

## Tracing the “Common but Differentiated Responsibilities” (CBDR) Principle under Climate Change Regime

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### *Abstract*

*Differentiation has always been a central yet controversial aspect of the climate change regime. It has always remained a cause of deadlocks among the state parties during the negotiations. Countries understood that climate change is a global problem. However, not all nations are equally capable of addressing this menace. Developing and Least Developed Countries (LDCs) requires assistance and time to prepare themselves for the mitigation and adaptation measures. To balance this difference among the countries, the United Framework Convention on Climate Change (UNFCCC) adopted a principle of Common but Differentiated Responsibilities (CBDR). CBDR is an equitable principle that held developed countries accountable for their historical responsibilities while addressing the special needs of the other part of the world. Within twenty-eight years, the CBDR principle has transformed from an authoritarian Kyoto model to a self-differentiation Paris model. Several experts consider this principle to have diluted with its adoption under the latest climate instrument. It was found that the objectives of this principle are yet not achieved. This principle still needs to be applied appropriately to address the concerns of vulnerable countries that are regularly struggling with the threats of climate emergency.*

**Keywords:** *CBDR, Climate Change, Differentiation, Kyoto Protocol, UNFCCC.*

## **I. INTRODUCTION**

The foundation of the climate regime is based on the principle of Common but Differentiated Responsibilities (CBDR). It was first incorporated under the United Nations Framework Convention on Climate Change<sup>2</sup> (UNFCCC) in 1992. This principle got further strengthened after its adoption under the Kyoto Protocol

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<sup>2</sup> United Nations Framework Convention on Climate Change, 9 May, 1992, 1771, *UNTS*, 107 [hereinafter *Convention*].

to UNFCCC.<sup>3</sup> However, after its adoption under the 2015 Agreement, it has been diluted, and it does not hold developed countries accountable anymore for their historical liabilities. This principle found its bases under the notion of equity and pragmatism.<sup>4</sup> This article shall present a conceptual framework of the CBDR principle. Further, it shall be emphasizing the incorporation of this principle into the climate change regime and aftermath. It shall be examining the structure of the CBDR principle under UNFCCC and Kyoto Protocol. Moving ahead, it will try to illustrate the subsequent development of this principle under the international climate regime. Lastly, this article will reflect upon the limitations of this principle and suggest its future implications.

## II. “COMMON BUT DIFFERENTIATED RESPONSIBILITIES” (CBDR) PRINCIPLE: A BRIEF OUTLINE

Article 2(1) of the United Nations Charter guarantees sovereign equality to all States.<sup>5</sup> The principle of sovereign equality further includes the principle of reciprocity.<sup>6</sup> However, the principle of Common but Differentiated Responsibilities is a deviance to the principle of reciprocity.<sup>7</sup> Such deviance signifies non-reciprocal arrangements based on the idea of substantive equality.<sup>8</sup>

The concept of differentiation is not new to the International Environmental Law. It was originated under the Treaty of Versailles in 1919, where the International Labour Organization has provided that “differences of climate, habits, and

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<sup>3</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 Dec., 1997, 2303 *UNTS*, 51 [hereinafter Kyoto Protocol].

<sup>4</sup> Philippe Cullet, *Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps*, 5(2) *Transnational Environmental Law* 307 (2016).

<sup>5</sup> United Nations, *Charter of the United Nations*, 1945, 1 *UNTS* XVI, (Apr. 22, 2020), <<http://www.un.org/en/sections/un-charter/chapter-i/index.html>>; Also See, Christina Voigt and Felipe Ferreira, *Differentiation in the Paris Agreement*, 6(1-2) *Climate Law* 59 (2016).

<sup>6</sup> Tuula Honkonen, *The development of the principle of common but differentiated responsibilities and its place in international environmental regimes*, in Tuomas Kuokkanen (ed.), *International Environmental Law-making and Diplomacy: Insights and Overviews* (Routledge, 2016), 160.

<sup>7</sup> Tuula Honkonen, *The common but differentiated responsibility principle in multilateral environmental agreements: regulatory and policy aspects* (Kluwer Law International, 2009) 32.

<sup>8</sup> Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003), 15.

customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labor difficult of immediate attainment."<sup>9</sup> Washington Treaty, 1922<sup>10</sup> also provided for deviance in tonnage permission. Later this concept got recognition in the General Agreement on Tariffs<sup>11</sup> in the development of 1965 and 1979. Further, this principle was incorporated in the Law of the Sea Convention<sup>12</sup> to grant special favor to the developing and fish-dependent nations.

Emerging out of different International Law treaties, it finally got incorporated into the International Environmental regime under Principle 12 of the Stockholm Declaration.<sup>13</sup> Later it got incorporated into several other Multilateral Environmental Agreements as 1991 Protocol to Convention on Long-Range Transboundary Air Pollution of 1979<sup>14</sup>, Vienna Convention, 1985<sup>15</sup> and Montreal Protocol, 1987<sup>16</sup>; Convention on Biological Diversity, 1992<sup>17</sup>; United Nations Framework Convention on Climate Change, 1992<sup>18</sup> and Kyoto Protocol, 1997<sup>19</sup> and United Nations Convention to Combat Desertification, 1994<sup>20</sup>.

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<sup>9</sup> The Constitution of the International Labour Organization, (Jun 28, 1919), 49 Stat. 2712, *TS*, 874 cited in Christopher D. Stone, Common but differentiated responsibilities in international law, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 278 (2004).

<sup>10</sup> Multilateral Limitation of Naval Armament (Five-Power Treaty or Washington Treaty), (Feb. 6, 1922), *TS*, 671 cited in Stone, n. 8, 278.

<sup>11</sup> General Agreement on Tariffs and Trade, opened for signature (Oct. 30, 1947), 55, *UNTS* 187 cited in Stone, n. 8, 278.

<sup>12</sup> United Nations Convention on the Law of the Seas, (Dec. 10, 1982) *UNTS*, vol. 1833, 3.

<sup>13</sup> United Nations, Stockholm Declaration of the United Nations Conference on the Human Environment, (5 to 16 Jun. 1972), Principle 12.

<sup>14</sup> Convention on Long-Range Transboundary Air Pollution, 13 Nov. 1979, *UNTS*, vol. 1302, 217.

<sup>15</sup> Vienna Convention for the Protection of the Ozone Layer, 22 Mar., 1985, 1513, *UNTS*, 323.

<sup>16</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept., 1987, 1522, *UNTS*, 3.

<sup>17</sup> Convention on Biological Diversity, 5 June 1992, 1760, *UNTS*, 79.

<sup>18</sup> UNFCCC, n. 1, 107.

<sup>19</sup> Kyoto Protocol, n. 2, 51.

<sup>20</sup> United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, 14 October, 1994, 1954, *UNTS*, 3.

### III. THEORETICAL BASIS FOR CBDR PRINCIPLE IN INTERNATIONAL ENVIRONMENTAL LAW

The principle of CBDR subsumes core fundamental aspects of Common Responsibilities and Differentiated Responsibilities.

#### A. Common Responsibilities

As provided in the Preamble of the 1992 Rio Declaration: “change in the Earth’s climate and its adverse effects are a common concern of humankind.”<sup>21</sup>

The problem of climate change is global that needs to be addressed by all the nations together.<sup>22</sup> This proposition follows two reasons, firstly all the countries owe a duty of protection and preservation towards the environment since they are an inherent part of it. Secondly, it would not be possible for some nations to tackle this issue without the co-operation of others. It is the duty of States not to indulge in any activity inside their territories that may cause harm to the environment. Moreover, common responsibility seeks to enforce universal obligations both in developed and developing States.<sup>23</sup>

#### B. Differentiated Responsibilities

It is difficult to determine the nature and extent of such responsibility.<sup>24</sup> The term differentiated responsibilities means that although protecting the environment from climate change is our collective responsibility, this responsibility gets separated among the developed and developing States based on the socioeconomic inequalities in their contribution and capacity towards climate change.

The Preamble of UNFCCC recognizes this historical responsibility of developed countries.<sup>25</sup> However, developed countries never interpreted it as a matter of their

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<sup>21</sup> UNFCCC, n. 1, 107.

<sup>22</sup> Justin Lee, Rooting the Concept of Common but Differentiated Responsibilities in Established Principles of International Environmental Law, 17 *Vermont Journal of Environmental Law* 27 (2015).

<sup>23</sup> Duncan French, Developing states and international environmental law: The importance of differentiated responsibilities, 49 (1) *International and Comparative Law Quarterly* 35-60 (2000).

<sup>24</sup> Lavanya Rajamani, Differentiation in the emerging climate regime, 14(1) *Theoretical Inquiries in Law* 151-172 (2013).

<sup>25</sup> UNFCCC, n. 1, 107.

liability, still is relevant, and makes a firm ground for differentiation for the developing countries.<sup>26</sup> It is alleged that since the industrialization, developed countries have emitted a lot of carbon into the atmosphere. It is because of this emission the whole world is facing the problem of climate change today. Thus, considering the polluter pays principle<sup>27</sup> responsibilities of countries to restore the environment shall be based on the proportion made to the contribution to climate change.<sup>28</sup> Further, it would be the developing countries that are more prone to the dangerous effects of climate change in the future.<sup>29</sup> Few scientists claim that climate change is a natural process, however even if we go by their argument, then the contribution to this natural phenomenon cannot be neglected.

According to Rajamani, where the contribution is based upon the lines of developing countries, the capacity element emanates from the perspective of developed countries.<sup>30</sup> When it comes to resolving the problem, it is pleaded that developed countries have adequate capacity and efficiency to tackle climate change, thus the ability to pay. Being more strong economies than developing countries and high GDP per capita, they could channelize their resources for taking concrete measures against climate change. Moreover, this capability of the developed part enables them to ascertain a leadership role that will ensure the equal participation of developing countries as well.<sup>31</sup> Both contribution and ability are related terms that determine the extent of responsibilities of the State.<sup>32</sup>

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<sup>26</sup> Yoshiro Matsui, Some Aspects of the Principle of Common but Differentiated Responsibilities, 2(2) *International Environmental Agreements: Politics, Law and Economics* 155 (2002) cited in Rachel Boyte, Common but Differentiated Responsibilities: Adjusting the Developing/Developed Dichotomy in International Environmental Law, 14 *New Zealand Journal of Environmental Law* 70-71 (2010).

<sup>27</sup> United Nations, United Nations Conference on Environment and Development, (3 to 14 June 1992), Principle 16 <[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)> (24 Apr. 2020).

<sup>28</sup> Edward A. Page, Distributing the burdens of climate change, 17(4) *Environmental Politics* 557 (2008).

<sup>29</sup> Boyte, n. 25, 70.

<sup>30</sup> Lavanya Rajamani, *From Berlin to Bali and beyond: Killing Kyoto Softly?*, 57(4) *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 909-939 (2008) cited in Boyte, n. 25, 70.

<sup>31</sup> Boyte, *Supra* note 28. At 25, 73.

<sup>32</sup> Harald Winkler and Lavanya Rajamani, CBDR&RC in a regime applicable to all, 14(1) *CLIMATE POLICY* 106 (2014).

As Principle 6<sup>33</sup> of the Stockholm Declaration provides, developing countries had other priorities needed to be settled that shall get compromised if they comply with the similar obligations observed by developed countries.<sup>34</sup> Many decisions like shifting from non-renewable sources of energy to renewable sources of energy are not easy for them to incorporate in their national regime as it requires a fund, technology, skilled labor, and their maintenance cost. More considerable hurdles in this direction are poverty, illiteracy, limited resources, unstable government, armed conflicts, inefficient & unskilled labor, natural and human-made disasters, a lower rate of human development, and lack of electricity supplies. Developing countries require more time to incorporate such mitigation and adaptation measures against climate change. Increasing their pace of development shall not be accessible without external assistance. Thus, the common responsibility for climate change was qualified with differentiation by differences in the capability and circumstances of the State parties.<sup>35</sup> The 1992 Rio Declaration<sup>36</sup> recognizes the special situation and needs of developing countries and those vulnerable towards climate change.<sup>37</sup> Principle 7 of the Rio Declaration provides that:

“States shall cooperate in a spirit of global partnership to conserve, protect, and restore the health and integrity of the Earth's ecosystem. Given 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 given the pressures their societies place on the global environment and of the technologies and financial resources they command.”<sup>38</sup>

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<sup>33</sup> UNCED, n. 26, Principle 6.

<sup>34</sup> Pieter Pauw and Et Al., Different Perspective on Differentiated Responsibilities, (Jun.) Discussion paper, Deutsches Institut für Entwicklungspolitik 1 (2014), (21 Apr. 2020), <[https://www.die-gdi.de/uploads/media/DP\\_6.2014..pdf](https://www.die-gdi.de/uploads/media/DP_6.2014..pdf)>.

<sup>35</sup> *Id.*

<sup>36</sup> Winkler and Rajamani, n. 31, 102-121.

<sup>37</sup> Rio Declaration, n. 26 Principle 6; PHILIPPE SANDS and Et Al., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, p 233, (Cambridge University Press, 2012).

<sup>38</sup> Rio Declaration, n. 26, Principle 7.

This principle recognizes the role of developed countries taking the lead in environmental protection actions and protecting the interests of those incapable. However, it eliminated their legal responsibility for the environmental harm caused by past and present and made liable only for future obligations.<sup>39</sup> Article 3 and 4 of UNFCCC also reiterate similar provisions on the CBDR principle.<sup>40</sup>

As per Cullet, “Different conceptions of justice can justify differential treatment in IEL.” He has considered equity as a root of differential treatment. He found that the world is governed by formal equality, and it has to observe substantive equality to ensure justice. This differential treatment enshrines substantive equality to uplift every weak aspect of society. Further, it has been perceived under two heads, the first part addresses the differences created by the past actions of one another. Thus to overcome those inequalities, it is necessary to adopt positive discrimination. Second is how differential treatment was used by nation-states to achieve the desired results under Environmental treaty negotiations.<sup>41</sup>

French has provided three justifications for CBDR principles.<sup>42</sup> Firstly, International law places an obligation on States to consider the special needs and circumstances of the developing countries.<sup>43</sup> Secondly<sup>44</sup>, the principle of common but differentiated responsibilities further gets supported under provisions like Preamble and Article 7<sup>45</sup> of the Rio Declaration 1992, where it seeks to establish a relationship of “new and equitable global partnership” that shall enhance the co-operation between the States.<sup>46</sup> This idea of co-operation has been enshrined in the UN Charter, NIEO, and UNCLOS negotiations. Thirdly<sup>47</sup>, the global South

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<sup>39</sup> French, n. 22, 35-60.

<sup>40</sup> Article 3 of the UNFCCC states that: “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.” Further, Article 4 provides that State parties shall observe common but differentiated responsibilities principle while taking actions in response of climate change. (See UNFCCC, n. 1, 107).

<sup>41</sup> Cullet, *Supra*. 3, 307.

<sup>42</sup> French, *Supra* n. 22, 52.

<sup>43</sup> *Id.*

<sup>44</sup> French, *Supra* n. 22, 55.

<sup>45</sup> UNCED, n. 26, Principle 7.

<sup>46</sup> Third Paragraph of Preamble to UNCED, UNCED, n. 26.

<sup>47</sup> French, *Supra* n. 22, 56.

had seen environmental policies and Agreements of the North with suspicion up till the Rio Declaration. They believed commitments to these Agreements would become obstacles in their development plans. Further, they considered that environmental problems were created by developed countries and must be addressed by them only with higher obligations. To win over the trust of developing countries for seeking their participation, provisions for technology transfer and financial assistance were made part of the differential treatment.

#### IV. IDEA OF JUSTICE UNDER DIFFERENTIAL TREATMENT

Corrective justice relates to the past contributions of the developed countries towards the degradation of the environment. This form of justice ensures the liability and provides that differences among the nations need no further insight.<sup>48</sup> It disregards the socio-environment consideration to be a part of legal equality.<sup>49</sup> On the other hand, Distributive justice provides concern for the existing inequalities in the development of the State parties.<sup>50</sup> It carries a view that equality does not end with providing adequate means to all. However, it ensures that such means are producing the desired outcome or not.<sup>51</sup> It is a well-recognized principle that equity follows justice.<sup>52</sup> Yet, judicial equality has got limitations<sup>53</sup>, thus mislead justice. Therefore makes it pertinent to trace different forms of justice under the lens of differentiation.

#### V. FORMS OF DIFFERENTIATION IN THE CLIMATE CHANGE REGIME

There is no agreement among the authors regarding the fixed forms of differentiation. They provide their variants of differentiation. It is to be noted that the Common but Differentiated Responsibilities principle is a form of differential treatment that found a place in the context of climate change.<sup>54</sup>

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<sup>48</sup> Cullet, *Supra* n. 3, 308.

<sup>49</sup> *Id.*.

<sup>50</sup> *Id.* at 308-309.

<sup>51</sup> *Id.* at 309.

<sup>52</sup> The Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), (1985), *ICJ Reports* cited in Cullet, no. 3, 308.

<sup>53</sup> Cullet, n. 3, 308.

<sup>54</sup> *Id.* at 305.

Stone places three versions of differentiation. In his first version called as rational bargaining Common but Differentiated Responsibilities (CDR), negotiators shall agree upon mutually agreed benefits aimed to enjoy profit to one party more than the other. However, it would not allow any party to suffer a loss that may worsen its position existing before the Agreement. The second category involves an element of fairness to which negotiations happen in an equitable manner that allows the surplus to the weaker parties; however, it is still not keeping the other in the loss. He calls this second method as equitable CDR. In the third category called as inefficient CDR by him, the weaker parties shall be made entitled to the surplus to an extent where they not only receive surplus but the equitable share of rich existing before the negotiations.<sup>55</sup>

For Cullet, differentiation has two forms: the allocation of rights and entitlements, the other relates to the redistribution of resources. In the former, he advocated for positive discrimination to overcome inequalities. It comprises of different provisions shall be made for various State parties. He considered that the primary aim of positive differentiation is not to eliminate differences but to ensure that inequalities must not be the outcome of any oppressive or adverse means. In his latter form, he seeks for a re-distribution of a finite resource among the nations from the haves to have not. This principle recognizes the loss caused to one party, however, seen as justified to serve the basic needs of the other. This form enables developing countries to observe provisions like the transfer of technology and fund from developed countries.<sup>56</sup>

Looking at the growing potential of developing countries like India fighting with the fundamental problems of poverty and power generation<sup>57</sup>, there emerged a need in the international community to redefine the structure of the CBDR principle and create a third category between developed and developing countries for such State parties.<sup>58</sup> Further various methods are incorporated in a treaty to provide support to weaker nations as a delayed period for implementing the treaty, relatively relaxed norms, transfer of aid and assistance, etc. For example, the

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<sup>55</sup> Stone, *Supra*. n 8, 276-301.

<sup>56</sup> Cullet, n. 7, 32-34.

<sup>57</sup> Lavanya Rajamani, *Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems*, 1(May) CENTRE FOR POLICY RESEARCH, CLIMATE INITIATIVE, WORKING PAPER (2013).

<sup>58</sup> Winkler and Rajamani, n. 31, 111.

Montreal Convention of 1987 granted a ten years grace period to developing countries and established a fund for the enforcement measures.<sup>59</sup>

## VI. STATUS OF CBDR PRINCIPLE UNDER INTERNATIONAL LAW

The principle of CBDR, as provided under Article 3, is not binding but a soft law.<sup>60</sup> This Article has used “should” in all the places making this provision not compulsory on the parties.<sup>61</sup> However, Article 4(2) of the UNFCCC obliges a party to follow the provision of the Convention legally. They are primary rules whose breach shall amount to a wrongful act.<sup>62</sup> Although being a soft law, it has served two crucial goals as to present the moral perspective of climate regime and bring all the participants under one roof. Due to its different interpretations, the legal status of this principle is debatable. At the same time, the legal significance of this principle under the international climate change regime cannot be denied.<sup>63</sup> It can be concluded that although this principle is a soft law however, it has got legal implications attached to it.

Stone provides that this principle is not a rule but an exception.<sup>64</sup> He has given few justifications in this regard. Firstly, Convention on heinous matters does not provide for any exception. Secondly, it is not appreciable to be a member of the Convention instead of favorable treatment. Thirdly, such preferential treatment may hamper the interest of those States who are genuinely observing the treaty standards. Fourthly, the even participation of minimum contributing countries can be purchased with the help of ‘side payments’ without affecting the objectives of a treaty.

Although the principle of CBDR has received much attention and recognition under various multilateral environmental agreements, it still lacks the status of

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<sup>59</sup> Stone, *Supra* n. 8, 278.

<sup>60</sup> Malgosia Fitzmaurice, *Responsibility and Climate Change*, 53 GERMAN YEARBOOK OF INTERNATIONAL LAW 106 (2010).

<sup>61</sup> UNFCCC, n. 1, Article 3.

<sup>62</sup> Fitzmaurice, n. 59, 107.

<sup>63</sup> Rosalind Cook, *Legal Responses for Adaptation to Climate Change: The Role of the Principles of Equity and Common but Differentiated Responsibility* (2010) Master’s thesis, Universiteit Utrecht 26-27 (25 Apr. 2020), <<https://dspace.library.uu.nl/handle/1874/44925>>.

<sup>64</sup> Stone, n. 8, 282.

customary international law.<sup>65</sup> This principle lacks a common understanding among the parties; for some, it is legal, while for others, it is moral.<sup>66</sup> Law is precise and binding, whereas principles hold a capacity to influence decision-makers, however, without any compulsion. Referring to a cumulative study of ICJ decisions, Maguire argues that CBDR has been efficient in providing desired interpretation; however, it does not have a legal value of itself.<sup>67</sup>

## **VII. “COMMON BUT DIFFERENTIATED RESPONSIBILITIES” (CBDR) PRINCIPLE AND CLIMATE REGIME**

While countries recognized the inevitable threat of climate change, the biggest question posed before them was who would reduce greenhouse gas emissions.<sup>68</sup> Keeping in mind the equity and leadership ability of developed countries,<sup>69</sup> UNFCCC adopted the CBDR principle seeking the subsequent participation of developing countries in it.

### **A. Incorporation of the Principle under UNFCCC**

Negotiations for UNFCCC demanded a legal, institutional framework that shall address the future issues related to climate change through periodic meetings and necessary protocols.<sup>70</sup> Although parties agreed for such a structure, however, contentious issues between them revolved around central obligation, implementation, and financial assistance.<sup>71</sup> The UNFCCC has tried to serve the interest of both developed and developing countries while leaving a few

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<sup>65</sup> Rowena Maguire, *The Role of Common but Differentiated Responsibility in the 2020 Climate Regime*, 2013(4) CARBON & CLIMATE LAW REVIEW p- 263 (2013).

<sup>66</sup> Tuula Honkonen, *The Principle of Common But Differentiated Responsibility in Post-2012 Climate Negotiations*, 18(3) REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW 257-267 (2009) cited in Maguire, n. 64, 263.

<sup>67</sup> Maguire, n. 64, 263.

<sup>68</sup> Mary J. Bortscheller, *Equitable but ineffective: How the principle of common but differentiated responsibilities hobbles the global fight against climate change*, 10(2) SUSTAINABLE DEVELOPMENT LAW & POLICY 49 (2010).

<sup>69</sup> UNFCCC, n. 2, Article 3.1.

<sup>70</sup> Daniel Bodansky, *The history of the global climate change regime*, in Urs Luterbacher and Detlef F. Sprinz (eds), INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE, (London, 2001), 32-33.

<sup>71</sup> Rajamani, n. 23, 154.

provisions to be addressed in future meetings.<sup>72</sup> The negotiations at UNFCCC have been attempting to effectuate the international principle of CBDRRC into the climate regime.<sup>73</sup> The Preamble Paragraphs of UNFCCC recognizes the past greenhouse gasses emission of developed countries and the need for the development of developing countries.<sup>74</sup> They further realize that climate change is a matter of global concern that can be addressed only through the cooperation and participation of all the states based on their differentiated responsibilities and respective capabilities.<sup>75</sup> They ask the developed country Parties to develop strategies accordingly.<sup>76</sup> Also, they undertake particular concerns of vulnerable countries.<sup>77</sup>

Article 3 of UNFCCC introduces the CBDRRC principle along with the principle of inter-generational equity, the precautionary principle, and the right to sustainable development<sup>78</sup> to achieve the objective of the Convention.

## **B. Provisions Related to Common Responsibilities**

Article 4.1 obliges all the parties to undertake measures related to mitigation and adaptation along with cooperation following the CBDR principle. Article 5 requires that all parties support and cooperate in scientific research, programme, and efforts at the international and inter-governmental levels. Article 6 seeks all parties to promote and facilitate at the national or regional level and cooperate following global standards for developing education, training programme and public awareness on climate change. Article 9 establishes the Subsidiary Body for Scientific and Technological Advice open to all Member States to provide assessment and advice to the Conference of Parties (COP). Article 12.1 seeks communication of information from all the parties regarding national inventories, implementation of the Convention, and other relevant information. Article 10 establishes the Subsidiary Body for Implementation open for participation to all

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<sup>72</sup> Bodansky, n. 69, 32-33.

<sup>73</sup> Douglas Bushey & Sikina Jinnah, *Evolving Responsibility-The Principle of Common but Differentiated Responsibility in the UNFCCC*, 6 BERKELEY JOURNAL OF INTERNATIONAL LAW 1 (2010).

<sup>74</sup> UNFCCC, n. 1, Paragraph 3 to Preamble.

<sup>75</sup> *Id.*, Paragraph 6 to Preamble.

<sup>76</sup> *Id.*, Paragraph 18 to Preamble.

<sup>77</sup> *Id.*, Paragraph 19, 20 and 22 to Preamble.

<sup>78</sup> Fitzmaurice, n. 59, 106.

Member States to provide an assessment of the data to COP received under Article 12. Apart from the above provisions, Article 18 provides one vote to each party to the Convention; however, regional economic integration organizations may exercise votes of their member States if not opposed.

### **C. Provisions Relating to Differentiation**

The CBDR principle under UNFCCC provides that countries shall be differentiated for their obligations towards climate change as developed and developing country parties. This principle further divides both the categories as per the levels of their commitments.<sup>79</sup> The industrialized countries were divided as Annex I and Annex II Parties. While Annex I parties include industrialized countries<sup>80</sup> and countries having their economies in transition, the Annex II parties include the members of OECD excluding such countries having their economies in transition.<sup>81</sup> The other group of developing country parties was recognized as Non-Annex I Parties.<sup>82</sup> They are the parties more vulnerable to the adverse effects of climate change and prone to economic impacts of climate change, including Least Developed Countries (LDCs) that have limited capacity to tackle the vulnerable effects of climate change.<sup>83</sup> This part was not held legally responsible for cutting their GHGs emissions. Article 3.1 of the Convention recognizes the leading role of the developed country parties, whereas Article 3.2 addresses the special need and situation of developing country parties. However, instead of any mechanism to determine categorization, the countries themselves had to adopt the obligations of either category voluntarily.<sup>84</sup>

Under Article 4.2, specially designed for developed country parties, provides “duty of conduct”<sup>85</sup> to reduce greenhouse gasses through mitigation measures, communicating information, making the calculation, and reviewing mechanism. Similarly, Article 4.3 obliges the developed country parties from Annex II to

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<sup>79</sup> Bortscheller, n. 67, 49.

<sup>80</sup> The category of ‘Industrialized countries’ includes those countries who were member to the Organization for Economic Co-operation and Development (OECD) in the year 1992.

<sup>81</sup> Bortscheller, n. 67, 50.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Fitzmaurice, n. 59, 106.

provide financial assistance to the developing country parties allowing them to fulfill their obligation. Such financial aid can be provided bilaterally, regionally, or through any other multilateral channel.<sup>86</sup> They are also obliged to support the country parties that suffered the adverse effect of climate change.<sup>87</sup> Further, Article 4.5 requires these countries to facilitate, financing, and to transfer environmentally sound technologies to developing country parties to meet their obligations. UNFCCC imposes leading responsibility upon the developed country parties to fulfill their obligation. In contrast, the developing country parties whose priority is economic development and poverty eradication is expected to participate subsequently.<sup>88</sup> The Convention provides flexibility not only to developing country parties, however to Annex I parties going through a transition in observing their obligations.<sup>89</sup> All the member parties are obliged to give special consideration to addressing specific needs, and concerns of developing countries including finance and technology transfer to Least Developed Countries,<sup>90</sup> countries with vulnerable economy due to climate change<sup>91</sup> and the countries affected by climate change being classified as:<sup>92</sup> Small Islands countries; Countries with low-lying coastal areas; Countries with arid and semi-arid areas, forested areas and areas liable to forest decay; Countries with areas prone to natural disasters, Countries with areas liable to drought and desertification; Countries with areas of high urban atmospheric pollution, Countries with areas with fragile ecosystems, including mountainous ecosystems; Countries whose economies are highly dependent on income generated from the production, processing, and export, and/or on the consumption of fossil fuels and associated energy-intensive products; and Landlocked and transit countries.

Article 12 provides for the communication of information with more stringency for developed countries. Article 12.2 and 12.3 require the developed country parties to provide information on their mitigation measures and those undertaken while granting financial and technological assistance. Article 12.4 makes it voluntary for the developing country parties to communicate the necessary

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<sup>86</sup> UNFCCC, n. 1, Article 11.5.

<sup>87</sup> *Id.*, Article 4.4.

<sup>88</sup> *Id.*, Article 4.7.

<sup>89</sup> *Id.*, Article 4.6.

<sup>90</sup> *Id.*, Article 4.9.

<sup>91</sup> *Id.*, Article 4.10.

<sup>92</sup> *Id.*, Article 4.8.

information to implement its obligation. Article 12.5 obliges developed country parties to establish initial communication within six months, whereas for other parties, the period is three years from the date of enforcement of the Convention. However, LDCs are provided flexibility to communicate such information anytime. Moreover, Article 12.7 specifies technical and financial support for developing country parties to transmit such information.

The provisions of UNFCCC are in favor of developing country parties. Without any recognition of historical responsibility in the text, they expressly hold developed country parties liable for the fulfillment of an obligation under the Convention. UNFCCC has recognized the special needs of developing countries and given them the flexibility to fulfill their obligations as per their capacity.<sup>93</sup> Through this kind of differentiation, UNFCCC has sought the participation of all nations based upon their ability, thus ultimately serving its purpose.<sup>94</sup>

#### **D. Incorporation of the principle under the Kyoto Protocol**

Kyoto Protocol to the United Nations Framework Convention on Climate Change establishes a strict binary mechanism for emission reduction in the light of the CBDR principle. It enhances cooperation among the Annex I parties and facilitates them in carrying out their obligation.

#### **E. Provisions Relating to Common Responsibilities**

Article 10 obliges all parties to the Protocol to formulate their mitigation and adaptation measures, financial and technological transfer, scientific research, and educational programme that includes capacity building to climate change carried out at a national and regional level based on the principle of common but differentiated responsibilities. The parties observing this Article have to act in compliance with the provisions of Article 4. Article 21 allows any party to make a proposal for being a party to Annex or amend the Annex to this Protocol. Such accepted annex shall be communicated to all the member parties. Article 20 allows any party to propose amendments to the Protocol, and Article 22 provides one vote to each party considering the exception and limitation of regional economic integration organizations.

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<sup>93</sup> *Id.*, Article 5(c) and 6(a).

<sup>94</sup> Maguire, *Supra* n. 64, 261.

## F. Provisions Relating to Differentiation

The Kyoto Protocol has adopted specific greenhouse gases emission reduction targets for the developed countries only.<sup>95</sup> Along with them, developing countries also agreed to check their emissions and focus on sustainable development.<sup>96</sup> It has provided three flexible market-based mechanisms for the Annex B countries as International Emissions Trading, Cleans Development Mechanism, and Joint Implementation<sup>97</sup> to obtain their goals in a more cost-effective manner.<sup>98</sup> Article 17 of the Protocol permits International Emission Trading to allow Annex B countries to trade in emissions to fulfill the obligations under the Protocol. The Clean Development Mechanism provided under Article 12 ensures assistance to non-Annex I country parties in realizing sustainable development and contributing towards the objectives of the Convention, along with assistance to Annex I parties in the fulfillment of their commitments under the Protocol. It benefits non-Annex I party from the project activities producing Certified Emission Reductions (CER) and Annex I parties by using Certified Emission Reductions for observing compliance with their commitments.<sup>99</sup> Article 6 provides Joint Implementation where to achieve the commitments under Article 3, any Annex I Party may transfer or acquire Emission Reduction Unit (ERU) emerging from mitigation actions from another such party. It establishes the Global Environment Facility (GEF) with the aim of providing co-operation in technology and fund transfer from developed to developing country parties.<sup>100</sup>

Article 2 of the Protocol imposes an obligation upon Annex I countries to observe mitigation measures and cooperate with other parties to enhance their policies in such a manner to reduce the adverse effects of climate change on developing country parties. Article 7 requires all Annex I parties to communicate information based on their actions are undertaken to ensure compliance with the Protocol.

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<sup>95</sup> *Id.*, 264.

<sup>96</sup> Bortscheller, *Supra* n. 67, 49.

<sup>97</sup> Kyoto Protocol, *Supra* n. 2, Article 6.

<sup>98</sup> Per Kågeson, Applying the principle of common but differentiated responsibility to the mitigation of greenhouse gases from international shipping, (2011), (Apr. 20, 2020), <<https://www.vti.se/sv/sysblocksroot/swopec-test/cts2011.5.pdf>>.

<sup>99</sup> Kyoto Protocol, *supra* n. 2, Article 12.3.

<sup>100</sup> Kågeson, *supra* n. 97.

In order to enforce their national inventories of anthropogenic emissions and technology required for the implementation of the Convention, Article 11 entrust Annex II developed country parties to the Convention for the transfer of financial resources to the developing countries. Such flow of funds is to be observed by all the developed country parties with adequate burden-sharing through bilateral, regional, or multilateral modes.<sup>101</sup>

The differentiation under the Kyoto Protocol is applied at two levels.<sup>102</sup> The first level of differential treatment is based on the industrial and non-industrial status of the parties, while the second further imposes individual reduction targets on industrialized parties.<sup>103</sup> Under the first head, the industrialized parties have been charged with the binding emission reduction targets and there is no such legal obligation for non-industrialized countries.<sup>104</sup> This distinction among the parties has resulted in the withdrawing of few UNFCCC parties from the Kyoto model.<sup>105</sup> The second head of differentiation under the Kyoto Protocol emphasizes the implementation of reduction targets by industrialized countries. However, it provides certain relaxation to the countries in transition.<sup>106</sup> Kyoto Protocol has been divided into two commitment periods. Under the first commitment period (2008-2012) the industrialized countries were obliged to reduce a minimum 5% of their total emission below 1990 levels.<sup>107</sup> Further, the second commitment period (2013-2020) seeks to cut at least 18% of their overall emissions below 1990 levels. This structure has upset the large emitter like the U.S., Russia, Canada, Japan, and New Zealand, and they withdrew themselves from such obligations. The Kyoto Protocol, under its second commitment period, did not adequately serve the purpose of reducing adequate emission targets thus raised a need for a newly negotiated instrument based on a perfect balance of equity and capacity.<sup>108</sup>

The differential model adopted under the Kyoto Protocol has been made from the perspective of developing countries. Those provisions of this Convention that

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<sup>101</sup> Kyoto Protocol, *supra* n. 2, Article 11.3.

<sup>102</sup> Maguire, *supra* n. 64, 263.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Kyoto Protocol, *supra* n. 2, Article 3.6.

<sup>107</sup> *Id.*, Article 3.1.

<sup>108</sup> Maguire, *supra* n. 64, 263.

provide deviation in targets and implementation of time-frames for the developing country parties were the most controversial ones.<sup>109</sup>

### VIII. SUBSEQUENT DEVELOPMENT OF CBDR UNDER THE INTERNATIONAL CLIMATE REGIME

Where UNFCCC and Kyoto were the legally binding arrangements, all the other agreements afterward were part of 'soft-law.' One of the significant aspects that emerged under subsequent development of this principle was the dilution of the principle of Common but differentiated responsibilities.<sup>110</sup> Since from Bali Action Plan, 2007<sup>111</sup> such a transformation could be seen under the climate change regime.

Mitigation actions from developing countries saw a shift from supported to unsupported actions.<sup>112</sup> The developing countries were required to observe UNFCCC imposed mitigation commitments, and any new imposition was restricted to be imposed by the Kyoto Protocol.<sup>113</sup> However, the Bali Action Plan sought to undertake "nationally appropriate mitigation actions" for developing countries.<sup>114</sup> Further Copenhagen Accord provided for submission and implementation of mitigation actions from developing countries.<sup>115</sup> Also, the Cancun Agreement made developing countries to differ from their usual emissions by 2020.<sup>116</sup>

Bali Action Plan, 2008 tries to enforce parallelism between developing and developed countries. It requires both of them to equally and voluntarily observe the nationally determined obligations.<sup>117</sup> Moreover, such actions shall be reviewed through measurement, reporting, and verification. The developed countries argued that since the time UNFCCC and Kyoto were negotiated, the balance of

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<sup>109</sup> Rajamani, *supra* n. 23, 155.

<sup>110</sup> *Id.*

<sup>111</sup> Report of the Conference of the Parties on its thirteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth Session, Decision 1/CP.13 Bali Action Plan, U.N. Doc. FCCC/CP/2007/6/Add.1 (14 March 2008)

<sup>112</sup> Rajamani, *supra* n. 23, 162.

<sup>113</sup> Kyoto Protocol, *supra* n. 2, Article 10.

<sup>114</sup> Rajamani, *supra* n. 23, 162.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 156.

power had been shifted in contemporary times.<sup>118</sup>The United States sought to replace ‘quantified emission limitation and reduction objectives’ of the Kyoto Protocol with Commitments or Actions.

Similarly, the Copenhagen Accord, 2009,<sup>119</sup> has been another non-binding, however, an influential agreement in the climate regime.<sup>120</sup> The mitigation targets have seen a shift from a prescription for developed countries to the prediction for developing countries.<sup>121</sup> It allowed parties to carry out self-differentiation of their mitigation action<sup>122</sup> voluntarily and not by emission reduction targets and timetables.<sup>123</sup> Despite being a critical Accord, it failed to provide an agreement for the post-2012 climate regime.<sup>124</sup>

Cancun Agreement, 2010<sup>125</sup> played a significant role in bringing down the political negotiations into the text seeking differentiation for all the State parties.<sup>126</sup>It has brought parallelism with a formation of similar obligations both for developed and developing countries.<sup>127</sup>

Durban Platform for Enhanced Action, 2011<sup>128</sup> gave an extension to the Kyoto Protocol through a second commitment period from 2013-2020, where countries

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<sup>118</sup> *Id.*

<sup>119</sup> Report of the Conference of the Parties on its fifteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth Session, Decision 2/CP.15 Copenhagen Accord, U.N. Doc. FCCC/CP/2009/11/Add.1 (30 March 2010).

<sup>120</sup> Rajamani, *supra* n. 23, 159.

<sup>121</sup> *Id.* at 160.

<sup>122</sup> *Id.*

<sup>123</sup> Jeffrey McGee and Jens Steffek, *The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law*, 28 JOURNAL OF ENVIRONMENTAL LAW 57 (2016).

<sup>124</sup> *Id.*, 43.

<sup>125</sup> Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth session, Decision 1/CP.16 The Cancun Agreement: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, U.N. Doc. FCCC/CP/2010/7Add.1 (15 March 2011).

<sup>126</sup> Rajamani, *supra* n. 23, 161; McGee and Steffek, *supra* n. 122, 60.

<sup>127</sup> *Id.*, 161.

<sup>128</sup> Report of the Conference of the Parties on its seventeenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its seventeenth Session Decision 1/CP.17 Establishment of an Ad Hoc Working Group on the Durban Platform for

would not be bound to nominate targets.<sup>129</sup> It brought forth a need for an agreement to determine the climate regime post-2020.<sup>130</sup> Doha Amendment of the Kyoto Protocol, 2012,<sup>131</sup> brought life to the Kyoto Protocol, however, with the least intention to incorporate it in the future.<sup>132</sup> Ad-Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was made responsible for drafting such an agreement that shall come into existence by 2015.<sup>133</sup>

COP at Warsaw, 2013<sup>134</sup> decided that countries shall be submitting self-differentiated “Intended Nationally Determined Contributions” to address their emissions. This approach has brought a change from strict differentiation of UNFCCC to self-differentiation in the climate regime, where the bottom-up approach of the Copenhagen Accord and Cancun Agreement was preferred over the top-down approach of the Kyoto Protocol.<sup>135</sup>

While Durban to Warsaw, no reference has been made to CBDR principle, Lima Call for Climate Action, 2014,<sup>136</sup> managed to bring it in the 2015 Agreement.<sup>137</sup> However, similar to the U.S.-China Joint Announcement on Climate

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Enhanced Action, Durban Platform, U.N. Doc. FCCC/CP/2011/9/Add.1 (15 March 2012).

<sup>129</sup> McGee and Steffek, *supra* n. 122, 60.

<sup>130</sup> Lavanya Rajamani, ‘Lima Call to Climate Action’: *Progress Through Modest Victories and Tentative Agreements*, 50(1) ECONOMIC AND POLITICAL WEEKLY 14 (2015).

<sup>131</sup> Report of the Conference of the Parties on its eighteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its eighteenth Session, Decision 1/CP.18 Doha Amendment, U.N. Doc. (28 Feb. 2013), FCCC/CP/2012/8/Add.1.

<sup>132</sup> McGee and Steffek, n. 122, 60.

<sup>133</sup> Lavanya Rajamani, *The Warsaw climate negotiations: emerging understandings and battle lines on the road to the 2015 climate agreement*, 63(3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 723 (2014).

<sup>134</sup> Report of the Conference of the Parties on its nineteenth session, Addendum, Part Two: Action taken by the Conference of the Parties at its nineteenth Session, Decision 2/CP.19 Warsaw international mechanism for loss and damage associated with climate change impacts, U.N. Doc. FCCC/CP/2013/10/Add.1 (31 January 2014).

<sup>135</sup> LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW*, p-175 (Oxford University Press, 2006).

<sup>136</sup> Report of the Conference of the Parties on its twentieth session, Addendum, Part Two: Action taken by the Conference of the Parties at its twentieth Session, Decision 1/CP.20 Lima Call for Climate Action, U.N. Doc. FCCC/CP/2014/10/Add.1 (2 Feb. 2015).

<sup>137</sup> Rajamani, n. 134, 14.

Change<sup>138</sup>agreement, the CBDR principle has been attached with a qualification “in the light of national circumstances” that gave an evolutionary interpretation to it.<sup>139</sup>

In 2015, the CBDR principle got adopted in the Paris Agreement<sup>140</sup> as a facilitative model based on self-differentiation. It seeks differentiation for all countries with a weakened distinction between developed and developing countries. Thus, it does not define a set of countries rigidly as Annex I and Non-Annex I parties, however, invites contributions from all the parties. As per Article 2(2) of the Agreement, the CBDR principle should be reflected in the light of different national circumstances. It means that even the developed countries can evade their responsibilities in case of any problematic distressing situation. Paris Agreement has implemented a shift from a top-down approach to a bottom-up approach. This Agreement illustrates that while avoiding the distinction between the countries ambition has been compromised by the parties. Even the cumulative goal of all countries, as provided under their NDCs is insufficient to achieve the objectives of the Agreement.<sup>141</sup>

## **IX. PROBLEMS WITH “COMMON BUT DIFFERENTIATED RESPONSIBILITIES” (CBDR) PRINCIPLE**

It is well-established that the principle of common but differentiated responsibilities is needed in International Environmental law; however, its extent is yet not determined. Biniiaz highlighted the inefficiency of this principle as, "(1) There is no agreement on what it means; (2) there is no agreement on when it

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<sup>138</sup>U.S.-China Joint Announcement on Climate Change, Nov. 2014, (May, 4, 2020), <<https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>>

<sup>139</sup> Lima Call for Climate Action, n. 135.

<sup>140</sup> Paris Agreement to United Nations Framework Convention on Climate Change, Dec. 12, 2015, *UNTS* 52.

<sup>141</sup> Correspondent, the world’s climate goals are not sufficient. They are also unlikely to be met, (20 Nov.) *THE ECONOMIST* (2019) < <https://www.economist.com/graphic-detail/2019/11/20/the-worlds-climate-goals-are-not-sufficient-they-are-also-unlikely-to-be-met>> (accessed on 2 May 2020)

applies; (3) it is over-argued; and (4) it breeds laziness in the negotiating process.”<sup>142</sup> Further, it is also not settled that when this principle ceases to exist.

CBDR principle, as incorporated under UNFCCC and Kyoto Protocol, kept obligations on only one group of countries that could not resolve the overall problem of climate change. At the same time, other groups may develop to such an extent that its emissions cannot go unchecked in the atmosphere. Countries like China and India, who were the part of developing countries, got protection under this rule to save themselves from liabilities, and presently they are among the top contributor to GHGs emissions.

Cullet argues that the socioeconomic situations of many developing countries have still not changed and thus, question the competency of this principle that failed in achieving its purpose. Also, this principle found to be inadequate in addressing the necessary population and societal realities within the countries.<sup>143</sup>

## X. CONCLUSION

The principle of Common but Differentiated Responsibilities is an equitable principle that is still in the transformation phase. This article traced the evolution of the common but differentiated responsibilities principle and provided theoretical insight over its future implications. It was incorporated under the UNFCCC in response to the contribution and capacity of the developed countries. As evident from the climate change negotiations, it is a much-debated issue and has got the immense potential to mold the shape of climate change agreements. In recent years, a shift has been seen from the prescriptive Kyoto model towards a self-differentiated structure. The problematic issue is that this change has come at the cost of ambition. Also, to be considered that the objectives of this principle have not been achieved even after twenty-five years of incorporation. In the realm of climate change need for this principle still exist, however, in a correct manner. With the latest adoption of this principle in the Paris Agreement, it becomes pertinent to reconsider its structure and its efficiency to address the much-required concerns.

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<sup>142</sup> Susan Biniaz, *Common but Differentiated Responsibilities*, p- 96 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 358-368 (2002) cited in Lee, n. 21, 33.

<sup>143</sup> Cullet, *supra* n. 3, 326.