An Appraisal of the Principle of Common But Differentiated Responsibilities in International Environmental Law

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Abstract

The significance of the environment to existence calls for national, regional and international concern for its protection and preservation. The concept of common but differentiated responsibilities, which was enshrined as principle 7 of the Rio Declaration at the first Rio Earth Summit in 1992, is a reflection of this essence. Within the context of this relevancy, this paper appraised the principle of common but differentiated responsibilities in international environmental law, with a view to underscore the values and applicability of the principle; evaluate its nativity and international legal recognition; examine the principle in the light of climate change issues and international legal and regulatory responses; as well as constraints associated with the application of the principle. The paper adopted a doctrinal research approach through which the subject area was reliably examined and analysed. The paper found that non participation constraint, emission targets and per capital approach constraint, and comparability of action constraint, are the factors militating against the principle in the climate regime. The paper concluded that there should is the need for global environmental security through the application of the principle and therefore recommended that climate regime should accommodate the responsibilities of developing countries in the fight against climate change and not just laying all emphasis on the developed nations, as every nation contribute one way or the other in the common problem though in varying degrees.

Keywords: Common but Differentiated Responsibilities and Climate Change.

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1. Introduction

The principle of Common but Differentiated Responsibility (CBDR) evolved from the notion of the common heritage of mankind and is a manifestation of the general principles of equity in international law. The principle recognises historical differences in the contributions of developed and developing States to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems. Despite their common responsibilities, important differences exist between the stated responsibilities of developed and developing countries.

The Rio Declaration accommodates the reality that, in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.[4] The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[5]

Similar language exists in the Framework Convention on Climate Change; parties should act to protect the climate system "on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities".[6] The principle of CBDR includes two fundamental elements. The first is the common responsibility of States for the protection of the environment, or parts of it, at the national, regional and global levels. The second is 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.[7]

1.2 CBDR Implications

In practical terms, the principle has at least two consequences. First, it entitles, or may require, all concerned States to participate in international

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4 Rio Declaration 1992 art. 7.

5 *Ibid.*

6 UNFCCC 1992 art. 3.

7 World Summit on Sustainable Development 2002, 'The Principle of Common But Differentiated Responsibilities: Origins and Scope' <https://www.un.org> accessed 4 January 2023.

response measures aimed at addressing environmental problems. Second, it leads to environmental standards that impose differing obligations on States. The principle finds its roots prior to UNCED and is supported by state practice at the regional and global levels. 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 (such as biodiversity – termed a common concern of humankind). 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.'

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.

The Stockholm Declaration emphasised the need to consider 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. In the Rio Declaration, States agreed that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, that the special situation of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority, and that standards used by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Differential responsibility therefore aims to promote substantive equality between developing and developed States within a regime, rather than mere formal equality. The aim is to ensure that developing countries can come into compliance with particular legal rules over time – thereby strengthening the regime in the long term. Practically speaking however, differential responsibility does result in different legal obligations. The techniques available in differentiated responsibility include 'grace periods' or delayed implementation and less stringent commitments.

In recent interpretation of World Trade Organization (WTO) law, there is movement towards an obligation to consider the particular economic, social and environmental situation of developing countries when adopting environmental measures. The WTO dispute settlement panel in the *Shrimp case* expressly mentioned the principle of common but differentiated responsibilities in its conclusions.[8] A particularly important aspect of the principle is international assistance, including financial aid and technology transfer.

As developed countries have played the greatest, role in creating most global environmental problems, and have superior ability to address them, they are expected to take the lead on environmental problems. In addition to moving toward sustainable development on their own, developed countries are expected to provide financial, technological, and other assistance to help developing countries fulfil their sustainable development responsibilities. In Agenda 21, developed countries reaffirmed their previous commitments to reach the accepted UN target of contributing 0.7 percent of their annual gross national product to official development assistance.

Nonetheless, States have common responsibilities to protect the environment and promote sustainable development, but due to different social, economic, and ecological situations, countries must shoulder different responsibilities. The principle therefore provides for asymmetrical rights and obligations regarding environmental standards, and aims to induce broad State acceptance of treaty obligations, while avoiding the type of problems typically associated with a lowest common denominator approach. The principle also reflects the core elements of equity, placing more responsibility on wealthier countries and those more responsible for causing specific global problems. Perhaps more importantly, the principle also presents a conceptual framework for compromise and co-operation in effectively meeting environmental challenges.

2. Nativity of CBDR and Its International Legal Recognition

Instances of common responsibility appear as early as 1949, where

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[8] WTO, 'United States Import Prohibition of Certain Shrimp and Shrimp Products' <https://www.wto.org> accessed 3 January 2023.

una and other fish were described as being "of common concern" to the parties by reason of their continued use by those parties. Other examples include outer space and the moon, on the other hand, are described as the "province of all mankind," waterfowl as "an international resource," natural and cultural heritage as "part of the world heritage of mankind as a whole," the conservation of wild animals as being "for the good of mankind" and resources of the seabed and ocean floor and subsoil as "the common heritage of mankind."[9]

Recent state practice supports the emergence of the concept of "common concern" as reflected in the Climate Change Convention, which acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind," and the Biodiversity Convention which affirms that "biological diversity is a common concern of humankind." While each of these formulations differ, and must be understood and applied in the context of the circumstances in which they were adopted, the attributions of "commonality" share common consequences. 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. 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.

The concept of CBDR is not new to the international community and was originally codified as an international environmental legal principle. Under CBDR, "all states are responsible for addressing global environmental degradation yet not equally responsible." This concept accounts for the need for all states to take collective responsibility for the environment, while allowing countries of varying levels of development to contribute according to their capacity.

The general idea of states being, collectively responsible for environmental problems though to different extents dates back to the first UN Conference

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[9] C D Stone, 'Common But Differentiated Responsibilities in International Law' [2004](98)(2) *The American Journal of International Law*, 276.

on the Human Environment in 1972 and the resulting Stockholm Declaration, which described CBDR 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."

In 1992, CBDR became enshrined as an international legal concept at the UN Conference on Environment and Development in Rio de Janeiro, also known as the Earth Summit, which covered issues related to climate change, deforestation, desertification, and biodiversity. The Rio Declaration provides:

> 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 of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[10]

In this context, CBDR is tied with sustainable development explicitly. Many developing countries have logically extended CBDR to all of the three pillars of sustainable development (environmental protection, economic development, and social progress). Twenty years later, the International Law Association built on the Rio Declaration. In its 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, the organization declared that the CBDR principle obliged "a duty to cooperate in the achievement of global sustainable development," and acknowledged "the special needs and interests of developing countries and of countries with economies in transition" and countries "affected adversely by environmental, social and developmental considerations."

However, as was clearly demonstrated during OWG, developed countries are not in full agreement with the broader interpretation of CBDR that allows for its application to general sustainable development. At the same 1992 Earth Summit at which CBDR was codified, the United States issued a written statement to the effect that the US understands and accepts that Principle 7 of the Rio Declaration highlights the special leadership role of the developed countries, based on their industrial development,

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[10] Rio Declaration 1992 principle 7.

experience with environmental protection policies and actions, and the wealth and technical expertise capabilities. However, that the US does not accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries. This line of thinking has continued to the present among many developed countries, particularly on the rejection of CBDR's application outside of the realm of environmental issues to sustainable development more broadly.

More recently, the UN Conference on Sustainable Development, better known as Rio+20, which is seen as the foundation of the development of the Sustainable Development Goals(SDGs), mentioned CBDR explicitly in its outcome document "The World We Want" in a somewhat ambiguous context. The document first reaffirms all the principles of the Rio Declaration on Environment and Development, including, *inter alia*, the principle of CBDR, as set out in Principle 7 of the Rio Declaration, as much as recalling that the UN Framework Convention on Climate Change (UNFCCC) provides 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. Though the second reference to CBDR in Rio deals more explicitly with the environment, the first reaffirmation leaves it open to interpretation as to whether CBDR should be more widely applied to sustainable development.[11]

Differentiated Responsibility appears in number of treaties. The London Convention requires measures to be adopted by parties according to their scientific, technical and economic capabilities.[12] The special needs of developing countries are expressly recognised by the Barcelona Convention,[13] and in the preamble to the UN Convention on the Law of the Sea,[14] where account is to be taken of their "circumstances and particular requirements," of their "specific needs and special circum-

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[11] S Ranii, 'Do Common but Differentiated Responsibilities Belong in the Post-2015 SDGs?'<http://cic;nyu.edu/blog/global-development/do-common-differehtiated-responsibiiities~belong> accessed 2 January 2023.

[12] London Convention 1972.

[13] Barcelona Convention 1976 art.11(3).

[14] UNCLOS 1982.

stances," or of their "special conditions" and "the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country parties." Other treaties identify the need to take account of States' "capabilities," "economic capacity" the "need for economic development," or the "means at their disposal and their capabilities".

The principle of differentiated responsibility has also been applied to treaties and other legal instruments for developed countries. Examples include the 1988 EC Large Combustion Directive, which sets different levels of emission reductions for each member state, the 1991 VOC Protocol, which allows parties to specify one of three different ways to achieve reduction, and the 1992 Maastricht Treaty which provides that without prejudice to the principle that the polluter should pay, if any measure involves costs deemed disproportionate for the public authorities of a member state, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of temporary derogations and/or financial support from the Cohesion Fund. Differentiation within developing countries is specified, for example, in the Climate Change Convention which recognises the "special needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change." Similarly, the Desertification Convention requires that Parties give priority to affected African country parties, in the light of the particular situation prevailing in that region, while not neglecting affected developing country parties in other regions.[15]

Under the Montreal Protocol the special situation of developing countries entitles them, provided they meet certain conditions, to delay their compliance with control measures.[16] Under the Climate Change Convention, the principle of common but differentiated responsibilities requires specific commitments only for developed country parties at this time, and allows for differentiation in reporting requirements. International funding as a means to implement differentiated responsibility has a long history, beginning with the UNEP Environmental Fund, and the World Heritage Fund in the 1970's.
A key example of implementation in this context is funding ozone

[15] United Nations Convention to Combat Desertification 1996.
[16] Montreal Protocol 1987.

reductions projects through the Multilateral Fund for the Montreal Protocol. Financing mechanisms, partly implemented by the Global Environmental Facility, are established under the Climate Change, Biodiversity and Desertification Conventions. These mechanisms provide financial grants for implementing environmental projects and environmentally sound technology.

3. CBDR and Climate Change: International Legal and Regulatory Responses

Multiple lines of evidence have shown that the climate is changing all over the world and this is largely due to anthropogenic greenhouse gas emissions.[17] This alteration is having an important impact on human development by increasing the severity of droughts, land degradation and desertification, the intensity of floods and tropical cyclones, the incidence of heat-related mortality; and decreasing water availability, crop yield and food security.[18] The international Community has identified climate change as a global problem and hence the field of international climate change law has evolved rapidly.[19] This field of international law is targeted at addressing climate change in a common but differentiating front.

4. CBDR and UNFCCC

The UNFCCC, as a framework instrument, is the focal point for the development of the norms and principles of international climate change law. The United Nations Conference on Environment and Development, held in 1992 in Rio de Janeiro, agreed on a Framework Convention on Climate Change (UNFCCC), which established as its ultimate objective the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

The preamble to the Convention acknowledges that the global nature of

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[17] E Jimenez, 'The Principle of Common but Differentiated Responsibilities and Respective Capabilities(CBDR&RC) and the Compliance Branch of the Paris Agreement' <https://www.oas.org> accessed 2 January 2023.

[18] S Mclnemey and Others, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (Washington DC: The World Bank 2011) 56.

[19] C P Carlame, *The Oxford Handbook of International Climate Change Law* (London: Oxford University Press 2016) 3-25.

climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.[20] It also notes that 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.[21]

The preamble also recalls that States have in accordance with the Charter of the United Nations and the principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[22] Concerning the needs of developing countries, the preamble affirms that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty.[23]

UNFCCC clarifies the principles that shall guide State parties in their efforts to combat climate change.[24] It reaffirms the principle of CBDR, and states that the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[25] The UNFCCC makes it a condition that the specific needs and special circumstances of developing country Parties should be given "full consideration".[26] However, the UNFCCC maintains that all Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and

[20] UNFCCC 1992 preamble.
[21] UNFCCC 1992 preamble.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid* art. 3.1.
[25] *Ibid.*
[26] *Ibid* art. 3.2.

mitigate its adverse effects.[27]

UNFCCC makes it a duty obligate on developed countries to provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1, which covers elements of information that each Party shall communicate to the Conference of the Parties.[28] It went further to provide that the developed country Parties shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are agreed between a developing country Party and the international entity or entities referred to in Article 11.[29]

It remains unclear both as 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. Again a possible contradiction is noticeable from the provisions of the Convention. On the one hand, the Convention emphasizes that "full account" should be taken of "the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty", on the other it underlines "that all Parties should take precautionary measures". On the sharing of costs, the UNFCCC declares that developed countries shall provide the financial resources, needed by the developing countries "to meet the agreed full incremental costs of implementing measures" that are "agreed" between a developing country Party and the international entity referred to in Article 11. Agreements appear to be needed both on what constitutes the "full incremental cost" and on the inclusion of that cost (or part of it) in a deal between the individual country and the international financing entity.

The fact that the UNFCCC in Article 4.8 and 4.9 underscores the importance of assisting, in particular, the most vulnerable and the least developed countries, may be taken as a sign that the degree of support from the developed countries may differ between different categories of developing States. However, Article 4.7 declares that "the extent to which developing country Parties will effectively implement their commitments under the

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[28] *Ibid* art. 4.3.
[29] *Ibid.*

Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties. Clearly the key notion of the UNFCCC emphasizes that because the developed nations have contributed the bulk of the greenhouse gases to date, and have benefited economically from the industrialization that caused those pollutants, they should take the lead in efforts to mitigate climate change. As a first step, pending the adoption of Protocols under the Convention, the UNFCCC imposed a non-binding goal of reducing greenhouse gas emissions by industrialized countries (the so-called Annex I countries) to their 1990 levels by the year 2000. Beyond this, the interpretation of the CBDR by the Convention appears vague.

5. CBDR and the Kyoto Protocol

The first Conference of the Parties (COP) in 1995 adopted the Berlin Mandate that specified that the process towards a first protocol should be guided by the UNFCCC's Article 3.1 (on the CBDR). In December, 1997, some 160 countries negotiated the Kyoto Protocol to the Framework Convention.

The Protocol, which entered into force in 2005, is the Convention's primary tool for combating global warming and climate change. It designates countries with emissions commitments as Annex B countries. With only a few exceptions, the Annex B countries are identical to the set of Annex I countries in the UNFCCC. The Kyoto Protocol maintains the principle of differentiated responsibilities, imposes targets and timetables for specific emissions reductions by 38 industrialized Annex B countries, and expands the opportunities for countries to achieve their commitments cost-effectively through three flexible mechanisms: emissions trading, joint implementation and the clean development mechanism.

The Kyoto Protocol establishes general obligations of cooperation towards technology transfer, and provides for financial assistance for mitigation and adaptation to developing countries through the Global Environmental Facility (GEF). The GEF operates three funds, the Special Climate Change Fund, the Least Developed Countries Fund, and the Kyoto Protocol Adaptation Fund. They are all mechanisms aimed at operationalizing the CBDR. The developing countries, however, have no specific obligations

to abate greenhouse gas emissions under the Protocol, and it provides no mechanism for developing countries to adopt emissions commitments voluntarily (other than to voluntarily use the option provided in the UNFCCC's Article 4.2(g) to notify the Depositary that it intends to be bound by the same commitments as the Annex I countries).

The Kyoto Protocol does not specifically cover emissions from international bunkers, but however requests the Parties included in Annex I to pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.[30]

The distinction between international and domestic emissions arises from the IPCC Guidelines, and the natural interpretation of Article 2.2 is that it refers to international emissions only. The Kyoto Protocol does not add much to the Convention in terms of interpreting the CBDR principle.31 However, the Protocol states that all Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall without introducing any new commitments for Parties not included in Annex I, *inter alia*, "formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change".[32]

6. CBDR and Paris Agreement

In December 2011, the Parties to the UNFCCC decided to 'launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties. Following intensive negotiations, in December 2015, Parties finally adopted the Paris Agreement (PA).

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[30] Kyoto Protocol 2005 art. 2.2.

[31] Centre for Transport Studies Stockholm, 'Applying the Principle of Common but Differentiated Responsibilities to the Mitigation of Greenhouse Gases from International Shipping'<https://www.transportportal.se> accessed 4 January 2023.

[32] Kyoto Protocol 2005 art. 1.0

Given its architecture, the PA represents an outstanding compromise.[33] It is often soft and mainly procedural. The PA serves as a balance between international legal certainty and national sovereignty (hybrid approach) as it provides for a rules-based regime under an international treaty (top-down), including Nationally Determined Contributions (MDCs)[34] elaborated by the Parties (bottom-up). An enhanced transparency framework was established in order to promote effective implementation.[35] Moreover, a transparent, non- adversarial and non-punitive mechanism to promote compliance was also established.[36]

The PA is a legal agreement applicable to all, with no differentiation between developed and developing countries, but it is still based on the principle of CBDR and Respective Capabilities (RC)[37] thus it provides some flexibility to developing countries based on their national circumstances. The principle of CBDR&RC has, from the beginning, underpinned the international efforts to address climate change.[38] The principle is a defining feature of the international climate change regime given that it recognizes that parties vary both in their levels of responsibility for climate change and in their capacities to cope with it. As a universally accepted principle, CBDR&RC provides a basis for differentiating among parties. CBDR, as articulated above, anticipates the concept of capability, when referring to finance and technology.[39]

PA establishes a 'mechanism to facilitate implementation of and promote compliance' which shall 'function in a manner that is transparent, non-adversarial and non- punitive' and 'pay particular attention to the respective national capabilities and circumstances or Parties.[40] The mechanism shall consist of an expert-based committee with 12 members

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[33] S Dubois and M Wemaere, 'The Paris Agreement: A Starting Point towards Achieving Climate Neutrality?'[2016](10)(1) *Carbon and Climate Law Review*, 1.
[34] Paris Agreement 2015 art. 3.
[35] *Ibid* art. 13.
[36] *Ibid* art. 15.
[37] *Ibid* art. 2.
[38] L Rajamani, 'Differentiation in the Emerging Climate Regime'[2003](14)(1) *Theoretical Inquiries in Law*, 152.
[39] H Winkler and L Rajamani, 'CBDR&RC in a Regime Applicable to All'[2013](14)(1) *Climate Policy*, 102.
[40] Paris Agreement 2015 art. 15.

on the basis of equitable geographical representation. The modalities and function of this mechanism are yet to be decided. Before starting to design the mechanism's details, is important to keep in mind the overall architecture of the PA. As mentioned above, the PA has no reference to developed and developing countries and is applicable to all, but it does not mean that it has to be applied symmetrically in all of its elements.

The PA contains a number of legally binding obligations for all parties, such as the preparation and communication of NDCs.[41] However, these obligations are of a procedural nature only, whilst the essence of mitigation, adaptation and finance obligations is not legally binding and left to the willingness of each party. It has to be noted that compliance in its legal sense is only possible with provisions that are legally binding, that is, obligations to parties that require certain actions.

The non-legally binding provisions can be implemented if they require domestic action or if they guide the design of the organizational structure of the regime, but they cannot be 'complied with.[42] Implementation is reserved for situations 'in which the relationship between an international rule and the behaviour it aims to change is more attenuated.[43] Therefore, the mechanism should focus on both compliance and implementation. It should span the compliance promotion of parties with their legally binding obligations and the implementation of the provisions that are not legally binding under the PA. Thus, the mechanism could consist of a compliance branch and an implementation branch.

7. International Maritime Organization (IMO) Response and CBDR

IMO is a specialized agency under the United Nations for intergovernmental cooperation in the field of regulation of ships engaged in international trade. Its task is to encourage and facilitate the general adoption of the highest practicable standards in maritime safety, efficiency

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[41] C Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement' [2016](25)(2) *Review of European, Comparative & International Environmental Law*, 161.

[42] *Ibid.*

[43] D M Bodansky, *The Art and Craft of International Environmental Law* (USA: Harvard University Press 2010)13.

of navigation and prevention and control of marine pollution from ships. IMO's role is primarily to enact international legislation, while the Contracting Governments assume responsibility for implementing and enforcing the legislation on ships flying their flag. When an IMO instrument has entered into force, countries that have ratified it can apply it not only to ships of their own flag but also to all other ships as a condition of entering their ports or internal waters, regardless of flag. This is an important principle, commonly referred to as the principle of "no more favorable treatment".

There has been ongoing cooperation between the Secretariats of IMO and UNFCCC on the work of greenhouse gas emissions from international shipping ever since UNFCCC entered into force in 1994. IMO's work on greenhouse gas emissions is guided by Assembly resolution A.963(23) on IMO Policies and Practices Related to the Reduction of Greenhouse Gas Emissions from Ships, which was adopted in December 2003. The resolution urges the Marine Environment Protection Committee (MEPC) to identify and develop the mechanisms needed to achieve limitation or reduction of Greenhouse Gas emissions, from international shipping.[44] In response to the Kyoto Protocol, the IMO in 2000 published a comprehensive report on greenhouse gas emissions from ships ("The first GHG report"), and the IMO Assembly subsequently in adopting Resolution 963(23), called upon Parties to adopt a mandatory Market-Based Instrument (MBI) for the reduction of emissions from vessels.[45]

MEPC 59 agreed by overwhelming majority that a market-based instrument was needed as part of a comprehensive package of measures to regulate GHG emissions from international shipping. The Committee further agreed that any regulatory GHG regime applied to international shipping should be developed and enacted by IMO as the sole competent international organization with a global mandate to regulate all non-commercial aspects of international shipping. The outcome of MEPC 59 was endorsed by the twenty-sixth session of IMO's Assembly in late 2009 (MEPC 60/INF. 9).

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[44] IMO Assembly Resolution on Policies and Practices Related to the Reduction of Greenhouse Gas Emissions from Ships 2003.

[45] IMO Assembly Resolution 963(23) of 2000.

The MEPC has over the years discussed numerous submissions by Parties on various ways of achieving abatement of GHG in the shipping sector, among them an Energy Efficiency Design Index (EEDI) for new ships and an Energy Efficiency Operational Indicator (EEOI) for existing and new vessels. The Parties have also debated over 70 submissions on market-based instruments, most of them either on varieties of emissions trading or on different forms of charges and taxes. However, despite ten meetings of the MEPC, three inter sessional working group meetings devoted entirely to greenhouse gases, a new IMO GHG study and an assessment by an expert group on market-based instruments, the organization has, ten years past its first GHG report and 13 years after the Kyoto Protocol, failed to come to agreement on measures aimed at combating C02emissions from international shipping.

The delay is to a large extent a result of the unresolved conflict over the interpretation of CBDR. What has happened since the Rio Declaration and the Kyoto Protocol shows that the legal interpretation of CBDR is subject to dispute. The United States already in 1997 refused taking on binding obligations unless key developing nations also took similar steps. States such as China, Brazil, India, and Saudi Arabia, on the other hand, maintain that the Protocol restricts the enforcement of binding obligations to the developed countries. Similar to land-based CO_2 emissions, they argue that the lion's share of CO_2 emissions from international shipping is the result of cumulative emissions related to the historical development of the industrialized countries.

Consequentially China and India claim that the CBDR principle should be fully respected in the negotiation of an international legal instrument for the reduction of GHG emissions from shipping and that, thus, any such instrument should be applicable only to the ships of developed countries. They demand that CO_2 emissions from their ships should be deemed as 'survival emissions'. However, given the unique characteristics of international shipping, obligations aimed only at ships that carry the flags of industrialized nations are not a viable option. There is no precedent in any of the fifty-one IMO international treaty instruments currently in existence where measures have been applied selectively to ships according to their flag.

8. International Climate Conferences

The international climate conferences have usually presented avenue for

State parties to the climate regime to negotiate better approaches in addressing global climate change problems. The Conference of Parties (COP 26) took place in Glasgow from 31 October to 12 November, 2021. The main goal was to secure global net- zero by mid-century and keep a maximum of 1.5C degrees of warming within reach. Net zero means total emissions are equal to or less than the emissions removed from the environment. Other goals included accelerating the phase out of coal and mobilising at least $ 100bn in climate finance per year.

After 13 days of negotiations between nearly 200 countries, the Glasgow Climate Pact was signed, and the Paris Agreement's Rulebook was completed. The Glasgow Climate Pact is a series of decisions and resolutions that build on the Paris Accord, setting out what needs to be done to tackle climate change. However, it does not stipulate what each country must do and is not legally binding. On the other hand, the Paris Rulebook gives the guidelines on how the Paris Agreement between all signatories on how they would set out their nationally determined contributions to reduce emissions. The finalized Rulebook includes agreements on: an enhanced transparency framework for reporting emissions; common timeframes for emissions reductions targets; and mechanisms and standards for international carbon markets.

The most recent conference is the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 27). The COP 27 took place in the Egyptian coastal city of Sharm el-Sheikh, from 6th to 20th of November 2022. The COP 27 concluded with a historic decision to establish and operationalize a loss and damage fund. Thus, after days of intense negotiations, countries reached agreement on establishing a fund to compensate vulnerable nations for 'loss and damage' from climate-induced disasters.

9. Arguments for CBDR in the Climate Change Regime

9.1 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.

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. 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. 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.

9.2 The Economic and Capacity Argument

Vulnerability to climate change differs from country to country. Impacts of climate change are 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 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.[46]

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 UNFCCC it is based on their respective capabilities. The capacity criterion in the CBDR principle builds on polluter pays principle which *inter alia* requires that

[46] Centre for Transport Studies Stockholm (n 28).

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 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. 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.

10. Arguments against CBDR in the Climate Change Regime

10.1 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.[47] The views of the US are express in no uncertain terms in the Byrd-Hagel Resolution of 1997 which forbids the United States from signing any legal agreement regarding the UNFCCC 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.

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

[47] P G Harris, 'Understanding America's Climate Change Policy: Realpoiiti'k, Pluralism and Ethical Norms' (OCEES Research Paper 1998) 15.

time as the industrial world but incorporates flexibility for developing countries with regards to targets timing and breadth of commitments. 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. 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.[48]

11. Constraints of CBBR in the Climate Change Regime

11.1 Non Participation Constraint

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." 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. 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.[49] 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

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[48] B Muller, Congressional Climate Change Hearings: Comedy or Tragedy? A Prime for Aliens (London: Oxford Institute for Energy Studies 2000) 67.

[49] D M Bodansky, 'Targets and Timetables: Good Policy but Bad Politics' (University of Georgia School of Law Research Paper Series 2007) 12.

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.

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. 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 a 255 industrialized country.

But an authoritative survey concludes "Leakage rates in the range of 5 to 20 per cent are common" 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. 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.

11.2 Emission Targets and Per Capita Approach Constraint

Under the current climate regime, the principle of CBDR has been translated in practice into a set of specific, quantitative emission mitigation obligations for industrialized countries and no emission mitigation obligations for developing countries. Emission targets and timetables *inter-alia*, aim to address the equity concerns to developing countries. However, this approach has been criticized on a number of grounds. First, emission targets represent an economic straitjacket and could impose unacceptable high costs on countries. Second from the political stand point, rich countries would never accept the huge transfer of wealth from them to the poor that is implicit in the per capital formulation. Third, from a developing country perspective, China and India argue that economy-wide, binding emission target are unacceptable because they would unduly restrict their national sovereignty.

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. But because virtually every aspect of a country's economy contributes to climate change – not energy production, but also transportation, manufacturing, and even agriculture – an economy –wide target represents, both symbolically and in practice, a constraint on a country's economy as a whole.

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,[50] and in the absence of effective sanctioning mechanism, states will be unlikely to participate and comply.[51] The USA persistent refusal to ratify the Kyoto Protocol illustrates the challenges of the emissions targets approach.

11.3 Comparability of Action Constraint

Comparability of action poses a challenge to CDBR in the following ways: first it requires comparison of mitigation actions between industrialized countries and developing countries.

Second, the requirement 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 costs" of developing countries measures as enshrined in the UNFCCC. The problem is that despite the use of the "agreed" there is no

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[50] D G Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming, Princeton* (Princeton University Press 2011) 56.

[51] B Scott, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford: Oxford University Press 2003) 13.

clarity as regards the basis on which incremental costs are to be defined. There is an urgent need to address these issues.

12. Conclusion

This paper has been able to extensively discuss the principle of common but differential responsibilities, its implications, codifications in multilateral treaties and its applicability to imperative international issues of climate change. Also, the arguments, for and against the principle have been considered. More importantly, the challenges that pose hindrances to the application of the principle in international law have been discussed. Global environmental sustainability remains an issue that must be negotiated to ensure international environmental security.

13. Recommendations

(a) To address the problem of non-participation, it would be imperative to set index growth targets for developing countries which will dispel the fear that greenhouse gas emission targets could adversely impact their economic growth.

(b) To achieve comprehensive participation and efficiency, new uniform formulas for setting targets should be made.

(c) There is the need to differentiate within the developing countries, so as not to make the developing countries economically disadvantaged over the developed.

(d) There should be an agreement among States for the application of the principles in the Maritime Sector.