

THE PRINCIPLE OF ‘COMMON BUT DIFFERENTIATED RESPONSIBILITIES’ AND THE CHALLENGES POSED BY IT IN THE CONTEXT OF INTERNATIONAL CLIMATE GOVERNANCE

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Abstract

With the increasing debate on whether the difference between the developed and the developing countries should be redefined, the principle of CBDR has come under scanner to determine whether the differentiated responsibilities also need to be reevaluated. Negotiating groups like the LDCs, the Umbrella group, argue that the major developing economies like India and China should be held responsible for their part of the current and future emissions as they have the resources to tackle the adverse impact caused by them to the environment whereas the developing countries argue otherwise. Many such challenges are being faced with the application of the principle in the international climate regime. This article underlines the meaning and objective of the principle and discusses its origin and its subsequent use in various legal instruments after the adoption of the UNFCCC. The article focuses at the challenges faced by the interpretation and application of the principle with the rapidly changing economic status of developing countries. This article is an attempt to underline the need to dilute the fixed differentiation between the developed and the developing countries for better results in dealing with the adverse environmental impacts. In the end, the article concludes by analyzing the outcome of the Paris Agreement towards the interpretation of the principle; and what changes are required to be made for its better implementation.

Keywords: UNFCCC, CBDR, climate, responsibilities, Annexes, Kyoto Protocol

1. Introduction

As a framework agreement, the United Nations Framework Convention on Climate Change¹ laid out several commitments and principles² to reduce the Green House Gases³ emission. One of these principles was the ‘common but differentiated responsibilities’⁴. The only guidance provided by the original treaty [was] that the assembled parties have “common but differentiated responsibilities and respective capabilities” to reduce their emissions⁵, and the implementing goals were left to the subsequent negotiations and the 1997 Kyoto Protocol.⁶ The convention makes few demands on the much less responsible and usually much less capable developing

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¹ Hereinafter as UNFCCC.

² Paul G. Harris, ‘Climate Change Priorities for East Asia: socio-economic impacts and international justice’ in Paul G. Harris (ed.), *Global Warming in East Asia: The Domestic and International Politics of Climate Change* (Routledge, Taylor and Francis Group 2003), p. 29.

³ Hereinafter as GHGs.

⁴ Hereinafter as CBDR.

⁵ Andrew Light, ‘An Equity Hurdle in International Climate Negotiations’ Vol. 31, No. 1 (SPRING 2013) 28, 29.

⁶ Paul G. Harris (n 2) p. 30.

countries.⁷ This exclusion of developing countries became one of the most contentious issues before and during the negotiations leading to the Kyoto Protocol and remains so.⁸

This article will, in the first section, discuss the principle of Common but differentiated responsibility and its objective under the UNFCCC. The following section discusses the origin of the principle and the legal instruments that have followed the principle subsequent to the adoption of UNFCCC. The article highlights the two elements of *common* and *differentiated* responsibilities imbibed in the principle. The article at length focuses on the challenges to the application of CBDR in the international climate regime and observes how these challenges have affected the adoption of the Paris Agreement of 2015. In the last section the author expresses the need to dilute the binary differentiation of CBDR and has made recommendations for effective implementation of the principle.

2. The Principle: Meaning and Objective

“Common but differentiated responsibility”... charges developed nations, with more responsibility than developing nations because they have generally had a higher impact on the environment through processes of industrialisation, and because they have greater financial and technological capacity to restore the damaged global environment.⁹

The United National Framework Convention on Climate Change adopted in May 1992 at the United Nation Conference on Environment and Development, recognizing ‘climate change as a common concern of humankind’, is the first legal instrument that used the term ‘common but differential responsibility’.¹⁰ The preamble to the convention recognises to certain extent the difference between the developed and the developing states on the basis of historical and current global greenhouse gases emissions share; the Convention later provides for the principle in Article 3, which states:

‘The 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*. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.’¹¹

Its contemporary, the Rio Declaration, also came as part of the United Nations Conference on Environment and Development.¹² Only 5 principles out of the 27 listed in the Rio Declaration

⁷ Ibid.

⁸ Ibid.

⁹ United Nations Department of Economic and Social Affairs Division for Sustainable Development, *Sustainable Development in the 21st century (SD21): Review of implementation of Agenda 21 and the Rio Principles* (Draft, December 2011) p. 73.

¹⁰ Ibid.

¹¹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 32 ILM 849 (1992) (UNFCCC), art. 3(1).

¹² Andrew J. O’Connell, ‘Tragedy of the Common but Differentiated Responsibilities: A Critique’ CEPMLP Annual Review - CAR Volume 16 (2013) 1, 6.

have been included in the Climate Convention¹³ and CBDR is one of those 5 principles. The principle has been stated in Article 7 of the Declaration as:

‘States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.’¹⁴

The principle in the Convention and the Declaration reiterates the duality in the rationale underlining the principles of intra-generational equity, namely that developed countries are in a better position to finance efforts towards sustainable development and that the same developed countries contributed more than their fair share to the creation for the major environmental problems.¹⁵ Ultimately, CBDR is meant to represent the philosophical notions of fairness and equity in international (climate) policy.¹⁶

3. History and Evidence of the Principle in other Legal Instruments

Paradoxically, the logic of common but differentiated responsibilities enabled negotiators to agree on a legal framework for international climate policy in the 1990s, yet proved a considerable obstacle to negotiating an adjusted treaty for the post-2012 period.¹⁷ The need to differentiate between the developed and the developing countries was necessary because historically industrialized countries account for two-thirds of cumulative carbon emissions¹⁸; developing countries have poverty elimination and social security as their priority; and because the developed countries have the means and are more efficient to grant assistance in terms of finance and technology. In the end, although the Convention uses developed and developing countries as the primary categories, it also recognizes two additional categories: countries with economies in transition and least developed states.¹⁹

The rationales underlining the common but differentiated responsibilities in the two instruments are reminiscent of ancient precepts of justice such as ‘to each according to his capacity’.²⁰ The aim is to bring about effective—rather than formal—equality among *de facto* unequal states and

¹³ Joyeeta Gupta, *The History of Global Climate Governance*, (Cambridge University Press, 2014) p. 66.

¹⁴ Rio Declaration on Environment and Development (adopted 14 June 1992) 31 ILM 874 (Rio Declaration) art. 7.

¹⁵ Dire Tladi, *Sustainable Development in International Law: An Analysis of Enviro-Economic Instruments* (Pretoria University Law Press, South Africa 2007) p. 50.

¹⁶ Carmen Richerzhagen, Clara Brandi, Hanna Schmole, Pieter Pauw and Steffen Pauw, *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations* (German Development Institute 2014) p. 6.

¹⁷ Ibid p.1.

¹⁸ Lavanya Rajamani, ‘Differential Treatment at Play: The Climate Regime’ in Lavanya Rajamani, *Differential Treatment in International Environmental Law* (first published 2006, Oxford Scholarship Online, 2012) p. 3.

¹⁹ Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ 18 Yale J. Int’l L. (1993) 451, 501-502.

²⁰ Dire Tladi (n 15) p. 50.

to ensure the participation of all countries in international environmental agreements.²¹ Although the term CBDR is recent, the practice of differentiating responsibilities in multi-lateral agreements is not.²² The Treaty of Versailles (1919), The Law of the Sea Convention (1982) and the General Agreement on Tariffs and Trade (GATT) are the examples which provided for ‘differential and more treatments’.²³

[In the] so-called modern era of international environmental law²⁴ the principle can be traced in many legal instruments like the Stockholm Declaration (1972) which described it as “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”²⁵; the 1992 Convention on Biological Diversity which in the preamble recognises that “economic and social development and poverty eradication are the first and overriding priorities”.²⁶

After the Convention and the Rio Declaration was adopted, the CBDR principle was followed in many of the subsequent legal instruments on environmental protection, like the Kyoto Protocol²⁷, the Montreal Protocol²⁸ which provides for the need to assist the implementation programme in developing countries through technology transfer and financial assistance; the Delhi Declaration 2002²⁹ that reaffirms ‘development and poverty eradication as overriding priorities of developing countries’³⁰; the Bali Action Plan³¹, it recognised the principle of common but differentiated responsibilities and respective capabilities [by] taking into account social and economic conditions and other relevant factors.³² The principle was reaffirmed in 1995 at the first conference of the FCCC parties in Berlin ... whereby developed countries pledged to act first to reduce their GHG emissions before requiring developing countries to do so.³³

In the agreement recently adopted in Paris³⁴, the language on differentiation has been expanded to include the term “in the light of different national circumstances”, which is likely to indicate that a previously strict firewall between developed and developing countries has been broken

²¹ Hans Christian Bugge, ‘The principle and duty to cooperate: The case of conventions on transboundary pollutions in Europe’ in Hao Duy Phan and others (eds.), *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar Publishing Limited 2015) p. 271.

²² *United Nations Department* (n 9) p. 73.

²³ Bjørn-Oliver Magsig, *International Water Law and the Quest for Common Security* (Routledge, Taylor and Francis, London 2015) p. 94.

²⁴ *Ibid.*

²⁵ Principle 23

²⁶ Preamble of convention

²⁷ *Andrew J. O’Connell* (n 12) pp. 6-7.

²⁸ *United Nations Department* (n 9) p. 75.

²⁹ The Delhi Ministerial Declaration on Climate Change and Sustainable Development, 2002; Decided on 1/CP.8 (2002) (FCCC/CP/2002/7/Add.1, 28 March 2003).

³⁰ *Ibid* p. 1.

³¹ The Bali Action Plan, Decision on CP 1/13 (FCCC/CP/2007/6/Add.1, 14 March 2008)

³² *Ibid* p. 3.

³³ *Paul G. Harris* (n 2) p. 31.

³⁴ The Paris Agreement, 2015, Draft Decision on 1/CP.21 (FCCC/CP/2015/L.9, 12 December 2015)

down;³⁵ however, the text still contains several provisions specifically indicating the responsibility of the developed countries towards the developing countries, for example, Article 9 that calls for financial support from the developed countries.³⁶ We will discuss the CBDR principle with respect to the Paris Agreement, more elaborately in later sections.

4. Defining the *Common and Differentiated Responsibilities*

CBDR entails in itself two elements of responsibilities- one is the *common responsibility* of all the states to cater to the concerns of environmental protection and sustainable development as it is impossible, for example, to combat global climate change unless states cooperate to reduce greenhouse gas concentrations in the atmosphere; and the other is of *differentiated responsibility* enabling the states to act, for environment protection, in their national capacity and as per their national priority. The Convention recognises climate change as the common responsibility of all States, and that international cooperation is necessary to protect it.³⁷

Common concern and the shared responsibility of humankind to address climate change underpin the UNFCCC and are a longstanding notion of international environmental law.³⁸ This aspect of common responsibility has evolved throughout the history of international environmental law as there are other principles directly related, including common concern, common heritage of mankind, and province of mankind.³⁹ 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.⁴⁰

Differentiated responsibility is based upon both historical responsibility of States and differing capacities of States to address climate change.⁴¹ The developing states have poverty elimination as their priority and unlike the industrialised states they may also lack the technical and financial capacity to deal with climate change.

Rajamani⁴² explains that the differentiated responsibilities between the states can be classified mainly into three broad categories: *central obligation*⁴³ with respect to emission reduction targets⁴⁴,

³⁵ Sudhir Chella Rajan and Sujatha Byravan, 'At Paris, Something for Everyone' (The Hindu 15 December 2015) available at <<http://www.thehindu.com/opinion/op-ed/paris-agreement-at-paris-something-for-everyone/artide7987957.ece>> accessed 10 December 2015.

³⁶ *The Paris Agreement* (n 34) art. 9.

³⁷ See generally, Lavanya Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime', *RECIEL* 9 (2) (2000) 120, 125.

³⁸ Kelly McManus, 'The principle of 'common but differentiated responsibility' and the UNFCCC' *Climateo Special Features* - November 2009, available at <http://www.mercyworld.org/_uploads/_dknw/files/2012/Link3.pdf> accessed on 12 December 2015, p.1.

³⁹ *Lavanya Rajamani* (n 37) p. 121.

⁴⁰ The Centre for International Sustainable Development Law Legal Brief, *The Principle of Common but Differentiated Responsibilities: Origins and Scope*, (For the World Summit on Sustainable Development 2002) available at <http://isdl.org/public/docs/news/brief_common.pdf> accessed on 17 December 2015.

⁴¹ *Kelly McManus* (n 38) p. 1.

⁴² *Lavanya Rajamani* (n 18) p. 12

⁴³ *Ibid.*

⁴⁴ *United Nations Framework Convention on Climate Change* (n 11) arts. 4(2)(a) and 4(2)(b)

establishing national systems for estimating the reductions⁴⁵, national communications ensuring compliance with mitigation commitments⁴⁶; on the basis of *implementation*⁴⁷ like making policies and measures to reach mitigation commitments can be done as per the national circumstances⁴⁸, flexible time frame for implementation, permission to adopt a subsequent base year⁴⁹; and *grants and assistance*⁵⁰ through financial assistance with respect to reporting obligations⁵¹ or commitments on mitigation, education⁵² etc and financing the transfer of environmentally sound technology to developing countries.⁵³

In summary, States have common responsibilities to address climate change and promote sustainable development, but due to different social, economic, historic and ecological situations, countries must shoulder different responsibilities.⁵⁴ The above reasons can be subsumed under the need to ensure equity and justice in addressing climate change, as applying uniform standards on all States may be unfair thereby imposing hardship on the less responsible and yet less capable of responding.⁵⁵

5. Challenges to the Application of CBDR Principle

The fact that the principle of CBDR needs rethinking cannot be denied after the massive shift in the economies from 1992 to the present. However, the formulation or the reshaping of the responsibilities face many challenges- the main issue is that the developed and the developing world want different things by the interpretation and application of the principle. The developed countries and the LDCs want the principle to dilute to bring in more commitments and responsibility on the major developing countries; whereas the latter advocate for following the strict language of the framework convention and the protocol. The major challenge in the application of CBDR principle in the present day international climate regime is the difficulty of negotiation or achieving of a consensus between the negotiating groups of their commitments and responsibilities. Although according to the principle of CBDR, developing countries are not required to reduce emissions in the existing Kyoto Protocol; their further involvement is needed in global emissions reduction.⁵⁶

⁴⁵ Ibid art. 5

⁴⁶ Ibid art. 7(1) and (2)

⁴⁷ Lavanya Rajamani (n 18) p. 12.

⁴⁸ United Nations Framework Convention on Climate Change (n 11) art. 8.

⁴⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997 entered into force 16 February 2005) 37 ILM 22 (1998) (Koto Protocol) art. 3(5).

⁵⁰ Lavanya Rajamani (n 18) p. 12.

⁵¹ United Nations Framework Convention on Climate Change (n 11) arts. 4(3) and 4(4).

⁵² Ibid.

⁵³ Ibid Art. 4(5).

⁵⁴ Kelly McManus (n 38) p. 2.

⁵⁵ Sylvanus Gbendazhi Barnabas, 'A Review of the Application of Common but Differentiated Responsibilities (CBDR) under the International Regime on Climate Change', p. 8, available at <<http://ssrn.com/abstract=2257342>> accessed on 23 December 2015.

⁵⁶ Development Research Centre of the State Council People Republic of China, *China's New Place in a World in Crisis: Economic, Geopolitical and Environmental Dimensions*, dhp. 17, p. 389, available at <http://www.gci.org.uk/Documents/China_Research.pdf> accessed on 23 December 2015.

To put the principle of CBDR into practice under the UNFCCC⁵⁷, the distinction was made between the 'Annex I' and the 'Non-Annex I' parties. This idea of a differentiated responsibility has been challenged on many occasions. Countries with economies in transition are indicated by an asterisk in Annex I. Although there was no question about which states qualify as economies in transition, their legal status posed a problem.⁵⁸

One of the challenges with respect to the differentiation is its lack of definition. There is no definition of CBDR as contained in Principle 7 of the *Rio Declaration* and no international environmental agreement before Rio expressly mentions it.⁵⁹ Principle 7 divides the world into developed and developing countries without defining the border-line between them.⁶⁰ Where that line should be drawn is an obstacle in any international treaty or protocol that tries to make the CBDR principle operational.⁶¹ Following are some of the major challenges discussed more elaborately.

a) Historic Responsibilities and the Differentiation

It is important to clarify that Article 3.1 does not refer to historic contributions to climate change as originally proposed by some developing countries but presents a more balanced approach emphasising Parties' responsibilities as well as their present-day capabilities.⁶² Ignoring historical accountability would give a retrospective licence to past emitters from developed countries to disadvantage the poorer countries.⁶³

The proposal for historic responsibility towards the climate change was put forward by the developing countries like India, Brazil, China and Bolivia in 2009.⁶⁴ The objective of the CBDR principle was to put a positive differentiation of responsibilities over the parties. With the continuous focus and discussion of the historic responsibility, the developed countries are unwilling to accept their past adverse affect on the environment and to comply with the historic responsibility towards the emission reductions. The developed world wants to cover the current and future emissions making the major polluters like China and India accountable for their part of the emissions whereas they advocate for strict differentiation and compliance with historic responsibilities.

[C]ontradictory issues of fairness arise, as Annex I countries bear essentially all the direct economic costs of reducing emissions, and non-Annex I countries are granted the right to

⁵⁷ *Carmen Riecherzhagen* (n 16) p. 1.

⁵⁸ *Daniel Bodansky* (n 19) p. 507.

⁵⁹ *Sylvanus Gbendazhi Barnabas* (n 56) p. 6.

⁶⁰ Per Kågeson, 'Applying the Principle of Common but Differentiated Responsibility to the Mitigation of Greenhouse Gases from International Shipping' CTS Working Paper 2011:5 Centre for Transport Studies Stockholm, p. 9.

⁶¹ *Ibid* p. 8.

⁶² Farhana Yamin and Joanna Depledge, *The International Climate Change Regime A Guide to Rules, Institutions and Procedures* (Cambridge Books Online, Cambridge University Press 2009) p. 70.

⁶³ Eric Neumayer, 'In defence of Historical Accountability for Greenhouse Gas Emissions' *Ecological Economics*, 33 (2), 2000 pp. 185-192; LSE Research Online, August 2012 1, 8.

⁶⁴ *United Nations Department* (n 9) p. 76.

increase emissions to meet developmental needs.⁶⁵ Finally, the focus on historical emissions as a baseline for regulation has differential and arbitrary impacts on individual nations.⁶⁶

The developing countries like Brazil, India and China still advocate that the developed countries have a historic responsibility for causing the carbon emissions which they caused for develop their economy- and now that it is the turn of the developing countries to improve their economy and should be given privileges with respect to emission reductions.

b) Fixed Differentiation between the Developed and the Developing

Attapattu⁶⁷ argues that it is now time to use the principle of CBDR to differentiation between the developed and the developing countries should be broader. In his article⁶⁸ he states:

“Can the BASIC nations (Brazil, South Africa, India and China) be properly categorised besides the poorest of the world? In terms of greenhouse gas emission stocks (aggregate emissions since the industrial revolution) perhaps, but their flows (current annual emissions) have the character of the established economies of North America and Europe.”

The Kyoto Protocol provides for a list of the annexes of the countries marking a clear and *fixed* distinction between the developed and the developing countries. However, since 1992, when the Kyoto Protocol was signed, there has been a massive difference in the emission levels by the countries of different annexes. The rapidly developing nations are having an almost equal adverse impact on the environment as the developed world. Thus, despite what major leaders in the developing world advocate, there is a need to re-define the annexes or dilute the principle.

It remains unclear both to what extent developing States should contribute and how much of the costs incurred by them shall be covered by contributions from the industrialized countries.⁶⁹

[T]he Protocol does not require any emissions reductions by developing countries, which represents a failure to properly apply the CBDR principle as the principle's basic premise is that everyone should bear at least some level of responsibility.⁷⁰

Over such a long period of time some developing countries will advance into fully industrialised nations, the most successful among them may even surpass some of today's rich countries in terms of GDP per capita.⁷¹ Differentiating responsibilities between developed and developing nations — as the UNFCCC does — fails to focus efforts on some of the largest emitters.

⁶⁵ John Blodgett and Larry Parker, 'Greenhouse Gas Emissions: Perspectives on the Top 20 Emitters and Developed Versus Developing Nations', CRS Report for Congress Order Code RL32721 2008 1, 11.

⁶⁶ Ibid p. 7.

⁶⁷ Sumudu Ataputtu, 'Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change', in Benjamin J. Richardson and others (eds.) *S.Climate, Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar Publishing 2009).

⁶⁸ Ibid.

⁶⁹ Per Kågeson (n 61) p. 10.

⁷⁰ United Nations Department (n 9) p. 76.

⁷¹ Per Kågeson (n 61) p. 9.

Moreover, many developed countries have not achieved stabilization of their emissions despite the UNFCCC.⁷²

The fixed categories would mean that the emerging super powers can circumvent the responsibility of adverse environmental impact caused by them in the present or in the future, with the developed countries still being liable for the adverse impact caused in the past, due to the historic difference. The fixed differentiation hardens the categorization between the poor, developing and the developed economies despite their improving economic state and its in turn adverse environmental impacts. The responsibility towards the environment should increase or be revised as the economic growth of a state improves instead of being defined or fixed for a long period of time.

However, the differentiation between the developed and the developing makes achieving the objective of the principle difficult making it possible for majorly rising economies to step back from their responsibilities towards the environment. The developed countries want to widen the ambit to include the majorly developing countries like BASIC nations to shoulder the responsibilities who are contributing in a large amount to the adverse climate impact.

c) Per Capita Emissions versus Total Emissions

The historically larger contribution of developed countries to climate change and their higher per capita emissions are, however, referenced as a factual statement in paragraph 3 of the Convention Preamble, which also recognises that the share of global emissions originating in developing countries will grow to meet their social and developmental needs.⁷³

The different methods of measuring total emission or per capita emission give very different rankings to the states as emitters. For example, China is by far the biggest polluter today based on its total amount of emissions, while the United States is historically the most important one and Qatar takes the lead if per capita emissions are considered.⁷⁴

The UNFCCC, in the preamble, notes-

“[T]hat the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, 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.”⁷⁵

Today, developing countries with 76.5% of the world's population are responsible for 36.9% of current carbon emissions, while industrial countries with 17.7% of the world's population are

⁷² John Blodgett (n 65) p. 12.

⁷³ Farhana Yamin and Joanna Depledge (n 62) p. 70.

⁷⁴ Edwin Zaccai and Marine Lugen, 'Common but differentiated responsibilities against the realities of climate change' in Alain Papaux and Simone Zurbuchen (eds.), *Philosophy, Law, and the Environmental Crisis* (2016), p. 6 (forthcoming), available at http://igateat.ulb.ac.be/fileadmin/media/publications/CEDD/Zaccai.Lugen._CBRD_against_the_realities_of_climate_change.pdf accessed on 24 December 2015.

⁷⁵ *United Nations Framework Convention on Climate Change* (n 11) para 3, Preamble.

responsible for 51%.⁷⁶ The United States and some other developed countries have categorically rejected anything like the idea of equal per capita distribution of rights to emit, or development rights described in this way.⁷⁷

The Umbrella Group has the highest emission ration currently in the world where as G77 and China has comparatively very low per capita emissions considering their large population but is bound to increase in the near future. The CBDR gives room to developing countries to increase their per capita emissions to meet their social needs. But with China alone being responsible for 14% of the world's greenhouse gas emissions as back as in 2000⁷⁸, the per capita emissions may prove to be a hindrance to the ultimate objective of the UNFCCC and the CBDR principle of stabilising the greenhouse gas concentration in atmosphere.⁷⁹

This line of argument is combined with the fact that the impacts of climate change will be felt with important differences among countries and regions in the world.⁸⁰ However, with the mobile nature of atmosphere, the emissions produced by countries like China, India which have room for emissions because of the lower per capita emissions rate, the environment as a whole shall be adversely impacted. In the process of convergence⁸¹, the rights and interests of one country to enjoy healthy environment are really infringed by another country. A country's high or low per capita real emissions cannot justify its high/low emission entitlements.⁸² [T]his approach could permit most less-developed countries to increase their emissions to accommodate expanding economies.⁸³

d) Protecting the Environment in a Heterogeneous World

The developed world has now passed the industrialisation stage and is now focusing on global market growth and enhancing economy. The largest emissions come from activities like energy production, transportation and consumption. On the other hand most of the developed countries have not even entered the phase of industrialisation. They rely majorly on non renewable energy resources to meet their every day need. As discussed earlier even fast developing countries like India and China have a lot to cater to in terms of economic and social security for its nationals.⁸⁴ Thus the application of the principle of CBDR after 20 years of

⁷⁶ See Generally, United Nations Development Programme, *Human Development Report 2004 Cultural Liberty in Today's Diverse World* (HRD 2004, Carfax Publishing, Taylor and Francis Ltd. 2004); Also see, Lavanya Rajamani (n 18) p. 3.

⁷⁷ Andrew Light (n 5) p. 33.

⁷⁸ John Blodgett (n 65) p. 2.

⁷⁹ *United Nations Framework Convention on Climate Change* (n 11) art. 2.

⁸⁰ Edwin Zaccai and Marine Lugen (n 74) p. 7.

⁸¹ See, Aubrey Meyer, *Contraction and Convergence, the Global Solution to Climate Change* (Schumacher Briefing No. 5, November 2000); Also see, Global Commons Institute *Contraction and Convergence Submissions to UNFCCC from Global Commons Institute* (2000) available at <http://www.gci.org.uk/UNFCCC_Submission.html> accessed on 23 December 2015.

⁸² *Development Research Centre* (n 56) p. 391.

⁸³ John Blodgett (n 65) p. 9.

⁸⁴ See generally, Fu Sha and Zou Ji, 'The challenges of the post-COP21 regime: interpreting CBDR in the INDC context' *Int. Environ. Agreements Springer Science+Business Media Dordrecht* (2015) 1.

signing of Kyoto Protocol is still faced by the challenge of the continued north–south dichotomy under the Durban platform.⁸⁵

Further, the developed countries have an influential stand on the developing countries through their financial strengths and the technological know-how. According to United Nations Conference on Trade and Development statistics, there were approximately 82,000 Multinational Companies and 820,000 of their branches in 2008, most of which are from developed countries.⁸⁶ These multinational companies though from the developed world have employees from the developing countries working for them in a huge number.

The heterogeneity is not only restricted to the north-south world. It also applies within the developing group. The developing countries are at very different stages for industrialization and urbanization. For example emerging economies like India and China have very high amount of emissions which will keep rising even in the near future. However, some other countries of the G77 or the Least Developed Countries are at very initial stages of such development. All [the] nations whose emissions paths currently seem to be within the climate-friendly range are poor developing countries.⁸⁷

Thus the main challenge to the applicability of CBDR is the heterogeneity of the groups and within the groups. Thus the responsibility allotment and the emission pledges are largely affected by the difference between the groups which seems to be increasing by the demand of urbanisation and rise in social needs. This diversity poses a challenge to the application of CBDR as different groups want different responsibilities and lesser commitment. A good example in this regards is the Paris Agreement negotiations, where the groups had different stand with respect to the legally binding emission reduction limit.

6. The Paris Agreement, 2015: Diluting the fixed Differentiation of Annexes

The convention closely associates equity with the principle of CBDR which to date has been [operational] as binary differentiation based on Annexes I and II.⁸⁸ Parties opposed to the differentiation emphasize that the mandate for the Ad Hoc Working Group on the Durban Platform for Enhanced Action⁸⁹ comes from the decision 1/CP.17⁹⁰ from Durban, which states that the new agreement should be ‘applicable to all parties’ and does not explicitly refer to equity, CBDR/RC, or the principles of Convention.⁹¹ [However], some 20 years after the climate

⁸⁵ Ibid.

⁸⁶ United Nations Conference on Trade and Development, *World investment report, transnational corporations, agricultural production and development* (United Nations, New York and Geneva WIR 2008) available at <http://unctad.org/en/docs/wir2008_en.pdf> accessed on 22 December 2015.

⁸⁷ *Carmen Riechersbagen* (n 16) p. 1.

⁸⁸ Arild Underdal, Håkon Sælen and Steffen Kallbekken, *Equity and spectrum of mitigation commitments in the 2015 agreement* (Nordic Council of Ministers 2014) p. 36

⁸⁹ Hereinafter as ADP.

⁹⁰ The Durban Platform for Enhanced Action, Decision on 1/CP.17 (FCCC/CP/2011/9/Add.1, 15 March 2012).

⁹¹ *Arild Underdal* (n 88) p. 36.

convention was agreed upon, most developing countries still want CBDR to maintain a clear differentiation between different categories of states.⁹²

As Parikh and Baruah show, the emissions of Non-Annex 1 countries increased by 223 per cent between 1990 and 2008, while the already high emissions of Annex I countries have roughly remained the same. However, ever since the UNFCCC was adopted in 1992, no progress has been made to better account for the dynamic diversification of developing countries⁹³

In the Paris Agreement the parties are being guided by the principle of CBDR as enshrined in the convention and various provisions provide for it, for example the Articles on enhanced implementation of the Convention⁹⁴, enhanced contribution to emission reductions⁹⁵, on formulation and communication of long-term low greenhouse gas emission development strategies⁹⁶. There has been a shift away from the binary approach to differentiation that was at the heart of the Kyoto protocol, towards a more flexible approach that encompasses all the countries.⁹⁷

The Paris Agreement observes that:

‘The Parties to this agreement *in pursuit of* the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.’

As discussed earlier the strict difference between the developed and the developing countries have been diluted in the agreement. There is also no mention of equity and historical responsibilities in the agreement. The CBDR mentioned in the agreement is more an expression than a principle commanding strict adherence. This may have negative implications on the developing world as they still need financial and technological assistance from the developed world. But at the same time, it will cast more responsibilities on the major emerging super-powers like Brazil, China, India and South Africa that have been contributing heavily to the carbon emission and are also financially capable to deal with the climate change. These developing countries have always advocated in the favour of retaining the principle because though they are rapidly developing, countries like India and China still have to work on providing toilets, electricity and other basic necessities to a large portion of its population.

There is provision for financial support to developing countries but this support is not clearly distinguished from ordinary capital flows⁹⁸ weakening the provision of the convention that the

⁹² *Carmen Richerzhagen* (n 16) p. 1.

⁹³ *Ibid* p. 2.

⁹⁴ *The Paris Agreement* (n 34) art. 2.

⁹⁵ *Ibid* art. 4(3).

⁹⁶ *Ibid* art. 4(10).

⁹⁷ Daniel Bodansky, ‘Reflections on the Paris Conference’ (*Opinio Juris*, 15 December 2015) available at <<http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/>> accessed on 24 December 2015

⁹⁸ Chandrashekar Dasgupta, ‘The Paris Agreement and Being Grateful for Small Mercies’ (*The Wire*, 16 December 2015) available at <<http://thewire.in/2015/12/16/the-paris-agreement-and-being-grateful-for-small-mercies-17430/>> accessed on 20 December 2015.

developed countries 'shall' support the developing countries towards the incremental costs of agreed implementation measures and shifting the mitigation costs to the shoulders of the poorer countries.⁹⁹

Overall, the position over the principle in the agreement has softened as most of the parties have agreed that it would ultimately harm the future climatic negotiations failing to bring out productive results in future Conference of Parties¹⁰⁰ meetings. Paris agreement may not be individually favourable to the negotiating groups, but is a step ahead in lessening the difference between the developed and the developing nations.

7. Conclusion

The purpose of the principle of CBDR is mutual support for preserving the environment through global partnership. However, there has been a shift from focusing on global partnership to dividing moral responsibilities; the reason to this is the lack of trust in the divide between the developed and the developing world. Additionally, the lack of fulfilment of promise by the developed countries to support the developing countries with finances and technology questions the standards equity and fairness in the principle. The state parties, both from the developed as well as the developing countries, should realise that to achieve the goal of sustainable development, each party shall have to compromise a little on their growing social and economic needs. It should be equitable, that is, it should encourage burden-sharing and treat developing countries fairly.¹⁰¹

With the gradual change taking place in the economies of the state parties the fixed differentiation made almost two decades back does not coincide with the current global economic pattern. The differentiation has now become imprecise as it is difficult to maintain the binary differentiation with the changing economic paradigms. The differentiation needs to constantly evolve and should be more flexible to accommodate the changing circumstances. Along with the economic standards, other factors like the historical, current and the future emissions should be considered as these cannot fit into the binary differentiation. Furthermore, the vulnerability with respect to geographic and ecological needs should be catered to.

In the Rio+20 Outcome Document, Paragraph 247 establishes the normative qualities that the Sustainable Development Goals¹⁰² should have, namely that the goals be¹⁰³

“global in nature and universally applicable to all countries while taking into account different national realities, capacities and levels of development and respecting national policies and priorities”.¹⁰⁴

⁹⁹ Ibid.

¹⁰⁰ Hereinafter as CoPs.

¹⁰¹ *Daniel Bodansky* (n 19) p. 555.

¹⁰² Hereinafter as SDGs.

¹⁰³ Clara Nobbe, 'Universality, common but differentiated responsibilities and the Sustainable Development Goals', SWP Working Papers January-April 2014 1, 3.

¹⁰⁴ Rio+20 United Nations Conference on Sustainable Development, 'The future we want' A/CONF.216/L.1 Agenda item 10 Outcome of the Conference, 19 June 2012, para 247; *See also, Clara Nobbe* (n 103) pp. 5-6.

The paragraph does not lay down the historic responsibilities or does not differentiate between the developed and the developing countries. These were later proposed and politically approved towards the interpretation and application of the CBDR principle in the international climate regime. Differentiating responsibilities between Annex I and non-Annex I countries fails to focus efforts on all the largest emitters.¹⁰⁵ The countries like China, India and Brazil, are one of the largest emitters in the present day and have population which is increasing at a fast rate. The developed countries need to realise that, in future, it will not be possible to come to a consensus towards environment protection without negotiating with these countries.

In the area of finance, the principle of CBDR could be applied to enforce more emphatic reforms in the international systems that reproduce and entrench poverty in developing countries¹⁰⁶ A large number of the developing countries are still dependent on fossil fuels for their energy requirements. With the Paris Agreement giving a hope for lesser use of such resources, the massive burden shall now be on the developing countries to find alternate energy supplies and on the developed countries to assist these countries with such alternatives through finance and technology.

At the G8 summit, developed countries affirmed the 2°C target, the consensus view from the Intergovernmental Panel on Climate Change that achieving that target required a global cut in emissions of 50 percent by 2050, and, most importantly, that developed countries should make a cut of 80 percent by 2050 as their fair share of cumulative emission reductions.¹⁰⁷ Despite having adopted the Paris agreement, these targets still will take a long way to go before they can be achieved. The present time need from the CBDR principle in the international climate regime, despite the challenges, is to allow the developing countries to focus on their social and economic needs and save the vulnerable countries like the LDCs and the Small Island Countries. Also alongside it should make the large emitters that have the capacity to lessen the adverse impact on the climate to shoulder the responsibility with the developed countries and prevent the current and future emissions. However, this approach should not hamper their social or economic growth.

References

- 1) Ataputtu S., 'Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change', in Benjamin J. Richardson and others (eds.) *S.Climate, Law and Developing Countries: Legal and Policy Challenges for the World Economy* (Edward Elgar Publishing 2009).
- 2) Barnabas S. G., 'A Review of the Application of Common but Differentiated Responsibilities (CBDR) under the International Regime on Climate Change', available at <<http://ssrn.com/abstract=2257342>> accessed on 23 December 2015.
- 3) Bodansky D., 'Reflections on the Paris Conference' (*Opinio Juris*, 15 December 2015) available at <<http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/>> accessed on 24 December 2015.

¹⁰⁵ John Blodgett (n 65) p. 2.

¹⁰⁶ Cristina Diez, 'Policy Brief and Proposals: Common but Differentiated Responsibilities', International Movement ATD Fourth World, 13 March 2014, p. 3, available at <<https://sustainabledevelopment.un.org/getWSDoc.php?id=4086>> accessed on 20 December 2015.

¹⁰⁷ Andrew Light (n 5) p. 30.

- 4) Bodansky D., 'The United Nations Framework Convention on Climate Change: A Commentary' 18 Yale J. Int'l L. (1993) 451.
- 5) Bugge H. C., 'The principle and duty to cooperate: The case of conventions on transboundary pollutions in Europe' in Hao Duy Phan and others (eds.), *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar Publishing Limited 2015).
- 6) Connell A. J., 'Tragedy of the Common but Differentiated Responsibilities: A Critique' CEPMLP Annual Review - CAR Volume 16 (2013) 1.
- 7) Dasgupta C., 'The Paris Agreement and Being Grateful for Small Mercies' (*The Wire*, 16 December 2015) available at <<http://thewire.in/2015/12/16/the-paris-agreement-and-being-grateful-for-small-mercies-17430/>> accessed on 20 December 2015.
- 8) Development Research Centre of the State Council People Republic of China, *China's New Place in a World in Crisis: Economic, Geopolitical and Environmental Dimensions*, chp. 17, available at <http://www.gdi.org.uk/Documents/China_Research.pdf> accessed on 23 December 2015.
- 9) Diez C., 'Policy Brief and Proposals: Common but Differentiated Responsibilities', International Movement ATD Fourth World, 13 March 2014, available at <<https://sustainabledevelopment.un.org/getWSDoc.php?id=4086>> accessed on 20 December 2015.
- 10) Global Commons Institute *Contraction and Convergence Submissions to UNFCCC from Global Commons Institute* (2000) available at <http://www.gdi.org.uk/UNFCCC_Submission.html> accessed on 23 December 2015.
- 11) Gupta J., *The History of Global Climate Governance*, (Cambridge University Press, 2014).
- 12) Harris P. G., 'Climate Change Priorities for East Asia: socio-economic impacts and international justice' in Paul G. Harris (ed.), *Global Warming in East Asia: The Domestic and International Politics of Climate Change* (Routledge, Taylor and Francis Group 2003).
- 13) Kågeson P., 'Applying the Principle of Common but Differentiated Responsibility to the Mitigation of Greenhouse Gases from International Shipping' CTS Working Paper 2011:5 Centre for Transport Studies Stockholm.
- 14) Light A., 'An Equity Hurdle in International Climate Negotiations' Vol. 31, No. 1 (SPRING 2013) 28.
- 15) Magsig B., *International Water Law and the Quest for Common Security* (Routledge, Taylor and Francis, London 2015).
- 16) McManus K., 'The principle of 'common but differentiated responsibility' and the UNFCCC' Climatico Special Features - November 2009, available at <http://www.mercyworld.org/_uploads/_dknw/files/2012/Link3.pdf> accessed on 12 December 2015.
- 17) Meyer A., *Contraction and Convergence, the Global Solution to Climate Change* (Schumacher Briefing No. 5, November 2000).
- 18) Neumayer E., 'In defence of Historical Accountability for Greenhouse Gas Emissions' *Ecological Economics*, 33 (2), 2000 pp. 185-192; LSE Research Online, August 2012 1.
- 19) Nobbe C., 'Universality, common but differentiated responsibilities and the Sustainable Development Goals', SWP Working Papers January-April 2014 1.
- 20) Parker L. and Blodgett J., 'Greenhouse Gas Emissions: Perspectives on the Top 20 Emitters and Developed Versus Developing Nations', CRS Report for Congress Order Code RL32721 2008 1.

- 21) Rajamani L., 'Differential Treatment at Play: The Climate Regime' in Lavanya Rajamani, *Differential Treatment in International Environmental Law* (first published 2006, Oxford Scholarship Online, 2012)
- 22) Rajamani L., 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime', *RECIEL* 9 (2) (2000) 120
- 23) Rajan S. C. and Byravan S., 'At Paris, Something for Everyone' (The Hindu 15 December 2015) available at <<http://www.thehindu.com/opinion/op-ed/paris-agreement-at-paris-something-for-everyone/artide7987957.ece>> accessed 10 December 2015.
- 24) Rio+20 United Nations Conference on Sustainable Development, 'The future we want' A/CONF.216/L.1 Agenda item 10 Outcome of the Conference, 19 June 2012.
- 25) Schmale H., Richerzhagen C., Pauw S., Pauw P., and Brandi C., *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations* (German Development Institute 2014).
- 26) Sha F. and Ji Z., 'The challenges of the post-COP21 regime: interpreting CBDR in the INDC context' *Int. Environ. Agreements Springer Science+Business Media Dordrecht* (2015) 1.
- 27) The Centre for International Sustainable Development Law Legal Brief, *The Principle of Common but Differentiated Responsibilities: Origins and Scope*, (For the World Summit on Sustainable Development 2002) available at <http://cisdl.org/public/docs/news/brief_common.pdf> accessed on 17 December 2015.
- 28) Tladi D., *Sustainable Development in International Law: An Analysis of Enviro-Economic Instruments* (Pretoria University Law Press, South Africa 2007)
- 29) Underdal A., Sælen H., and Kallbekken S., *Equity and spectrum of mitigation commitments in the 2015 agreement* (Nordic Council of Ministers 2014).
- 30) United Nations Conference on Trade and Development, *World investment report, transnational corporations, agricultural production and development* (United Nations, New York and Geneva WIR 2008) available at <http://unctad.org/en/docs/wir2008_en.pdf> accessed on 22 December 2015.
- 31) United Nations Department of Economic and Social Affairs Division for Sustainable Development, *Sustainable Development in the 21st century (SD21): Review of implementation of Agenda 21 and the Rio Principles* (Draft, December 2011).
- 32) United Nations Development Programme, *Human Development Report 2004 Cultural Liberty in Today's Diverse World* (HRD 2004, Carfax Publishing, Taylor and Francis Ltd. 2004).
- 33) Yamin F. and Depledge J., *The International Climate Change Regime A Guide to Rules, Institutions and Procedures* (Cambridge Books Online, Cambridge University Press 2009).
- 34) Zaccai E. and Lugen M., 'Common but differentiated responsibilities against the realities of climate change' in Alain Papaux and Simone Zurbuchen (eds.), *Philosophy, Law, and the Environmental Crisis* (2016) (forthcoming) available at <http://igcat.ulb.ac.be/fileadmin/media/publications/CEDD/Zaccai.Lugen._CBRD_against_the_realities_of_climate_change.pdf> accessed on 24 December 2015.