ A frequently voiced response to this assertion is that, on an ethical basis industrialized countries should on their own, take the initial steps of making serious emissions reductions. But the simple reality is that developing countries provide the greatest opportunities now for relatively low cost emissions reductions.³⁰¹ Hence, it would be excessively and unnecessarily costly to focus emissions-reductions activities exclusively in the developed world. However, global participation should not suppress the principles of equity on which the principle of CBDR is built.

It has been proposed that to achieve broad participation, a framework for multilateral climate action must be flexible enough to accommodate different types of national strategies by allowing for different types of commitments. It must enable each country to choose a pathway that best aligns the global interest in climate action with its own evolving national interests. The flexible approach will involve developed countries committing to emissions targets, but allowing them to implement their commitments “in conformity with domestic law.” This approach will allow developed countries, through their national legislation, to specify their targets in somewhat different ways. This allows developed countries to define their targets differently in their national legislation targets differently in their national legislation for example, with respect to precise sectoral coverage, base years, or allowable offsets.

A broader form of flexibility has been proposed by Australia which is enshrined in a proposal to establish schedules of national commitments and actions, which is similar to the nationally appropriate mitigation action (NAMAs) registry proposal of Korea. Rather than defining commitments through a top-down negotiating process, as in Kyoto, states would engage in a bottom-up process, in which they would develop national schedules of commitments and actions and then register those commitments and actions internationally. As the Australian proposal explains, the schedule approach would “give Parties substantial flexibility to craft commitments and actions in a manner appropriate to their national circumstances.” Schedules could include both legally binding commitments as well as non-binding actions. The Australian proposal suggests that developed country schedules should include comparable mitigation efforts, including emission

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306 Id.
targets, while developing country schedules could include other types of commitments or actions, such as sectoral targets or particular policies and measures.\textsuperscript{307}

These types of flexibility when fully implemented will address the challenge of lack of broad participation in the climate regime which continues to plague the principle of Common but Differentiated Responsibility in the Climate Regime.

\footnote{Bodansky \textit{supra} note 304.}
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