

UNDERSTANDING THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND ITS MANIFESTATIONS IN MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAS)

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Abstract

After decades of increasing international cooperation on environmental issues, the notion of common but differentiated responsibilities (CBDRs) evolved into a cardinal principle in the context of international environmental negotiations. More specifically, CBDRs emerged as a policy principle that reflects the more idealistic principle of equity. It reflects the lasting political consensus that the broadest possible cooperation by all countries is needed to combat global environmental problems and that all parties have a responsibility to act accordingly while taking into account their different national circumstances, capacities, and development needs. An essential aspect of the principle is international assistance, including financial aid and technology transfer from developed to developing countries. The principle of CBDRs now embodied in most multilateral environmental agreements (MEAs) means that two factors determine a nation's obligations concerning global environmental problems. The first factor is the contribution of a particular nation to global environmental problems; the second is a nation's economic and technological capacity to reduce or mitigate global environmental problems. This paper seeks to proffer a detailed understanding of the principle of CBDRs and its manifestations in multilateral environmental agreements. This paper finds that the principle of CBDRs seeks global solutions for global environmental concerns by considering states' differentiated degrees of responsibility for causing these problems and their divergent capacities to redress them. Also, the paper finds that the principle of CBDRs is reflected in MEAs across four different environmental regimes; the global atmosphere regime, the biodiversity conservation regime, the land conservation regime and the climate change regime. Further, the paper finds that the principle of CBDRs has moved from being a soft international legal principle (as in the Rio Declaration on Environment and Development) to a growing but an increasingly robust component of international environmental law (as demonstrated by its codification in the United Nations Framework Convention on Climate Change). The paper recommends that the principle of CBDRs should continue to guide the negotiations of MEAs and the obligations of parties in MEAs. Further, the paper recommends that MEAs that do not reflect the CBDRs principle should be reviewed to capture and reflect the principle.

Keywords: The principle of CBDRs, fundamental elements of CBDRs, manifestations of CBDRs, multilateral environmental agreements

1. Introduction

Common but Differentiated Responsibilities (CBDRs) is a well-established concept in international environmental law developed from applying the principle of equity in general international law. CBDRs principle seeks to achieve equity, justice, and fairness in international environmental relations by balancing nations' responsibilities to redress transboundary and

global environmental problems with their right to develop.¹ The principle of CBDRs is often said to be about incorporating justice and fairness into international environmental agreements' obligations² and has been described as 'the bedrock of the burden-sharing arrangements crafted in international environmental treaties.'³ According to the CBDRs principle, while all countries are responsible for global environmental problems, for example, global warming, stratospheric ozone depletion, biodiversity loss, desertification, etc., some countries are more responsible than others.⁴ Thus, the principle of CBDRs requires all countries to play their part in global environmental protection based on the different contributions of developed and developing countries to global environmental problems.⁵

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¹See Craig, R.K. 'Climate Change and Common But Differentiated Responsibilities for the Ocean' [2017] (11)(4) *Carbon & Climate Law Review*, 325-334; Rowena, M. 'The Role of Common but Differentiated Responsibility in the 2020 Climate Regime: Evolving a New Understanding of Differential Commitments' [2013] (7) *Carbon & Climate Law Review*, 260.

²Tuula Kolari, 'The Principle of Common But Differentiated Responsibility in Multilateral Environmental Agreements' in Tuula Kolari and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007* (Department of Law: University of Joensuu, Joensuu, Finland), pp. 21-22.

³See Joanne, S. and Lavanya, R. 'EU Climate Change Unilateralism' [2012] (23)(2) *The European Journal of International Law*, 469-494:476; See Dinah Shelton, 'Equity' in Daniel Bodansky and Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 639, 657; See Patrick, W. 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?' [2017] (29) *International Journal of Refugee Law*, 201, 225; Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press 2015) pp. 73-74.

⁴Paul, G.H. 'Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy' [1999] (7)(1) *N.Y.U. Environmental Law Journal*, 27-48:30; Chris Wold and David Hunter and Melissa Powers, *Climate Change and The Law-Chapter 4 The International Response To Climate Change: The United Nations Framework Convention On Climate Change* (Lexis-Nexis, 2nd ed., 2013) p. 19; See *Sustainable Development in the 21st century (SD21): Review of implementation of Agenda 21 and the Rio Principles* (United Nations Department of Economic and Social Affairs Division for Sustainable Development, December 2011) p. 73; See Temitope, T.O. and Odunola, A.O. 'Differential Treatment in International Environmental Law and the Climate Regime: From 'Common but Differentiated Responsibilities' to 'Common but Differenced Responsibilities and Respective Capabilities' [2015] (5) *University of Ibadan Journal of Public and International Law*, 1-28:6; See Bortscheller, M.J. 'Equitable but ineffective: How the principle of common but differentiated responsibilities hobbles the global fight against climate change' [2010] (10)(2) *Sustainable Development Law and Policy*, 49, 65; Weiss, E.B., 'Common but differentiated responsibilities in perspective' [2002] (96) *American Society of International Law Journal Proceedings*, 366.

⁵See Nabaat, T.M. 'Sustainable Development and its Evolution in the Realm of International Environmental Law' [2016] *NAUJILJ*, 1-16:14; R. Emas, *The Concept of Sustainable Development: Definition and Defining Principles* <https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_defin_ituon_rev.pdf> accessed on 22 July 2019; See Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006); See Dire Tladi, *Sustainable Development in International Law:*

In general, public international law is based on the formal equality of states. However, despite international law's fundamental principle of sovereign equality, which treats all states equally regardless of their size or power, international environmental law distinguishes among states through the principle of CBDRs. The principle of CBDRs establishes the common responsibility of states for the protection of the global environment. But besides, it also lays down different standards of conduct for developed and developing nations.⁶ The principle of CBDRs seeks global solutions for global environmental concerns by considering states' differentiated degrees of responsibility for causing these problems and their divergent capacities to redress them. Through multilateral environmental agreements (MEAs), international environmental law implements CBDRs with more lenient obligations for economically disadvantaged states.⁷

The principle of CBDRs captures the unequal historical contributions of developed and developing countries to many global environmental concerns and their vastly different economic and technical capacity to take corrective measures to deal with such problems.⁸ Although all nations have shared responsibilities for the protection of shared environmental resources, there are essential differences between those of developed States and those of developing States.⁹ For example, while all states share the responsibility to address global climate change, individual states' requirements may differ, depending on their past greenhouse emissions and financial and

An Analysis of Enviro-Economic Instruments (Pretoria University Law Press, South Africa 2007) p. 50; 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.

⁶Legal Response Initiative (LRI), Common but differentiated responsibilities and respective capabilities <<https://legalresponse.org/legaladvice/the-principle-of-common-but-differentiated-responsibilities-and-respective-capabilities-a-brief-summary/>> accessed 12 July 2020.

⁷Bafundo, N.E. 'Compliance with the Ozone Treaty: Weak States and the Principle of Common but Differentiated Responsibility' [2006] (21)(3) *American University International Law Review*, 461-495:462-463; See Patricia Birnie and Alan Boyle, *International Law and The Environment* 1-2 (2nd ed. 2002); See Daniel, B. 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' [1999] (93) *Am. J. Int'l L.*, 596, 615; See Christopher, D.S. 'Common but Differentiated Responsibilities in International Law' [2004] (98) *American Journal of International Law*, 276, 276-81; See Michael, W. 'Comment, Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context' [2002] (13) *Colo. J. Int'l Envtl. L. & Pol'y*, 473, 473-78; William, B. 'Climate change, fragmentation, and the challenges of global environmental law: elements of a post-Copenhagen assemblage' [2010] (32)(2) *University of Pennsylvania Journal of International Law*, 877.

⁸Jutta, B. 'The United States and International Environmental Law: Living with an Elephant' [2004] (15)(4) *EJIL*, 617-649:629; See P. Birnie and A Boyle, *International Law & the Environment* (2nd ed., 2002) pp. 100-104; Philippe Sands, *Principles of International Environmental Law* (2nd ed., Cambridge University Press 2003) pp. 285-89.

⁹Susana, B. 'Colonizing the atmosphere: a common concern without climate justice law?' [2019] (26) *Journal of Political Ecology*, 105-127:112; See Rajamani L., 'The reach and limits of the principle of common but differentiated responsibilities and respective capabilities in the climate change regime' In N.K. Dubash (ed), *Handbook of climate change and India: development, politics and governance* (New Delhi: Oxford University Press 2011) pp. 118-129.

technical capacity.¹⁰ The basis for the principle of CDBRs is that all states are obligated to act (common), but developed nations assume greater responsibility (differentiated)¹¹ to carry more of the immediate burden of achieving environmental protection globally because they have contributed more to global environmental problems and have greater financial and technical resources to tackle such problems.¹²

Currently, existing instruments and practice suggest that states are paying attention to equity considerations in international environmental relations and recognize that global issues must reflect both the states' contributions to a particular problem and their abilities to deal with it. The practical demonstrations of the concept range from the differentiation of commitments in terms of timelines or degree to the provision of technical and financial assistance to developing countries and even the contingency of developing country compliance upon providing such assistance.¹³ Thus, the principle of CDBRs has at least two consequences. First, it requires all concerned states to participate in international response measures aimed at addressing environmental problems. Secondly, it leads to environmental standards that impose differing obligations on states.¹⁴ The principle of CDBRs can be seen as one way to integrate environment and development at the global level formally and as a means to make one country's commitments more "just" relative to the commitments of other countries – more proportional in other words.

¹⁰Jutta B. 'The United States and International Environmental Law: Living with an Elephant' [2004] (15)(4) *EJIL*, 617-649:629; See P. Birnie and A Boyle, *International Law & the Environment* (2nd ed., 2002) pp. 100-104.

¹¹Anjail, D.N. 'India's Environmental Trump Card: How Reducing Black Carbon through Common but Differentiated Responsibilities Can Curb Climate Change' [2011] (39) *Denv. J. Int'l L. & Pol'y*, 523-552:534; See Christopher, D.S. 'Common but Differentiated Responsibilities in International Law' [2004] (98) *Am. J. Int'l L.*, 276, 276;

¹²See Environmental Principles and Concepts (Organisation for Economic Co-Operation and Development 1995) p. 7 <<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD%2895%29124&docLanguage=En>> accessed 24 January 2021; Edith, B.W. 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' [1993] (81)(675) *The Georgetown Law Journal*, 675-710:705; Max, V.S. 'General Principles of International Environmental Law' [1996] (3)(193) *Ilsa Journal of Int'l & Comparative Law*, 193-209:205; Leelakrishnan, P. and Jayadevan, V.R. 'Concept of Common But Differentiated Responsibility in Climate Negotiations' [2019] (61)(1) *Journal of the Indian Law Institute*, 47-67:47; See Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law, Common but Differentiated Responsibility, [2002] (96) *AM. Soc'Y INT'L L. PROC.*, 358, 358; See Duncan, F. 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' [2000] (49) *Int'l & Comp. L.Q.*, 35, 50.

¹³Brunnée Jutta, 'The Stockholm Declaration and the Structure and Processes of International Environmental Law' in Aldo Chircop and Ted McDorman (eds), *The Future of Ocean Regime Building: Essays in Tribute to Douglas M. Johnston* (Kluwer Law 2008) pp. 41-62; See Meriem, H. and Céline, G. and Philippe, Q. 'Sectoral Targets for Developing Countries: Combining Common but differentiated Responsibilities with meaningful Participation' [2011] (11)(1) *Climate Policy*, 731-751.

¹⁴Stathis, N.P. 'The IMOs Climate Change Challenge: Application of the Principle of Common but Differentiated Responsibilities and Respective Capabilities' [2015] (6)(1) *Wash. & Lee J. Energy, Climate & Env't.*, 160-195:172-173; See Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd ed., Cambridge University Press 2012) p. 235.

In essence, it recognizes the unique needs of developing countries, especially in international environmental law.¹⁵

2. The Development of the Principle of CBDRS

Within the environmental regime, the starting point for the principle of CBDRs can be traced to the United Nations Conference on the Human Environment (The UN Stockholm Declaration) of 1972.¹⁶ Although the term was not explicitly mentioned in the resultant declaration (Stockholm Declaration), its spirit was clearly expressed. Statements on securing the development potential of developing countries when forming national policies were included and proclamations regarding the special circumstances of developing countries that need consideration when planning for national resource development.¹⁷ Another representation of the principle of CBDRs included in the Stockholm Declaration was that the extent to which developed countries apply environmental standards may be inappropriate and of unwarranted social cost for developing countries. Principle 23 of the 1972 Stockholm Declaration provides:

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.¹⁸

¹⁵Pauw Pieter and others, 'Different perspectives on differentiated responsibilities: A state-of-the-art review of the notion of common but differentiated responsibilities in international negotiations' Working Paper, Discussion Paper, No. 6/2014 (German Development Institute 2014) p. 3-4; Sands and Peel, *ibid*, p. 233; Honkonen T., *The common but differentiated responsibility principle in multilateral environmental agreements: regulatory and policy aspects* (Kluwer Law International 2009); See Dellink, R.B. and others, *Sharing the burden of adaptation financing: translating ethical principles into practical policy* (IVM report R08/05) (Vrije Universiteit & Netherlands Environmental Assessment Agency 2008) <<https://research.vu.nl/en/publications/sharing-the-burden-of-adaptation-financing-translating-ethical-pr>> accessed 24 January 2021.

¹⁶United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/REV.1 (June 16, 1972) [Hereinafter, Stockholm Declaration].

¹⁷Per Josephson, 'Common But Differentiated Responsibilities in the Climate Change Regime - Historic Evaluation and Future Outlooks' Thesis in International Environmental Law (Stockholm University 2017) p. 17; Manuj Bhardwaj, *The role and relationship of climate justice and common but differentiated responsibilities & respective capabilities (CBDR-RC) principle in the international climate change legal framework: Historical evaluation, developments, challenges & future outlooks of CBDR-RC principle & climate justice* <https://www.connect4climate.org/sites/default/files/files/publications/Climate%20Justice%20Manuj%20Bhardwaj%20India_0.pdf> accessed 29 January 2021.

¹⁸Principle 23 of the Stockholm Declaration; Stathis, *supra* note 14, p. 165; See di Gianfranco Tamburelli, 'The Principle of Common but Differentiated Responsibility in the International Agreements for the Protection of the Ozone Layer' in Cordini Postiglione (ed.), *Ambiente e Cultura* (VII International ICEF Conference, Naples, 1999) pp. 503-544.

Also, the need of developing countries for technical and financial assistance was acknowledged in Principle 12 of the Stockholm Declaration, which provides that resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.¹⁹

Finally, Principle 24 of the Stockholm Declaration states that international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres in such a way that due account is taken of the sovereignty and interests of all States.²⁰ Though these principles of the declaration did not make any weighty obligations of differentiation between the countries, however, it sent a reassuring signal to developing countries that their individual circumstances and capabilities will be taken into account²¹ when formulating law, policies, standards and obligations to deal with the issues of global environmental degradation.²²

The provisions of the United Nations Conference on Environment and Development (UNCED) (The Rio Declaration on Environment and Development) of 1992 significantly expanded upon the CBDRs principle. The principle was one of the most “conspicuous aspects” of the UNCED that was evident in all the Rio instruments. Principle 7 of the Rio Declaration provides for the CBDRs of States by declaring that:

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 of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.²³

¹⁹Principle 12 of the Stockholm Declaration; Ellen Hey, *The Principle of Common But Differentiated Responsibilities*, p. 5 <https://legal.un.org/avl/pdf/ls/Hey_outline%20EL.pdf> accessed 19 January 2021; *Review of Implementation of the Rio Principles*, pp. 53-54 <<https://sustainabledevelopment.un.org/content/documents/1127rioprinciples.pdf>> accessed 3 January 2021.

²⁰Principle 24 of the Stockholm Declaration; Josephson, *supra* note 16; Bhardwaj, *supra* note 40.

²¹Jutta, *supra* note 12, p. 19.

²²Jutta, *ibid*.

²³United Nations Conference on Environment and Development: *The Rio Declaration on Environment and Development*, principle 7, June 13, 1992, UN Doc.A/CONF.151/5/Rev.1, 31 I.L.M. 874 [Hereinafter *Rio Declaration*]; Stathis, *supra* note 14, pp. 167-168; Per Kågeson, *Applying the Principle of Common but Differentiated Responsibility to the Mitigation of Greenhouse Gases from International Shipping*, CTS Working

Principle 6 of the Rio Declaration further provides that the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.²⁴ Principle 7 of the Rio Declaration must be read in conjunction with Principle 11 that foresees that States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.²⁵

Principles 7, 6, and 11 of the Rio Declaration recognize that richer countries are more at fault for “global environmental degradation” and should therefore play a more significant role in mitigating the damage elsewhere while also contributing to “sustainable development.”²⁶ To implement CDBRs, cooperation to development is the most attractive incentive to ensure that developing countries will accept international environmental law enforcement as a priority of their national policies.²⁷

3. Fundamental Elements of the Principle of CDBRs

The principle of CDBRs has two ‘core elements’. The first element concerns nations' common responsibility to protect ‘the environment, or parts of it, at the national, regional and global levels.’²⁸ The first one is the common responsibility that describes the shared obligations of two or more States towards protecting a particular environmental resource. Common responsibility is possible to apply where the resource is shared, under the control of no State, or the sovereign control of a State, but subject to a common legal interest, such as biodiversity and climate.²⁹ For CDBRs to apply, however, environmental issues must be ‘common.’ In this context, ‘common’ refers to collective or common interests, while ‘common responsibilities’ refer to ‘the shared

Paper 2011:5 (Centre for Transport Studies, Stockholm 2015) pp. 5-6; Neelima Jerath, ‘International Environmental Conventions : An Indian Perspective’ *Punjab ENVIS Newsletter Vol 13, No. 3 (2015-16)* p. 4; See Jutta, supra note 12; Universal Rights, Differentiated Responsibilities: Safeguarding human rights beyond borders to achieve the Sustainable Development Goals. Human Rights Policy Brief, April 2015 (Center for Economic and Social Rights and Third World Network, 2015) p. 1; See Daniel B. Magraw Jr. and Barbara Ruis, ‘Principles and Concepts of International Environmental Law’ in Nicholas A. Robinson and Lal Kurukulasuriya (eds), *Training Manual on International Environmental Law* (Pace University Law Faculty Publication 2006) p. 29.

²⁴Rio Declaration, Principle 6.

²⁵Fajardo T., *International Environmental Law and Environmental Crime: An Introduction*. Study in the framework of the FFACE research project (Granada: University of Granada 2015) p. 11.

²⁶Climate Change and Human Rights: A Rough Guide (International Council on Human Rights Policy 2008) p. 6; See Alberto do Amaral Junior, Intergenerational Equity: What Role Should Law Play?, p. 2 <https://law.yale.edu/sites/default/files/documents/pdf/SELA15_Amaral_CV_Eng.pdf> accessed 29 December 2020.

²⁷Fajardo, supra note 25, p. 10.

²⁸Craig, supra note 1, p. 329; See Rowena, supra note 1, See Josephson, supra note 17, p. 13.

²⁹Ntale Mustapher, ‘Rethinking the Application of the Principle of ‘Common but Differentiated Responsibilities’ in the International Climate Legal Framework: The Principle of Common But Differentiated Responsibilities: Origins and Scope <<http://www.cisd.org/pdf/briefcommon.pdf>> accessed 17 July 2019.

obligations of two or more States towards the protection of a particular environmental resource.³⁰ This first element entails the *common responsibility* of all the states to cater to environmental protection concerns as it is impossible, for example, to combat global climate change unless states cooperate to reduce greenhouse gas concentrations in the atmosphere.³¹

“Common” suggests that the responsibility to conserve, protect and restore the health and integrity of the Earth’s ecosystem rests on every State. In doing so, all nations should “cooperate in a spirit of global partnership.” However, the responsibilities are said to be “differentiated” in that not all countries should contribute equally.³² The concept of common responsibility exists in different international legal instruments that regulate the protection and conservation of resources considered part of humanity's common heritage. The recognition of common responsibility is the source of a series of obligations that involve States' participation through the adoption of response measures for environmental problems.³³

The second element concerns the necessity of taking into account each nation’s particular circumstances, ‘particularly each State’s contribution to the evolution of a particular environmental problem and its ability to prevent, reduce and control its impacts on the environment.’³⁴ ‘Differentiated’ responsibilities aim to promote substantive equality between developing and developed States within an environmental regime, rather than mere formal equality. Thus, rather than subjecting all-party States to the same obligations, the CDBRs principle assigns responsibilities based on a range of factors, including a nation’s development level and its contribution to the environmental problem being addressed.³⁵

“Differentiated” signifies a special treatment to common environmental problems through introducing notions of equity into international environmental lawmaking. This type of equity can be reflected in various ways: exemptions from obligations, lessened obligations, and more extended periods to meet set obligations.³⁶ Differentiated responsibility shared between States in protecting the environment has been widely accepted in international treaties and State

³⁰Craig, supra note 1.

³¹Rishika, K. ‘The Principle of ‘Common But Differentiated Responsibilities’ and the Challenges Posed by it in the Context of International Climate Governance’ (3)(2) *International Journal of Law and Legal Jurisprudence Studies*, 98-113:102 <<http://ijlljs.in/wp-content/uploads/2016/04/impl.pdf>> accessed 24 January 2021; See generally, Lavanya, R. ‘The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime’ [2000] (9)(2) *RECIEL*, 120, 125; See Kelly McManus, ‘The principle of ‘common but differentiated responsibility’ and the UNFCCC’ *Climatico Special Features - November 2009* <<https://www.yumpu.com/en/document/view/20355846/the-principle-of-common-but-differentiated-responsibility-climatico>> accessed 24 January 2021.

³²Review of Implementation of the Rio Principles, supra note 19, p. 52.

³³Susana, supra note 9.

³⁴Craig, supra note 1, p. 329; See Rowena, supra note 1; Mustapher, supra note 29.

³⁵Craig, *ibid*; See Günther Handl, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992 (United Nations 2012) p. 5 <<https://legal.un.org/avl/ha/dunche/dunche.html>> accessed 23 January 2021.

³⁶Stathis, supra note 14.

practices. Its transposition is implemented by adopting different environmental standards established based on special needs and circumstances, future economic development of the countries, and their historical contribution to a specific environmental problem. The recognition of differentiated responsibilities reduces the scope for the imposition of duties on States because of the recognition of common responsibilities.³⁷

Introducing such differentiation into international environmental law acknowledges the particular needs of developing States in creating international rules. Differentiation within an environmental context is undoubtedly useful in its attempt to allow these States the right to development, a right that has been more extensively enjoyed by developed States.³⁸ Thus, differentiated responsibility is a source of *rights* for developing States. That means recognizing a differentiated responsibility allows States to determine their environmental policies based on their specific environmental and development contexts. The aim is to ensure that developing States can comply with their international legal environmental protection commitments in the long term.³⁹

4. Manifestations of the Principle of CDBRs in MEAs

The manifestations of the principle of CDBRs in Multilateral Environmental Agreements (MEAs) shall be discussed under four different environmental regimes namely, the global atmosphere regime, the biodiversity conservation regime, the land conservation regime and the climate change regime.

4.1. The Principle of CDBRs within the Global Atmosphere Regime

A. The Montreal Protocol 1987

The 1987 Montreal Protocol to the Vienna Convention⁴⁰ for the Protection of the Ozone Layer on Substances that Deplete the Ozone Layer ("Montreal Protocol") is one of the first MEAs to incorporate CDBRs into its provisions by administering different obligations for developed and developing states.⁴¹ The Montreal Protocol, while not specifically referring to the CDBRs principle, contains an elaborate set of provisions giving effect to that principle. Acknowledging

³⁷Susana, supra note 9.

³⁸Stathis, supra note 14.

³⁹Susana, supra note 9.

⁴⁰The Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989; the Vienna Convention was adopted in 1985) (Hereinafter, the Montreal Protocol) <<https://www.unenvironment.org/ozonaction/who-we-are/about-montreal-protocol>> accessed 19 January 2021.

⁴¹Bafundo, supra note 6, pp. 463-464; See Montreal Protocol, *ibid*; See London Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, art. 10, June 29, 1990, 30 I.L.M. 537, 550-51; UNEP, Handbook for the international treaties for the protection of the ozone layer: The Vienna Convention 1985 - The Montreal Protocol 1987 (6th ed., UNEP 2003) <<https://wedocs.unep.org/bitstream/handle/20.500.11822/8045/-Handbook%20for%20the%20International%20Treaties%20for%20the%20Protection%20of%20the%20Ozone%20Layer%20-%20Sixth%20Edition-2003Handbook-2003.pdf?sequence=2&isAllowed=y>> accessed 11 January 2021.

that “special provision is required to meet the needs of developing countries for these substances,” the Montreal Protocol adopts, for the first time in international environmental law history, three mechanisms that take into account the special situation of developing countries in formulating their obligations: different phase-out period for developing countries with a grace period of 10 years to phase out controlled substances; establishment of a fund to help developing countries receive financial and technical assistance to meet with their obligations under the Protocol; and transfer of technology including facilitating access to environmentally safe alternative substances and technology.⁴²

To assist developing countries, article 5 of the Montreal Protocol, which recognized the special situation of developing countries, grants a ten year grace period during which such developing countries may delay compliance with the Montreal Protocol's control measures of ozone depleting substances (ODS).⁴³ Thus, developing countries can delay compliance if a country's per capita consumption of certain controlled substances was below a threshold (a proxy for economic development).⁴⁴ Article 5(1-3) of the Montreal Protocol provides:

Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter until 1 January 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures set out in Articles 2A to 2E...⁴⁵

⁴²Sumudu Atapattu, Climate change, Equity and Differentiated Responsibilities: Does the Present Climate Regime Favor Developing Countries? p. 5 <<https://www.iucnael.org/en/documents/73-atapattu-climate-chang-e-e-quity-and-differentiated-responsibilities/file>> accessed 12 January 2021; See Lavanya, R. ‘The changing fortunes of differential Treatment in the evolution of international environmental law’ [2012] (88)(3) *International Affairs*, 605:623:608; See Susan , E.S. and Anne R.D. ‘Decline in Antarctic Ozone Depletion and Lower Stratospheric Chlorine Determined from Aura Microwave Limb Sounder Observations’ [2018] (45) *Geophysical Res. Letters*, 382, 382, 388; See Jeffrey Dunoff and Steven R. Rattner, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (4th ed., Wolters Kluwer Law & Business 2015).

⁴³Bafundo, supra note 6; Smith, R.J. The road to a climate change agreement runs through Montreal (Washington DC: Peter G. Peterson Institute for International Economics Policy Brief 10-21, 2010).

⁴⁴Pauw Pieter and others, supra note 15, p. 43; Davidson, L.S. ‘Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities’ [2012] (12) *International Environmental Agreements*, 63-84; UNEP, The Montreal Protocol on Substances that Deplete the Ozone Layer, as either adjusted and/or amended in London 1990, Copenhagen 1992, Vienna 1995, Montreal 1997, Beijing 1999 (Nairobi: UNEP Ozone Secretariat 2000); Deleuil, T. ‘The common but differentiated responsibilities principle: changes in continuity after the Durban Conference of the Parties’ [2012] (21)(3) *Review of European Community & International Environmental Law*, 271-281.

⁴⁵Montreal Protocol, Article 5(1); See Ellen Hey, supra note 19, p. 6.

Article 10 of the Montreal Protocol stipulates that developed states must help developing states comply with the protocol through a financial mechanism that gives financial and technical assistance to developing countries.⁴⁶ Article 10(1-3) provides as follows:

The Parties shall in the context of the provisions of ... the Convention, and taking into account in particular the needs of developing countries, co-operate in promoting technical assistance to facilitate participation in and implementation of this Protocol. The Parties, at their first meeting, shall begin deliberations on the means of fulfilling the obligations set out in Article 9, and paragraphs 1 and 2 of this Article, including the preparation of work plans. Such work plans shall pay special attention to the needs and circumstances of the developing countries...⁴⁷

To facilitate the provision of financial and technical assistance to developing countries under the Protocol, the London Amendment to the Montreal Protocol in its Article 10(1&2) established a funding mechanism called the Montreal Protocol Multilateral Fund during the London Ozone Conference in 1990.⁴⁸ Additionally, Article 10A of the Montreal Protocol mandates parties to transfer available substitutes and technologies for ozone depleting substances to developing countries.⁴⁹ Article 10A (a & b) provides that each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism, to ensure that the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under paragraph 1 of Article 5 and that the transfers referred to in subparagraph (a) occur under fair and most favourable conditions.⁵⁰

4.2. The Principle Of CBDRs Within The Biodiversity Conservation Regime

A. The Convention On Biological Diversity 1992

Even as CBDRs is not explicitly comprised in the 1992 Convention on Biological Diversity (CBD) convention text, it is implicitly acknowledged and manifested. The CBD's preamble stipulates that biodiversity conservation is a common concern of humankind, but it also reaffirms states' sovereign rights over their biological resources.⁵¹ The preamble also recognizes that "economic and social development and poverty eradication are the first and overriding priorities"

⁴⁶Bafundo, supra note 6, pp. 463-464; Biermann, F. 'Financing environmental policies in the south: experiences from the multilateral ozone fund' (1997) (9)(3) *International Environmental Affairs*, 179-219.

⁴⁷The Montreal Protocol, Article 10(1-3) <<https://ozone.unep.org/treaties/articles/article-10-technical-assistance>> accessed 23 January 2021.

⁴⁸Bafundo, supra note 6; Biermann, supra note 46; See Patlis, J.M. 'The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment' [1992] (25)(1) *Cornell International Law Journal*.

⁴⁹Bafundo, supra note 6; See Smith, supra note 43; See Davidson, supra note 2.

⁵⁰The Montreal Protocol, Article 10(A).

⁵¹Pauw Pieter and others, supra note 15, pp. 31-32.

for developing countries. Thus, the operational provision of the CBD does mirror the objectives of CBDs by putting general emphasis on the special situation of developing countries.⁵²

When it comes to differentiated responsibilities, the CBD draws a simple picture. Developing countries have to protect biodiversity, but developed countries have to pay for it.⁵³ According to article 20 of the CBD, the implementation of obligations undertaken by developing countries will depend on developed countries' commitments to provide new and additional financial resources and provide access to and transfer technology on fair and most favourable terms.⁵⁴ According to Article 20(2&4) of the CBD:

The developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention and to benefit from its provisions...⁵⁵ The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.⁵⁶

The Convention provides a funding mechanism by which developing countries are supported by developed countries to implement. Article 21(1) of the CBD provides that there shall be a mechanism for the provision of financial resources to developing country Parties for purposes of this Convention on a grant or concessional basis the essential elements of which are described in this Article...⁵⁷ In line with the provisions of Article 21(1) of CBD, a special funding mechanism was created entitled the Global Biodiversity Conservation Fund (GBCF), which also promotes technology transfers from developed countries to developing countries.⁵⁸ Other parts of the CBD that relate to the special interests and circumstances of developing countries⁵⁹ include Article 16 of the CBD, which provides for the facilitation of access and

⁵²Review of Implementation of the Rio Principles, supra note 19; Samson Reiny, *NASA Study: First Direct Proof of Ozone Hole Recovery Due to Chemicals Ban*, NASA (January 4, 2018) <<https://www.nasa.gov/feature/godda/2018/nasa-study-first-directproof-of-ozone-hole-recovery-due-to-chemicals-ban>[<https://perma.cc/YBK8-PV6M>] > accessed 6th November 2019 .

⁵³Pauw Pieter and others, supra note 15; See MEA Millennium Ecosystem Assessment, *Ecosystems and human well-being – biodiversity synthesis*, Washington, DC 2005 <<https://www.millenniumassessment.org/document.s/document.354.aspx.pdf>> accessed 20 January 2021.

⁵⁴Magraw and Ruis, supra note 23, p. 30.

⁵⁵Convention on Biodiversity, Article 20(2).

⁵⁶Convention on Biological Diversity, Article 20(4); Pauw Pieter and others, supra note 15.

⁵⁷Convention on Biological Diversity, Article 21(1).

⁵⁸Environmental Principles and Concepts, supra note 12.

⁵⁹Magraw Jr. and Ruis, supra note 23, p. 30.

transfer of technology and requires developed countries to facilitate the access and the transfer of technologies necessary for the preservation, the sustainable use, as well as the Utilization of advantages of biotechnology in developing countries.⁶⁰ Also, article 15(7) of the CBD provides for CDBRs in benefit-sharing by allowing industrialized states to share the benefits of commercial use and other utilisations of genetic resources with developing countries. Developing countries could also benefit from commercial and other (domestic) Utilization of genetic resources, but they do not have an obligation to share this with industrialized countries.⁶¹

Further, the CDBRs principle is reflected in article Art 17(1), which provides for exchange of information and requires industrialized states to facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biodiversity, taking into account the special needs of developing countries.⁶² Also, the CDBRs principle is reflected in Article 18(1) of the CBD, which provides for technical and scientific cooperation with developing countries in the field of conservation and sustainable use of biological diversity, where necessary, through the appropriate international and national institutions.⁶³ Article 18(2) of the CBD further provides that each Contracting Party shall promote technical and scientific cooperation with other Contracting Parties, in particular developing countries, in implementing the Convention, through the development and implementation of national policies that will develop and strengthen national capabilities, through human resources development and institution building.⁶⁴

B. The Nagoya Protocol 2010

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (the Nagoya Protocol on Access and Benefit Sharing (ABS))⁶⁵ is a 2010 supplementary agreement to the 1992 [Convention on Biological Diversity](#) (CBD). The Nagoya Protocol, which sets out obligations for its contracting parties to take measures about access to genetic resources, benefit-sharing, and compliance, captures some principles of CDBRs. Article 8 of the Nagoya Protocol provides for research/emergencies and requires developed countries to promote research and access to treatment by developing countries.

Article 8(a&b) of Nagoya Protocol, which provides for special considerations of developing countries, states:

⁶⁰Convention on Biodiversity, Article 16.

⁶¹Convention on Biodiversity, Article 15(7); Pauw Pieter and others, supra note 15, p. 33.

⁶²Convention on Biodiversity, Article 17(1); Pauw Pieter and others, *ibid*.

⁶³Convention on Biodiversity, Article 18(1); Pauw Pieter and others, *ibid*.

⁶⁴Convention on Biodiversity, Article 18(2).

⁶⁵The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity (Hereinafter, The Nagoya Protocol) <<https://www.cbd.int/abs/about/>> accessed 19 January 2021. The Nagoya Protocol was adopted on 29 October 2010 in [Nagoya](#), Japan and entered into force on 12 October 2014. As of October 2020 it has been ratified by 128 parties, which includes 127 [UN member states](#) and the [European Union](#).

In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall Create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries,... Parties may take into consideration the need for expeditious access to genetic resources and expeditious fair and equitable sharing of benefits arising out of the use of such genetic resources, including access to affordable treatments by those in need, especially in developing countries.⁶⁶

Also, Article 22 of the Nagoya Protocol provides for capacity building reflects the principle of CBDRs and requires developed countries to support capacity-building, capacity development, and strengthening human resources and institutional capacities to effectively implement the protocol in developing countries LDCs, SIDS, and economies in transition.⁶⁷ The CBDRs principle is also reflected in Article 23 of the Nagoya Protocol, which provides for technology transfer, collaboration, and cooperation and requires that the developed countries Parties undertake to promote and encourage access to technology by, and transfer of technology to, developing country Parties, in particular, the least developed countries and small island developing States among them, and Parties with economies in transition, to enable the development and strengthening of a sound and viable technological and scientific base for the attainment of the objectives of the Convention and the Protocol.⁶⁸

Further, the principle of CBDRs is reflected in Article 25 of the Nagoya Protocol, which provides for financial mechanism and resources and requires taking into account the need of developing country Parties, in particular the least developed countries and small island developing States among them, and of Parties with economies in transition, for financial resources, as well as the capacity needs and priorities of indigenous and local communities, including women within these communities.⁶⁹

4.3. The Principle Of CBDRs Within The Land Conservation Regime

A. United Nations Convention To Combat Desertification (UNCCD) 1994

The principle of CBDRs is reflected in the UNCCD. Article 4(1) of the UNCCD specifically underscores the general obligations-and thereby, as it were, all parties' common responsibilities while singling out affected developing country parties as "*eligible for assistance.*"⁷⁰ Article 4(1) of the UNCCD provides that:

⁶⁶Nagoya Protocol, Article 8(a & b).

⁶⁷Nagoya Protocol, Article 22.

⁶⁸Nagoya Protocol, Article 23.

⁶⁹Nagoya Protocol, Article 25(3).

⁷⁰United Nations Convention to Combat Desertification (Hereinafter, UNCCD) 1994, Article 4; Pauw Pieter and others, *supra* note 15, p. 34.

The Parties shall implement their obligations under this Convention, individually or jointly, either through existing or prospective bilateral and multilateral arrangements or a combination thereof, as appropriate, emphasizing the need to coordinate efforts and develop a coherent long-term strategy at all levels.⁷¹

Article 4(2)(b) went on to provide that in pursuing the objective of this Convention, the Parties shall give due attention, within the relevant international and regional bodies, to the situation of affected developing country Parties with regard to international trade, marketing arrangements and debt with a view to establishing an enabling international economic environment conducive for the promotion of sustainable development.⁷² Article 4(3) provides that:

Affected developing country Parties are eligible for assistance in the implementation of the Convention.⁷³

Thus, the UNCCD distinguishes developed country parties from developing country parties and between affected (i.e., by desertification) country parties and non-affected country parties. Parties that are both affected countries and developing countries “are eligible for assistance in the implementation of the Convention.”⁷⁴

Articles 5 and 6 of the UNCCD further provides for differentiated obligations. The Convention specifies distinct obligations for affected country parties under Article 5; for example, affected country parties are to “give due priority to combating desertification and mitigating the effects of drought, and allocate adequate resources in accordance with their circumstances and capabilities; establish strategies and priorities, within the framework of sustainable development plans and/or policies, to combat desertification and mitigate the effects of drought⁷⁵. Further, developed country parties under Article 6, are to actively support, as agreed, individually or jointly, the efforts of affected developing country Parties, particularly those in Africa, and the least developed countries, to combat desertification and mitigate the effects of drought; “provide substantial financial resources and other forms of support to assist affected developing country Parties, particularly those in Africa, effectively to develop and implement their own long-term plans and strategies to combat desertification and mitigate the effects of drought; promote and facilitate access to affected country Parties, particularly affected developing country Parties, to appropriate technology, knowledge and know-how.”⁷⁶

Thus, developed country parties are legally obliged to make significant financial assets available to developing countries for the purposes of compliance assistance. Further, developed countries

⁷¹UNCCD, Article 4(1).

⁷²UNCCD, Article 4(2).

⁷³UNCCD, Article 6(a-e).

⁷⁴Pauw Pieter and others, *supra* note 15, p. 34.

⁷⁵UNCCD, Article 5(a-e).

⁷⁶UNCCD, Article 6(a-e).

are obliged to transfer technologies to developing countries that support combating desertification.⁷⁷

Also, the UNCCD provides for regional differentiation and Regional Annexes. The UNCCD convention explicitly singles out Africa as a priority region in the convention title (“...particularly in Africa”) and Article 7 (“Priority for Africa”).⁷⁸ Article 7 of the UNCCD requires that in implementing the Convention Parties should 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.”⁷⁹ Furthermore, the UNCCD entails five regional annexes that specify the “particular conditions” in fighting dryland degradation and desertification for the regions of I. Africa; II. Asia; III. Latin America and the Caribbean; IV. Northern Mediterranean; and V. Central and Eastern Europe, and spells out regional needs and guidelines for the respective affected country parties.⁸⁰

Also, Article 17 of the UNCCD calls for the promotion of technical and scientific cooperation in the fields of combating desertification and mitigating the effects of drought “according to parties’ respective capabilities.”⁸¹ Article 17(1)(d) of the UNCCD provides:

The Parties undertake, according to their respective capabilities, to promote technical and scientific cooperation in the fields of combating desertification and mitigating the effects of drought through appropriate national, subregional, regional, and international institutions. To this end, they shall support research activities that: develop and strengthen national, subregional, and regional research capabilities in affected developing country Parties, particularly in Africa, including the development of local skills and the strengthening of appropriate capacities, especially in countries with with a weak research base, giving particular attention to multidisciplinary and participative socio-economic research.⁸²

4.4. The Principle Of CBDRs Within The Climate Change Regime

⁷⁷Pauw Pieter and others, supra note 15, p. 36.

⁷⁸Pauw Pieter and others, *ibid.*

⁷⁹UNCCD, Article 7; The Principle of Common But Differentiated Responsibilities: Origins and Scope. A CISDL Legal Brief, World Summit on Sustainable Development 2002 Johannesburg, 26 August. pp. 2-3 (Hereinafter, A CISDL Legal Brief) <https://cisdl.org/public/docs/news/brief_common.pdf> accessed 24 January 2021.

⁸⁰Pieter Pauw and others, supra note 15, pp. 34-35; United Nations Convention to Combat Desertification (UNCCD) (1994) <<http://www.unccd.int/en/about-the-convention/Pages/Textoverview.aspx>> accessed 10 January 2019.

⁸¹UNCCD, Article 17; Grainger, A. ‘The role of science in implementing international environmental agreements : the case of desertification’ [2009] (20)(4) *Land Degradation and Development*, 410-430.

⁸²UNCCD, Article 17(1) (d).

A. The United Nations Framework Convention On Climate Change (UNFCCC) 1994

The principle of CBDRs lies at the heart of the international climate change regime⁸³ and has, from the beginning, underpinned the international efforts to address climate change. The CBDRs principle recognizes that parties vary in their levels of responsibility for climate change and their capacities to cope with it and provide a basis for differentiating among parties.⁸⁴ The UNFCCC, one of the primary mechanisms for coordinating international action on climate change through mitigation and adaptation, recognizes that climate change is of common concern and that each State has a common responsibility to protect the climate. However, in attributing roles and responsibilities, the CBDRs principle is aware of the historically larger contributions to the climate change problem by developed countries and also their higher technical and financial capabilities to cut down emissions. Such recognized facts result in differentiated responsibilities; developed countries “should take the lead in combating climate change,” including their effects, as well as assist developing countries with funds, technologies, and knowledge in addressing the problem of climate change.⁸⁵

⁸³Rebecca, D. and Jane, M. ‘International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law’ [2017] (18)(2) *Melbourne Journal of International Law*, 1-39:11-12.

⁸⁴Estefanía Jiménez, The Principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR&RC) and the Compliance Branch of the Paris Agreement; Lavanya, R. ‘Differentiation in the Emerging Climate Regime’ [2013] (14)(1) *Theoretical Inquiries in Law*, 152-171; Center for Climate and Energy Solutions, Differentiation in a 2015 Climate Agreement (WWW document, June 2015) <<https://www.c2es.org/publications/differentiation-2015-climate-agreement>> accessed 10 June 2018; See Douglas, B. and Sikina, J. ‘Evolving Responsibility? The Principle of Common but Differentiated Responsibility in the UNFCCC’ [2010] (6) *Berkeley J. Int’l L. Publicist*, 1-10:2; Rina, K. ‘Exiled by Emissions-Climate Change Related Displacement and Migration in International Law: Gaps in Global Governance and the Role of the UN Climate Convention’ [2017] (18) *Vermont Journal of Environmental Law*, 614-647:637; Idowu, A. ‘Distributive Justice and Human Rights in Climate Policy: The Long Road to Paris’ [2016] (7)(2) *Afe Babalola University: J. of Sust. Dev. Law & Policy*, 59-80:70; Dire Tladi, *Sustainable Development in International Law: An Analysis of Enviro-Economic Instruments* (Pretoria University Law Press, South Arica 2007) p. 50; Carmen Richerzhagen and others, *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.

⁸⁵Pananya, L. ‘The Interaction Between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments’ [2014] (6)(1) *Goettingen Journal of International Law*, 145-170:149; See Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, 2004) 70; See Sylvanus Gbendazhi Barnabas, ‘A Review of the Application of Common but Differentiated Responsibilities (CBDR) under the International Regime on Climate Change’, [2013] *SSRN Electronic Journal*, 8 <<https://www.researchgate.net/deref/http://3A%2F%2Fdx.doi.org%2F10.2139%2Fssrn.2257342>> accessed 28 January 2021 ; Daniel, B. ‘The Paris Climate Change Agreement: A New Hope?’ [2016] (110) *American Journal of International Law*, 288, 298-300; See Anubhab, P. and Kumar, KSK. ‘Accounting for Impacts due to Climate Change in GHG Mitigation Burden Sharing’ [2015] (15) *Climate Policy*, 724, 725; Steven, V. ‘Justice and Climate Finance: Differentiating Responsibility in the Green Climate Fund’ [2015] (50)(1) *The International Spectator*, 31-45:32; See Rajamani, L. ‘The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Change Regime’ [2000] (9)(2) *Review of European, Comparative & International Environmental Law*, 120, 120-131; Sung, S. ‘Border Tax Adjustments and Developing Countries: A Perspective from China’ [2016] (21)(1) *Annual Survey of International & Comparative Law*, 149-176:158; Barbara Adams and Gretchen Luchsinger, Climate Justice for a

The preamble of the UNFCCC acknowledges the CBDRs principle in the following words:

Acknowledging that the global nature of 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. 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.⁸⁶

The principle of CBDRs is also articulated in Article 3(1&2) of the UNFCCC, which provides as follows:

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. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.⁸⁷

Article 4(2) (a&b) of the UNFCCC reaffirms the CBDRs of States to protect the global environment by providing as follows:

All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all

Changing Planet: A Primer for Policy Makers and NGOs (UN Non-Governmental Liaison Service (NGLS): United Nations 2009) p. 3.

⁸⁶United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [Hereinafter UNFCCC; UNFCCC Preamble; Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Martinus Nijhoff Publishers 1998) p. 295; Sam Adelman, *Sovereignty, Sustainability and Natural Resources: The Limits of the Law*. Pp. 1-24:11 <https://warwick.ac.uk/fac/soc/law/research/clusters/international/devconf/participants/papers/adelman_-_sovereignty_sustainability_and_natural_resources.pdf> accessed 29 January 2021; Bortscheller, M.J. 'Equitable But Ineffective: How The Principle of Common But Differentiated Responsibilities hobbles the Global Fight against Climate Change' [2010] (10)(2) *Sustainable Development Law & Policy*, 49-68.

⁸⁷UNFCCC, Article 3(1&2); Susana, supra note 9; Kelly McManus, The principle of 'common but differentiated responsibility' and the UNFCCC. November 2009 <<http://climaticoanalysis.org>> accessed 10 December 2020; See Laura, Horn. 'Climate Change and the Future Role of the Concept of the Common Concern of Humankind' [2015] (2) *AJEL*, 24-56:35

greenhouse gases...using comparable methodologies to be agreed upon by the Conference of the Parties; Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases..., and measures to facilitate adequate adaptation to climate change.⁸⁸

Also, Article 12 of the UNFCCC, which provides for communication of information related to the implementation of the UNFCCC, allows for differences (recognized the principle of CBDRs) between developed and developing countries in reporting requirements. Article 12(2)(a&b) of the UNFCCC provides that Each developed country Party and each other Party included in Annex I shall incorporate in its communication the following elements of information: (a) A detailed description of the policies and measures that it has adopted to implement its commitment under Article 4, paragraphs 2(a) and 2(b); and (b) A specific estimate of the effects that the policies and measures referred to in subparagraph (a) immediately above will have on anthropogenic emissions by its sources and removals by its sinks of greenhouse gases during the period referred to in Article 4, paragraph 2(a).⁸⁹

Further, Article 12(6) of the UNFCCC provides that each developed country Party and each other Party included in Annex I shall make its initial communication within six months of the entry into force of the Convention for that Party. Each Party not so listed shall make its initial communication within three years of the entry into force of the Convention for that Party or the availability of financial resources according to Article 4, paragraph 3. Parties that are least developed countries may make their initial communication at their discretion. The frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties, taking into account the differentiated timetable set by this paragraph.⁹⁰

B. The Kyoto Protocol 1997

The next major milestone in the manifestation of the principle of CBDRs under the climate change regime was the 1997 Kyoto Protocol. The Kyoto Protocol adopted a simple two-tiered system for assigning responsibility, mainly in mitigation targets. The Protocol assigned targets

⁸⁸UNFCCC, Article 4(2)(a&b); Ved P. Nanda and George Pring, *International Environmental Law and Policy For The 21 St Century* (2nd ed., Brill/Nijhoff 2003).

⁸⁹UNFCCC, Article 12(2)(a&b).

⁹⁰UNFCCC, Articles 12(6), UNFCCC; The principle can also be found in numerous UNFCCC Conference of Parties (COP) decisions, including the Bali Action Plan of 2007, the Copenhagen Accord of 2009 and the Cancun Agreements of 2010; See United Nations Framework Convention on Climate Change 'Conference of the Parties (COP)' (WWW document) <<http://unfccc.int/bodies/body/6383.php>> accessed 23 January 2021; UNFCCC, Decision 1/CP.13, Bali Action Plan, UN Doc. FCCC/CP/2007/6/Add.1; UNFCCC, Decision 2/CP.15, Copenhagen Accord, UN Doc. FCCC/CP/2009/11/Add.1; UNFCCC, Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention. UN Doc. FCCC/CP/2010/7/Add.1; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, UN Doc. FCCC/CP/1997/L.7/add. 1, 37 International Legal Materials (1998), 22.

to some countries and none for others. Specifically, it defined targets for both countries that were members of the Organisation for Economic Co-operation and Development (*OECD*) in 1990 and countries that were in transition to a market economy at the time. It established no targets for developing countries.⁹¹ To fix countries' responsibilities, the developed and developing countries were categorized as Annex I and Annex II countries, respectively, under the Kyoto Protocol, with Annex I countries given binding targets. Annex I countries (41 in number) are required to limit anthropogenic emissions of GHGs, enhance 'sinks,' and coordinate work among themselves to reduce emissions to 1990 levels. Twenty-four out of the annex I countries⁹² are the major ones responsible for the historical pollution.

Article 3(1) of the Kyoto Protocol, which reflects the CBDRs principle, provides that:
The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 percent below 1990 levels in the commitment period 2008 to 2012.⁹³

The CBDRs principle also manifests itself in provisions that grant assistance, among other things, financial and technological.⁹⁴ The developed countries (Annex I parties) are expected to provide the developing countries with finance and costs, including those for technology transfer. They are also expected to meet the specific needs of the developing countries and assist them in adaptation to natural and human systems in response to the effects on the climate change impacts and the transfer of environmentally sound technology.⁹⁵ Article 11(2) (a & b) of the Kyoto Protocol provides:

...the developed country Parties and other developed Parties included in Annex II to the Convention shall Provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of existing commitments under Article 4, paragraph 1(a), of the Convention that are covered in Article 10, subparagraph (a); and 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

⁹¹Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997 U.N. Doc. FCCC/CP/1997/L.7/Add.1 [Hereinafter *Kyoto Protocol*]; See Douglas, B. and Sikina, J. 'Evolving Responsibility? The Principle of Common but Differentiated Responsibility in the UNFCCC' [2010] (6) *Berkeley J. Int'l 2 L. Publicist*, 2; Alan, M. and Richard, R. 'US Rejection of the Kyoto Protocol: the impact on compliance costs and CO2 emissions' [2004] (32) *Energy Pol'y*, 447, 448-49.

⁹²See Leelakrishnan and Jayadevan, supra note 12; Annex II countries include-Australia, Austria, Belgium, Canada, Croatia, Denmark, EEC, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States.

⁹³Kyoto Protocol, Article 3(1)

⁹⁴Joanne and Lavanya, supra note 3, p. 478.

⁹⁵Leelakrishnan and Jayadevan, supra note 12.

advancing the implementation of existing commitments in Article 4, paragraph 1, of the Convention that are covered by Article 10 and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 of the Convention, in accordance with that Article.⁹⁶

C. The Paris Agreement 2015

The CBDRs principle remains a vital principle of the Paris Agreement.⁹⁷ The Preamble to the Paris Agreement states that the Parties to this Agreement in pursuit of the Convention's objective are being guided by the principles of the UNFCCC, including 'the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.'⁹⁸ Article 2(2) of the Paris Agreement also states that 'this Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.'

Also, the principle of CBDRs is reflected throughout Paris Agreement provisions explicitly and the way it distinguishes between developed and developing countries' obligations and the support available to them.⁹⁹ For example, the Paris Agreement emphasizes the importance of financing and technology transfer from developed to developing nations while adding new loss and damage provisions for them.¹⁰⁰ In other words, the Paris Agreement assigns the core responsibility for the provision of finance to the developed countries. It recognizes that developing countries require support to implement the Agreement effectively.¹⁰¹ Article 3 of the Paris Agreement provides:

As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts ... with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to

⁹⁶The Kyoto Protocol, Article 11(2)(a&b).

⁹⁷The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) Reg No 54 113 (Hereinafter, The Paris Agreement); See 21st Conference of the Parties, United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement 8-10 (12 December 2015) <<http://unfccc.int/resource/doc/2015/cop21/eng/109r01.pdf>> accessed 17 July 2020.

⁹⁸Paris Agreement Preamble; See Christina, V. and Felipe, F. 'Dynamic differentiation: the principles of CBDR-RC, progression and highest possible ambition in the Paris Agreement' [2016] (5)(2) *Transnational Environmental Law*.

⁹⁹Dowd and Mcadam, supra note 83, p. 13; See Lavanya, R. 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' [2016] (65)(2) *International & Comparative Law Quarterly*, 493-514:493.

¹⁰⁰Craig, supra note 1, pp. 330-331.

¹⁰¹Castro, P. 'Common But Differentiated Responsibilities Beyond the Nation State: how is Differential Treatment Addressed in Transnational Climate Governance Initiatives?' [2016] (5)(2) *Transnational Environmental Law*, 379-400.

support developing country Parties for the effective implementation of this Agreement.¹⁰²

Further, the parties to the Paris Agreement are guided by the principle of CBDRs on enhanced implementation of the Convention, enhanced contribution to emission reductions, and formulation and communication of long-term low greenhouse gas emission development strategies.¹⁰³ Article 4(3) of the Paris Agreement provides:

Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.¹⁰⁴

Article 4(5) of the Paris Agreement provides that Support shall be provided to developing country Parties for the implementation of this Article, ... recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.¹⁰⁵ Additionally, Article 4(15) of the Paris Agreement provides that Parties shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.¹⁰⁶

Under the Paris Agreement, differentiation is applied in different ways across thematic areas and pragmatic rather than ideological or politicized. While all parties are obliged to contribute to mitigation ('all Parties are to undertake and communicate ambitious (mitigation) efforts'), differentiation is achieved as each Party determines the type, scope, and stringency of its mitigation contribution in a bottom-up pledge and review system. Such self-differentiation introduces a more refined and flexible way of addressing CBDRs than the old annex-based system, and at the same time, promotes broader participation.¹⁰⁷

5. Conclusion

The principle of CBDRs is of utmost importance for both the political and the environmental effectiveness of international environmental regimes. Furthermore, it fosters new relations between states based on cooperation and partnership, emphasizing that substantive inequality is not to be tolerated in global environmental cooperation. It is important to remember that the CBDRs principle consists of two sides: common responsibility denotes that we cannot afford to exclude countries from participating and reduce global environmental problems; differentiated responsibility means that not all parties need to adopt an equal burden in the effort to address

¹⁰²The Paris Agreement, Article 3.

¹⁰³Rishika, *supra* note 31.

¹⁰⁴The Paris Agreement, Article 4(3).

¹⁰⁵The Paris Agreement, Article 4(5).

¹⁰⁶The Paris Agreement, Article 4(15).

¹⁰⁷Castro, *supra* note 101; Lavanya, *supra* note 99, p. 509.

global environmental challenges. The aim is to bring solidarity and substantive justice into the burden-sharing of MEAs.¹⁰⁸

States have common responsibilities to protect the environment, but countries must shoulder different responsibilities due to different social, economic, and ecological situations. Therefore, the principle provides for irregular rights and obligations regarding environmental standards and seeks to encourage broad State reception of treaty obligations at the same time as avoiding the kind of problems usually connected with a least common denominator approach. The principle also reveals the fundamental elements of equity, placing more responsibility on richer countries and those accountable for causing particular environmental global problems. More significantly, the CBDRs principle also presents a conceptual framework for compromise and cooperation in efficiently addressing environmental challenges.¹⁰⁹ The principle of CBDRs has moved from being a soft international legal principle (as in the Rio Declaration on Environment and Development) to a growing but an increasingly robust component of international environmental law (as demonstrated by its codification in the United Nations Framework Convention on Climate Change).¹¹⁰

The authors therefore recommends that the principle of CBDRs should continue to guide the negotiations of MEAs and the obligations of parties in MEAs. Further, MEAs that do not reflect the CBDRs principle should be reviewed to capture and reflect the principle. The reason for the foregoing views is that the equity, justice and fairness of MEAs can only be achieved when nations which have contributed more to global environmental problems are made to bear more of the immediate burden of addressing and mitigating such global environmental problems. Thus, developed country parties to MEAs should continue to bear more of the responsibilities of achieving global environmental protection because they have contributed more to global environmental problems and have greater financial and technical resources to deal with such problems.

¹⁰⁸Kolari, supra note 2, p. 53; Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003) p. 92.

¹⁰⁹A CISDL Legal Brief, supra note 79, pp. 2-3.

¹¹⁰Paul, G.H. 'Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy' [1999] (7)(1) *N.Y.U. Environmental Law Journal*, 27-48:45.