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**PRINCIPLE OF COMMON BUT DIFFERENTIATED
RESPONSIBILITIES AND ITS CURRENT INTERPRETATION
PROBLEMS IN THE CONTEXT OF THE CLIMATE CHANGE
INTERNATIONAL REGULATIONS**

Tesis para optar al grado de Magister en Derecho Internacional, Inversiones,
Comercio y Arbitraje.

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INTRODUCTION

It is widely recognized that the Earth is experimenting serious environmental challenges nowadays. Acid rain, ozone depletion, toxic and hazardous products and others, are problems that are affecting life in our planet as we know it¹. One of these environmental issues is the climate change caused by global warming, due to the increasing greenhouse gases (GHG) emissions. Currently, this problem is an international community concern because of its potential effects which not only imply changes in the climate of the Earth, but also changes in agricultural conditions and the ecosystem, loss of biodiversity, the emergence of new and old diseases which were already controlled many years ago, and other unpredictable ones.

International community concern for these issues has contributed to the birth of the climate change regime, whose rules and principles should serve as a framework for cooperation among countries, in order to solve and mitigate the harmful effects of this problem. In particular, the international climate regime's objectives are basically the mitigation of GHG hazardous consequences and the adaptation of the ecosystem to the climate change.² The international regime comprises basically the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol, and the cornerstone of these instruments is the principle of Common but

¹ See Sands, Philippe, and Peel, Jacqueline, "Principles of International Environmental Law", Cambridge University Press, Third Edition, 2012, p. 3.

² See Article 2 of the UNFCCC.

Differentiated Responsibilities (CBDR), which is the field of study of this research.

The principle of CBDR establishes the common responsibility of states for the protection of the global environment, but at the same time, it posits that states bear responsibilities for the global environment in proportion both to their differing contributions to the global environmental crisis and their respective capabilities of solving it³.

About this subject, there is a consensus on the existence of a common responsibility of all the international community, and also about the different responsibilities of developed and developing countries. Nevertheless, there is no agreement on the distinguishing factors of this differentiation⁴. This lack of agreement has been enhanced by the economic growth of large developing countries (China, India, South Africa and Brazil), which are important GHG emitters nowadays. In fact, these large developing countries currently have high levels of GHG emissions and still they are not considered as responsible as developed countries are. Consequently, this situation has opened the debate about the legitimacy of the differentiation criteria imposed by the UNFCCC and the Kyoto Protocol.

Today, the international community is engaged in intense negotiations to design an agreement that builds on, complements and may even replace part

³ See Rajamani, L. (2000). The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime. *Review of European Community & international environmental law*, 9, p.122.

⁴ See Rajamani, L. (2010). *The Legal Principles Relating to Climate Change: Initial Scoping Paper*. Retrieved November 14, 2012, from International Law Association Committee Web site: www.ila-hq.org. p. 15.

of the existing climate regime⁵. Nevertheless, these negotiations have not been successful because of the lack of a political compromise among states⁶.

Considering the final objective of the climate change regulations, which is to set up rules that regulate the behaviour of states in order to mitigate harmful consequences of the GHG emissions on the Earth and to adapt the ecosystem to the climate change, it seems necessary to set up a new approach of the principle of CBDR through the establishment of an efficient, clear and equitable form to interpret and apply the provisions involved.

In my opinion, there are three new facts to consider. First, today each country's capacity to emit GHG is not necessarily related to their historical level of development. Second, GHG emissions in developing countries are growing dramatically. And third, there are not enough incentives for developing countries to grow in a sustainable way. For these reasons, a new interpretation of the principle of CBDR should consider a factual element, which is the global level of GHG emissions by each country, objectively measured, and a subjective element, composed by states' historical liability and respective capabilities to solve the global climate crisis. In the same sense, it is necessary to assign new responsibilities to developing countries and to incentive their growth in a sustainable way.

With this research I will try to analyze new forms of interpretation and application of the principle of CBDR under the climate change legal

⁵ Ibid., p.3.

⁶ See Arístegui, J.P. (2012). Evolución del Principio Responsabilidades Comunes pero Diferenciadas en el Régimen Internacional del Cambio Climático. *Anuario de Derecho Público Universidad Diego Portales*, 3, p.587.

regulations. For this purpose, in the first part of this work I will raise the problem by describing the climate change legal instruments and their application, through the study of the UNFCCC, the Kyoto Protocol and the outcome documents of the relevant negotiations from the Kyoto Protocol to date. In the second part, I will examine the understandings and foundations of the principle of CBDR by analyzing its definition and contents, rules of law that compose it and its current application and interpretation within the framework of climate change regime and other multilateral environmental agreements. Finally, I will conclude my research analyzing the different possible interpretations within the climate change regime and proposing possible changes that may be included in order to state a new approach of the principle of CBDR, establishing what would be an effective, stable and equitable form to interpret and apply the provisions involved.

Chapter I: CLIMATE CHANGE REGULATIONS

1.1. Climate Change

1.1.1. General Overview

The climate is a complex, interactive system consisting of the atmosphere, land surface, snow and ice, oceans and other bodies of water, and living things. Climate is often defined as ‘average weather’⁷ and it is determined in large part by the presence in the atmosphere of naturally occurring greenhouse gases, including water, vapour, carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O) and tropospheric ozone (O₃)⁸. All of these gases create a radiation balance over the Earth.

The Intergovernmental Panel on Climate Change (IPCC) explains that one of the fundamental ways to change the Earth radiation balance is by altering the longwave radiation from Earth back towards space and this can be done by altering greenhouse gas concentrations⁹. About 30% of the sunlight that reaches the top of the atmosphere is reflected back to space, and the energy that is not, is absorbed by the Earth’s surface and atmosphere. To balance the incoming energy, the Earth itself must radiate, on average, the same amount of

⁷ See Le Treut, H., Somerville R., Cubasch U., Ding, Y., Mauritzen, C., Mokssit, A., Peterson, T. & Prather, M. (2007). Historical Overview of Climate Change. In S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor & H.L. Miller (Eds.), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge and NY: Cambridge University Press, p. 96.

⁸ See Sands, et al., op. cit., p. 274.

⁹ See Le Treut, et al., op. cit., p. 96.

energy back to space. The reason the Earth's surface is this warm is the presence of greenhouse gases (GHG), which act as a partial blanket for the longwave radiation coming from the surface. This blanketing is known as the natural greenhouse effect.¹⁰ When the balance of the greenhouse gases is altered, the blanket effect increases and the Earth warms above normal.

The fourth IPCC Assessment Report (AR4) provided evidence for the marked increase of global atmospheric concentration of GHG, which has caused the growth in global average temperatures, stating that the evidence shows that this growth has originated in human activities¹¹⁻¹². Just to have an idea, Carbon Dioxide (CO₂), which comprises nearly 50% of all anthropogenic greenhouse gases, had a concentration ranged between 170 and 280 parts per million (ppm) before the Industrial Revolution. Levels are now far above that range —387 ppm by 2010— and the rate of increase may be accelerating¹³. It has been proved that the capacity of ecosystems to adapt to global warming is severely tested beyond warming of 2 C°. This limit can easily be exceeded nowadays. "Unless the world acts quickly to alter emissions pathways, models project that by 2100 the global average temperature will increase to 2.5°-7° C above preindustrial levels"¹⁴

Since this problem is mostly a consequence of human activities, law has an important role in its regulation and solution. In fact, the main function of law

¹⁰ Ibid., p. 97.

¹¹ See Aerni, P., Boie, B., Cottier, T., Holzer, K., Jost, D., Karapinar, B., Matteotti, S., Nartova, O., Payosova, T., Rubini, L., Shingal, A., Temmerman, F., Xoplaki, E. & Z. Bigdeli, S. (2010). Climate Change and International Law: Exploring the Linkages between Human Rights, Environment, Trade and Investment. *German Yearbook of International Law*, 53, p.140.

¹² See Le Treut, H., et al., op.cit., p. 102-103.

¹³ See Hunter, D., Salzman, J. & Zaelke, D. (2011). *International Environmental Law and Policy*. New York: Thomson Reuters/ Foundation Press, p.608.

¹⁴ Ibid, p. 609.

is to regulate social behaviour, and in this case, there are conducts that are creating an irreversible damage in the global environment. To regulate and solve this problem it is necessary to deal with several issues. In fact, “mitigation of climate change and adaptation to its regional effects involves understandings the complex interactions between demographic, climatic, environmental, economic, health, political, institutional, social and technological processes”¹⁵. In my opinion, we should add to this list the integration of processes related to domestic and international law and their multiple branches, and States’ particular situations and capacities. The principle of international law that incorporates this last element is the principle of Common but Differentiated Responsibilities (CBDR), which is the object of this research.

1.1.2. Role of the concept of Sustainable Development.

Sustainable development (SD) is a very important concept in the field of international environmental law. Since 1987 Brundtland Report it has been considered a “global policy objective” and it is presented in most of the environmental treaties and other instruments. The most commonly used definition is precisely given by the 1987 Brundtland Report, which defines it as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”¹⁶. To achieve that objective, the institutional framework of SD seeks to promote a balanced integration of economic, social and environmental dimensions¹⁷, while trying

¹⁵ Aerni, et al., op. cit., p. 140.

¹⁶ See Sands, et al, op.cit., p. 9

¹⁷ See United Nations Conference on Sustainable Development (2012). *The Future we want*. Rio de Janeiro: Author, p. 17.

to incorporate the preservation of the environment as a part of the developmental process¹⁸. The challenge is to coordinate and reconcile different areas, sciences and processes, in order to promote development by protecting the environmental principles and objectives.

One of the elements to note in the Brundtland Report's definition is the notion of common responsibility, which is incorporated through the idea of intergenerational equity. In fact, SD implies that only broad cooperation and participation in common efforts ensures that future generations are able to enjoy rich life on this planet¹⁹. As we will see, this is an important link between SD and the principle of CBDR, which includes the common responsibility as an essential part of its structure.

The 1992 Rio Declaration on Environment and Development includes the SD concept in several sections. This concept is established in Principle 1, which states that "*human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature*". Later, Principle 3 adds the idea of "equity", stating that "*the right to development must be fulfilled so as equitably meet developmental and environmental needs of present and future generations*". In relation to equity, Principles 6 and 7 include the concern for the special situation and needs of developing countries and the role of developed countries in acknowledging "*the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global*

¹⁸ See Honkonen, T. (2004). *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects*, Alphen aan den Rijn: Kluwer Law International, p. 5

¹⁹ Ibid.

*environment and of the technologies and financial resources they command*²⁰⁻²¹.

With respect to climate change regime, we see the presence of SD concept in the statement of parties' rights and duties. UNFCCC Article 2 establishes that the objective of this convention is to stabilize "*greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*", adding that this level should be achieved "*in a sustainable manner*". In addition, UNFCCC Article 3(4) establishes the right and duty of the parties to promote SD, adding that policies and measures to protect the climate system should take into account that, "*economic development is essential for adopting measures to address climate change*". In addition, Article 4.1 (d) establishes the commitment of the parties to "*promote sustainable management*".

As we see, the role of SD in the climate change regime is to be the foundation of its main objective. In fact, the UNFCCC has a specific objective established in its Article 2, and it is closely related to the final objective of SD, which is to promote development that meets the needs of the present without compromising the ability of future generations to meet their own needs. In addition, UNFCCC was formulated on the basis of SD through the establishment of principles that include the idea of preservation of the environment as a part of the developmental process, inter-generational and

²⁰ See Principle 7 of the 1992 Rio Declaration.

²¹ In my opinion, at this point there is a manifest relation between SD and the principle of CBDR, since both of them are based on the principle of equity. This relation between "equity" and the principle of CBDR will be discussed in Chapter 2 of this research.

intra-generational equity²², common responsibility and the concern for the special needs of developing countries. As we will see, the legal principle that implements this statement is the principle of CBDR.

Notwithstanding the above items, the concept of SD has been widely criticized basically because of its ambiguity. In fact, it has been said, that SD concept seeks to keep its definitional scope as broad as possible and for that reason it lost its ability to present a compromise position between the needs and desires of developing and industrial countries²³. Both, industrial and developing countries use sustainable development concept to their advantage but they differ in their approach, focus, method and aims²⁴ because its amplitude allows for multiple interpretations.

In addition, the legal status of sustainable development is debated on whether it has binding force or not. In this sense, the International Law Association has said that “the focus should not be on whether sustainable development has binding force or not, but rather on the extent to which it is influencing legal and political debate including the resolution of judicial disputes”²⁵. Indeed, there is an evident relation between countries’ economic development and severe environmental problems²⁶. In the field of climate change, for example, it is easy to observe a proportional country level development and their GHG

²² Inter- generational equity refers to the right of future generations to enjoy a fair level of the common patrimony. Intra generational equity refers to the right of all people within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources. See French, D. & Fuentes, X. (2010). *The Hague Conference: International Law on Sustainable Development*. Retrieved November 14, 2012, from International Law Association Committee Web site: www.ila-hq.org, p. 5.

²³ See Rajamani (2010), op. cit., p. 30.

²⁴ Ibid.

²⁵ Hunter, et al., op. cit., p. 612.

²⁶ See Honkonen, op. cit., p. 5.

emissions. Therefore, and even when it is not binding, SD influence in all of law areas and science is of fundamental importance so as to achieve a better country level development, without compromising the environment.

1.2. Climate Regime Key Regulations.

The first evidences of global warming attributable to human activities appeared in the 70's and 80's. This information led the international community to organize and call for regulations to deal with this issue. For this reason, climate change regulations emerged onto the international political stage in 1988, when the UN General Assembly (acting on a proposal from Malta) adopted the resolution 43/53, which declare that “*climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth*”²⁷⁻²⁸. In 1988, the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) created the Intergovernmental Panel on Climate Change (IPCC), which was established to assess the scientific, technical, and economic basis of climate change and provide decision makers with objective information²⁹. Its First Assessment Report was ready in 1990, warning that, although there were many uncertainties, human activity was leading to increased atmospheric concentrations of CO₂ and rising temperatures³⁰. Because of the statements in this report, in 1990, Ministerial Declaration of the Second World Climate Conference called for negotiations on an effective framework convention on climate change, containing appropriate commitments to begin without delay.

²⁷ See United Nations Resolution, A/RES 43/53, December 6th, 1988.

²⁸ See Yamin, F. & Depledge, J. (2004). *The International Climate Change Regime. A guide to rules, institutions and procedures*. Cambridge: Cambridge University Press, p. 22.

²⁹ See Hunter, et al., op. cit., p. 612.

³⁰ See Yamin, et al., op. cit., p. 23.

Finally, in June 1992, the UN Framework Convention on Climate Change was signed by 155 states and the EC at UNCED³¹.

All these events contributed to the birth of the UNFCCC, which was the first international environmental agreement to be negotiated virtually by the whole of the international community, with 143 states participating in the final session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC/FCCC)³².

The UNFCCC attempts to adopt a comprehensive approach to integrating environmental considerations into economic development and defines, in legal terms, rights and obligations for different members of the international community in the quest for sustainable development and the protection of the global climate³³. Since this convention affects the economic interest of almost all nation states, it is important to note that this formative period coincided with an economic prosperity of the OECD countries, resulting in widespread support for increasing environmental protection and development assistance³⁴.

In 1994, the UNFCCC was implemented and a year later the first Conference of Parties (COP-1) met in Berlin, where important decisions were adopted³⁵. The final document of this COP-1, the Berlin Mandate, specified that the negotiations should revise the commitments of industrialized countries, but it did not introduce any new commitments for developing countries. This is the origin of the Kyoto Protocol. Later, in 1996, the IPCC's second Assessment

³¹ See Sands, et al., op. cit., p.276.

³² Ibid.

³³ Ibid.

³⁴ See Yamin, et al., op. cit., p. 23.

³⁵ Ibid, p. 24.

Report confirmed that human activities were indeed changing the world's climate.

In the following pages, we are going to describe some of the Climate Change Legal Instruments, considering their principal norms and application.

1.2.1. United Nations Framework Convention on Climate Change.

In the first place, it is important to say that the UNFCCC defines climate change as “*a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods*”³⁶. This definition reflects what is mentioned above, in the sense of regulating human behaviour as an important part of the influences of climate change. The importance of the human factor is reaffirmed by the Convention's Preamble, which establishes that “*Concerned that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind*”.

Some of the statements of this convention are:

- General commitments for developed and developing countries, consistent in the development of “*national inventories of anthropogenic emissions by sources and removals by sinks of all GHG not controlled*”

³⁶ See Article 1 (2) of the UNFCCC.

by the Montreal Protocol". The parties will also promote technology transfer and sustainable management, conservation and enhancement of sinks and reservoirs³⁷;

- Specific commitments for developed countries: to stabilize and to limit emissions of GHG concentrations in the atmosphere at a safe level, in accordance with soft targets and timetables; and to communicate detailed information about policies and measures;
- A financial mechanism and a commitment by certain developed country parties to provide financial resources for meeting certain incremental cost and adaptation measures; and
- Important guiding principles, within which is the principle of CBDR³⁸.

The UNFCCC, since its beginning, has been characterized by the establishment of a marked difference between developed and developing countries. This is the basis for the allocation of obligations under the climate change regulations and the principle of CBDR. In fact, the preamble recognizes that environmental standards should be different depending on developmental context to which they apply, clarifying that countries' cooperation must be in accordance with their common but differentiated responsibilities, and that developed countries have major responsibility due to their relative contributions to the enhancement of the GHG effect. In the same sense, the convention divides countries into:

- Annex I (OECD countries and economies in transition- EITs)
- Annex II (OECD countries only); and

³⁷ See Leal-Arcas, R. (2001). Is the Kyoto Protocol an adequate environmental agreement to resolve the climate change problem? *European Environmental Law Review*, 10, p. 284.

³⁸ See Sands, et al., op. cit., p.276-278.

- Non-Annex I (mostly developing countries)

Here are some interesting considerations that are worth mentioning. For example, the preamble establishes that *“noting 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”*. This is a remarkable paragraph for the object of this research. First, it includes recognition of the historical and current responsibility of developed countries as the biggest emitters of GHG. This consideration is an important part of the convention’s structure and one of the elements that inform the principle of CBDR. Second, per capita emissions are mentioned with regard to developing countries, specifying that they *“are still relatively low”*. In my opinion, this phrase involves a condition because the word “still” implies that this situation can change in the future and developing countries could eventually have high per capita GHG emissions. Considering that the preamble is the reference upon which the rules are dictated and this fact is easily modifiable, we must think that a change in this sense means having to rethink the agreement. Third, this paragraph says that *“noting (...) the share of global emissions originating in developing countries will grow to meet their social and development needs”*. I think that the ambiguity of these words may contribute to the convention’s interpretation problems that we observe today. This phrase may have implicit permission regarding GHG emissions increase in order to achieve social and development needs and that would be against a sustainable

development concept, which seeks to promote development in a sustainable way³⁹.

The UNFCCC establishes that its ultimate objective (and any related legal instrument that the Conference of Parties may adopt) is to achieve “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner*” (Article 2). Nevertheless, the Convention does not specify the meaning of the phrase “*dangerous anthropogenic interference*” and for that reason, it is not clear if this objective is fully achievable. Some say that this limit is imposed by the 2° C that scholars have established as the maximum point of ecosystem’s adaptation, and some others say that this limit is a political, not a scientific decision⁴⁰.

From the establishment of this objective arise two main obligations: mitigation and adaptation. Mitigation activities are all efforts to prevent or avoid the harmful effects of climate change, and adaptation activities are all efforts to reduce or adjust to the anticipated impacts of climate change⁴¹. Mitigation, as a general commitment, is established very vaguely in UNFCCC Article 4 (1),

³⁹ Another interesting consideration of the preamble is recognition of the energy consumption as a resource to achieve social and economic development, adding that it should take into account “*the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general (...)*”. In fact, about 84% of current CO₂ emissions are energy-related and about 65% of all GHG emissions can be attributed to energy supply and energy use. Unfortunately, this matter did not receive sufficient support to be included in the operations part of the Convention, despite their importance in controlling GHG emissions. See Hunter, et al., op. cit., p. 647.

⁴⁰ Ibid., p. 608-609.

⁴¹ Ibid., p. 640.

a) and b), only setting up the obligation to develop, update and publish national inventories of anthropogenic GHG emissions, and implement, formulate and publish national programmes containing measures to mitigate climate change. Meanwhile, UNFCCC Article 4 (2) states mitigation commitment for developed countries, in the sense of limiting their anthropogenic emissions. Here, it is interesting to note that the verb used in this article is “to limit” and not “to stabilize” or “to reduce”. Also, Article 4 (2) a) establishes return to the 'early levels' by the year 2000, but there is not an expressed commitment to keep emissions no higher than 1990 levels after 2000. In my opinion, all these aspects demonstrate that the UNFCCC does not state effective rules to stabilize GHG emissions.

1.2.2. The Kyoto Protocol

The Kyoto Protocol to the Climate Change was adopted by the third Conference of the Parties in December 1997, meeting in Berlin, and it contains binding GHG emissions limits for developed countries⁴². In fact, it was determined that the commitments provided for in Article 4 (2) a) and b) of the UNFCCC were “not adequate” and decided to launch a process to strengthen the commitments of Annex I parties of the UNFCCC⁴³, through the adoption of a protocol or another legal instrument⁴⁴. The main objective of the Protocol was to reduce net GHG emissions of developed countries by at least 5% below the 1990 levels by the period 2008-2012. Nevertheless, the

⁴² See Dernbach, J. & Kakade, S. (2008). *Climate Change Law: An Introduction*. Retrieved March 8, 2013, from Social Science Research Network database.

⁴³ According to Article 1 paragraph 7 of the Kyoto Protocol, “Party included in Annex I” means a party included in Annex I to the UNFCCC, as may be amended, or a party which has made a notification under Article 4, paragraph 2 (g), of the UNFCCC.

⁴⁴ *Ibid.*, p. 283-284.

process was not intended to introduce any new commitments for non- Annex I parties⁴⁵⁻⁴⁶.

The major achievement of the Kyoto Protocol was a commitment of Annex I parties to quantified emission reduction and a timetable for their accomplishment. The basic obligation accepted by the Annex I parties provides that they “*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*”⁴⁷. The assigned amounts are calculated pursuant to each party’s quantified emissions limitation and reduction commitments set out in Annex B⁴⁸⁻⁴⁹. In addition, Article 2 of the Protocol contains a list of policies and measures that parties may implement in order to achieve their quantified limitation and emission reduction targets, stating also that these policies and measures shall be implemented “*in accordance with its national circumstances*”⁵⁰.

The most innovative aspect of the Protocol is “the flexibility mechanisms”. The Protocol establishes three flexibility mechanisms. The first one is the ‘emission trading’, which involves purchasing or acquiring credits representing GHG reduction in other countries. This mechanism permits an

⁴⁵ See Leal-Arcas, R., op. cit., p. 286.

⁴⁶ The Kyoto Protocol State that countries undergoing the process of transition to a market economy but that are also classified as Annex I parties, including Czech Republic, Hungary, Russia, Ukraine and Poland, should freeze their emissions at the 1990 levels but are not bound to make any reductions. Countries which were in the process of becoming industrialized but have constrained resources with which to combat environmental problems, including China and India, had no formal binding targets but had the option to set voluntary reduction targets. Ibid.

⁴⁷ See Article 3, Kyoto Protocol to the United Nations Framework Convention on Climate Change.

⁴⁸ See Sands, et al., op. cit., p. 286.

⁴⁹ In fact, Annex A of the Kyoto Protocol includes GHG that are applicable in the scope of the protocol, and Annex B sets which are specific commitments of each of the countries, which are those listed in Annex I of the UNFCCC.

⁵⁰ See Sands, et al., op.cit., p. 287

Annex B party to buy emission reduction credits, in the form of assigned amount units (AAUs), from another Annex B party where it would be more cost-effective for it to do so rather than to undertake the reduction domestically⁵¹. The second one is the ‘clean development mechanism’, which enables industrialized countries to finance emissions-avoiding projects in developing countries and to receive credits for doing so⁵². Finally, we have the joint implementation mechanism, whereby a developed country can receive ‘emissions reduction units’ when it helps to finance project that reduce net emissions in another developed country (including countries with economies in transition)⁵³.

The Protocol also stipulates stricter reporting and review procedures for Annex I parties, a compliance system to address cases of non-compliance with the Protocol and regular review of commitments⁵⁴.

In my opinion, the Kyoto Protocol tried to address a long-term objective with short-term measures. Indeed, it sought to reach a reduction of GHG emissions of developed countries by at least 5% below the 1990 levels by the period 2008-2012. This aim did not seem very challenging, the period purposed to implement it was too short and there was no obligation to maintain certain levels of GHG emissions over time⁵⁵. In addition, there were important omissions in this Protocol, like energy⁵⁶, per capita GHG emissions, and

⁵¹ Ibid.

⁵² See Leal-Arcas, R., op. cit., p. 287.

⁵³ Ibid., p. 287-288.

⁵⁴ See Yamin, et al., op. cit., p. 25.

⁵⁵ This subject was discussed in the 2007 Bali Action Plan, where it was established the Ad Hoc Working Group on Long Term Cooperative Action under the Convention (AWG-LCA).

⁵⁶ Energy is treated in Article 2, stating that the parties should enhance energy efficiency and research new and renewable forms of energy. In addition, Annex A includes this subject into the sources of GHG.

global emissions of developing countries. The latter was an important exclusion and it reflected one of the interpretations given to the principle of CBDR, which attended only to an historical approach and not to the current level of GHG emitted.

1.3. Negotiations for a post -2012 climate regime.

Negotiations for a climate change regulation have been difficult since the beginning. The most important disagreement is the division of developed and developing countries, in order to distribute obligations and responsibilities. In fact, this was the reason for the U.S. rejection of the Kyoto Protocol, which represents one of the toughest episodes of the negotiations. Because of this, the negotiation process was up on hold until 2007, where the COP-13 met with the purpose of setting the basis for the agreement of a new climate change regulations.

In the following pages, there will be a brief description of the most important milestones of the negotiation process post Kyoto Protocol.

1.3.1. Bali Action Plan

The Bali Action Plan was the most important decision taken by the COP- 13. It creates a new process and sets out a two year agenda to enable the parties to establish a multilateral framework on post-2012 issues, at COP-15 in

Nevertheless, there is not an especial treatment to this issue, which is an important omission because energy is currently the most emitting source of GHG, in both developed and developing countries. In fact, International Energy Agency, in its 2010 report, concludes that OECD Europe, United States, China and India must heavily invest in cleaner technologies to reduce their CO₂ emissions by the year 2050. See International Energy Agency (2010). Energy Technology Perspectives. Scenarios & Strategies to 2050. Paris: Author.

Copenhagen, Denmark. The object of the Bali Action Plan was to start negotiations for a multilateral agreement to address climate change regulations that will be successor to the first commitment period under the Kyoto Protocol to the UNFCCC⁵⁷.

The Bali Action Plan was important because for the first time since the United States renounced the Kyoto Protocol, all of the UNFCCC parties, including the U.S., had agreed to a comprehensive negotiation process, hoping to reach new commitments in Copenhagen⁵⁸.

Basically, the Bali Action Plan states the parties' decision to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention, by addressing a shared vision for long-term cooperative action, in accordance with the provisions and principles of the Convention, in particular the principle of CBDR. It also establishes the parties' decision of:

- Enhanced national and international action on mitigation of climate change, including measurable, reportable and verifiable nationally appropriate mitigation commitments (NAMAs) by developing countries, and quantified emission limitation and reduction objectives for developed countries parties⁵⁹;

⁵⁷ See Anton, D. (2008). *Introductory note to Intergovernmental Panel on Climate Change. Fourth Assessment Synopsis Report Summary for Policy Makers and the Bali Action Plan*. Retrieved December 23, 2012, from Social Science Research Network database, p.3.

⁵⁸ See Hunter, et al., op. cit., p. 696- 697.

⁵⁹ The key difference between them is that quantified emission limitation and reduction objectives are broad economy-wide emission limitations, while NAMAs are more flexible and may take other forms, like an emissions intensity target, limiting emissions per unit GDP. See Bushey, D. & Jinnah, S. (2012). *Evolving*

- Enhanced actions for adaptation;
- Enhanced technology development and transfer to support action on mitigation and adaptation, and a system for measurement, reporting and verification (MRV);
- Enhanced actions that provide financial resources and investment to support action on mitigation and adaptation and technology cooperation.

At this point, the negotiations on a post-2012 climate regime had moved forward on two tracks: one to develop an “agreed outcome” under the UNFCCC; the other to negotiate amendments to the Kyoto Protocol, including new emissions targets for developed country parties. For this purpose, the Bali Action Plan established an Ad Hoc Working Group on Long- Term Cooperative Action under the Convention (AWG-LCA) and an Ad Hoc Working Group on Long Term Cooperative Action under the Kyoto Protocol (AWG-KP). They were to complete their work at the Copenhagen Conference of the parties.

1.3.2. Copenhagen Conference.

From the Bali Action Plan, the climate change negotiations were divided into two tracks: the development of a new regulation under the UNFCCC and the negotiation of new commitments under the Kyoto Protocol. The countries with Kyoto emissions targets (including the EU member states, Japan, Canada, and Australia) were generally unwilling to accept a new round of

Responsibility? The Principle of Common but Differentiated Responsibility in the UNFCCC. Retrieved January 4, 2013, from Hein Online database, p. 3.

emissions targets under Kyoto for the post-2012 period unless the other major emitters (including the United States and China) accepted legal commitments as well, and their expressed preference for a single new comprehensive legal agreement that would replace Kyoto. The US had the same opinion. On the other side, developing countries were united in opposing a one track approach and repeatedly insisted at the Copenhagen Conference that the Kyoto track receive equal attention as the Convention track. But developing countries differ in their views about the outcome of the Convention track. India and China have insisted that developed country parties agreed to a second commitment period under Kyoto, but opposed the adoption of a new legal agreement addressing their own emissions. In contrast, other developing countries (including the small island states) support, as a complement to Kyoto, the negotiation of a new legal agreement that would be more comprehensive in coverage, including the United States and major developing countries such as China, India, and Brazil⁶⁰. In addition, there were disagreements about what constitutes a developing country and how NAMAs should be supported and monitored⁶¹.

The Copenhagen Conference, which met in December 2009, had been intended as the deadline to resolve these questions⁶². Nevertheless, because of all the disagreements exposed, the Copenhagen conference resulted only in a political and not legal agreement, as expected. Moreover, the Copenhagen Conference was unable to ‘adopt’ the Accord and it just could take note of it. This was because of the rejection of a small group of countries, led by Sudan,

⁶⁰See Bodansky, D. (2010). *The Copenhagen Climate Change Conference: A Post- Mortem*. Retrieved December 29, 2012, from Social Science Research Network database, p.3-4.

⁶¹ See Bushey, et al., op. cit., p. 3.

⁶² Ibid, p.1.

Venezuela and Bolivia. Procedurally, taking note of the Accord gives it some status in the UNFCCC process but not as much as endorsement by the COP. In place of adopting the Accord, the parties established a process whereby parties could associate themselves with the document through a notification to the UNFCCC secretariat of their mitigation targets or, in the case of developing countries, NAMAs⁶³.

Notwithstanding the foregoing, key elements of the Copenhagen Accord included:

- A long-term goal of limiting climate change to no more than 2° C⁶⁴;
- Systems of pledge and review for both developed and developing country mitigation commitments and actions. This system basically consists of international MRV in case of NAMAs that are financed internationally, and domestic MRV, with international consultation and analysis, in case of NAMAs reviewed internally⁶⁵;
- Significant new financial resources, including financing mitigation actions and adaptation actions in developing countries⁶⁶.

Even though the Copenhagen Accord did not reach a legal status and it could not be adopted as an accord, there were remarkable aspects that are worth mentioning. First, it had great support from an important group of countries (114 parties). Second, it incorporated a differentiation between developing countries. Indeed, the Copenhagen Accord establishes a new differentiation of

⁶³ See Bushey, et al., op. cit., p. 4.

⁶⁴ Nevertheless, the commitments addressed were not enough to limit temperature increases to the 2°C goal identified in the Accord.

⁶⁵ This is an eclectic arrangement of the Copenhagen Accord, after extensive discussion about whether NAMAs should be subject to a national or international MVR. See Arístegui, op.cit., p. 607.

⁶⁶ See Bodansky, op. cit., p.1.

countries into three categories: developed countries; developing countries in general, which “*will implement mitigation actions*”; and least developing countries (LDC) and small islands developing states (SIDS), which “*may undertake actions voluntarily and on the basis of support*”. Finally, it gave an important attention to developing countries emissions, including measuring, reporting and verifying developing countries mitigation actions, and financing mitigation and adaptation actions in developing countries⁶⁷. In my opinion, these represent the major reorientation of the climate change negotiation because, as we have seen, until this period the negotiations focused almost exclusively on emissions reductions by developed countries. For the first time, the major developing countries agreed to reflect their national emissions reduction pledges in an international instrument, to report on their GHG inventories and their mitigation actions⁶⁸. In this sense, the Copenhagen Accord addressed the principle of CBDR in a different way than the Kyoto Protocol, by setting up a three-tiered system for assigning responsibility to cut emissions: developed countries with quantified targets; developing countries who “will” take some action; and LDCs and SIDS, who “may” take action, contingent upon funding from the international community⁶⁹. I think that this is one of the most remarkable achievements of the Copenhagen Accord.

1.3.3. Durban Platform.

The Durban Platform for Enhanced Action was adopted by parties of the UNFCCC, in December 2011, which launched a new round of negotiations, aimed at developing a new binding instrument for the post-2020 period.

⁶⁷ See Bushey, et al., op. cit., p. 2.

⁶⁸ See Bodansky, op. cit., p. 10.

⁶⁹ See Bushey, et al., op. cit., p. 5.

At this point, the negotiation positions were the following⁷⁰:

- The European Union, supported by LDC and SIDS, sought a mandate to negotiate a new legally-binding instrument engaging all countries, as a condition for its agreement to a second commitment period under the Kyoto Protocol.
- United States insisted that it would accept a mandate to negotiate a new outcome of a legal nature that was symmetrical in its application to developing countries as well as developed countries.
- China said that it would accept legal commitments only for a post-2020 period
- India opposed to the EU's calls for a new legal-binding instrument.

Considering these positions, the Durban Platform decides “*to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action*”⁷¹. This Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) should start its work in the first half of 2012 and complete it as early as possible, but no later than 2015. After that, the Conference of Parties would be in conditions to adopt a protocol, legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of Parties. Accepting

⁷⁰ See Bodansky, D. (2012). *The Durban Platform Negotiations: Goals and Options*. Retrieved December 29, 2012, from Social Science Research Network database, p. 1.

⁷¹ See Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Decision -/CP.17, para 2.

the request of China, the Durban Platform establishes that the binding instrument mentioned in its paragraph 2 should come into effect and be implemented from 2020⁷². All these measures taken by the Durban Platform are known as the Durban Package.

It is interesting to note that the Durban Platform established the mandate to launch a process to develop a “protocol, legal instrument or an agreed outcome with legal force”. The legal nature of the instrument was not set up, and probably these alternatives will be matter of discussion in the future. Also, paragraph 2 states that this protocol, legal instrument or the agreed outcome adopted under the mandate of the Durban Platform should be applicable to all Parties. In my opinion, this is the most important statement of the declaration, as it seeks to create a legal instrument applicable to developed and developing countries, without establishing the radical differences that were indicated in the UNFCCC and the Kyoto Protocol. Certainly, this implies the most important shift in the conception of the principle of CBDR, since the beginning of the climate change regime process.

Some other remarkable points in the Durban Platform are:

- It makes no reference to the 2007 Bali Action Plan.
- Even when it states that the new legal instrument will be “*under the Convention*”, there is no explicit reference to the principle of CBDR and the principle of equity.

⁷² See Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Decision -/CP.17, para 4.

1.3.4. Doha Climate Change Conference.

The Decision 1/CMP.7, outcome of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, agreed on a second commitment period under the Kyoto Protocol until 2020, in March 2012. After that, in November 2012, the parties of the Doha Climate Change Conference adopted it as an amendment to the Kyoto Protocol. The Doha Amendment aims to facilitate implementation of the Protocol after the first commitment period and includes quantified emissions limitation or reduction commitments for the second commitment period for a number of Annex I Parties⁷³. It maintains the division between developed and developing countries, assigning mitigation obligations only to developed countries and not to developing countries, as the Kyoto Protocol did.

⁷³ See UNFCCC web page, <http://unfccc.int/2860.php#decisions>.

Chapter II: PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES: UNDERSTANDINGS AND FOUNDATIONS

2.1. Definitions and contents.

The principle of common but differentiated responsibilities (CBDR) has been developed from the application of equity in general international law. As an international environmental law principle, its function is basically to provide a framework for negotiating and implementing new and existing agreements, allowing countries which are in different positions with respect to specific environmental issues, to be treated differently⁷⁴.

The principle of CBDR, as an international environmental law principle, has two main elements: The first concerns the common responsibility of states for the protection of the environment, at the national, regional and global levels. The second concerns the need to consider differing circumstances, particularly in relation to each state's contribution to the creation of a particular environmental problem and its ability to prevent, reduce and control the threat⁷⁵. It is important to note that the word "responsibility" does not refer to the duty to repair that causes the commission of a wrongful act, but rather the sense of duty or obligation of the parties, which drives them to articulate specific rules within a system⁷⁶.

⁷⁴See Hunter, et al., op. cit., p. 464.

⁷⁵See Sands, et al., op. cit., p. 233-236.

⁷⁶See Arístegui, op. cit., p. 597.

The principle of CBDR is affirmed in various international instruments, for instance, the 1992 Río Declaration, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Long-Range Transboundary Air Pollution Convention (LRTAP), and, of course, the climate change instruments.

2.1.1. Common Responsibility.

The “common responsibility” consists of a shared interest, which results in common obligations for two or more states with the aim of preventing or solving a particular environmental problem that affects them, taking into account its relevant characteristics and nature, physical location and historic usage associated with it. Thus, common responsibility is possible to apply when the interest to prevent and solve the environmental problem implies certain risks that affect more than one nation, a region or the whole world, without boundary limits⁷⁷⁻⁷⁸. For this reason, the common responsibility has rooted in the principle of co- operation, whereby the states are obligated, in spirit of solidarity, to cooperate in preventing transboundary pollution⁷⁹.

In case of climate, this is a resource which is not property of a single state, on the contrary, it affects the whole world and, for that reason, its change is a matter of common concern and common responsibility of the international community. As it was mentioned in Chapter I of this research, the resolution 43/53 of UN General Assembly declares that “*climate change is a common*

⁷⁷See Sands et al., op. cit., p. 233-236.

⁷⁸Honkonen notes that the common responsibility involves the requirement of all states to take into account the needs of all members of the international community in developing and applying their policies and laws, which were previously thought to be solely a matter of domestic jurisdiction. In fact, the common responsibility implies to join and considerate the needs of others. See Honkonen, op.cit., p. 1-2.

⁷⁹ See Rajamani (2000), op. cit., p. 121.

concern of mankind, since climate is an essential condition which sustains life on earth". In the same sense, the Preamble of the UNFCCC establishes that *"change in the Earth's climate and its adverse effects are a common concern of humankind"*, adding 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"*.

In practical terms, the common obligations established in the climate change regime are, basically, to develop and update national inventories of emissions by sources and removals by sinks of GHG, formulate and implement national and regional programs to mitigate climate change, promote and cooperate in scientific, technological, socioeconomic and other research, and report⁸⁰⁻⁸¹.

2.1.2. Differentiated Responsibility.

Differentiated responsibility involves differentiation of commitments. This means that obligations are distributed taking into consideration some differentiated environmental standards, including special needs and circumstances, technological and economic development and historic contribution to causing an environmental problem⁸². Honkonen, citing Oran Young, described the differentiation element of the principle of CBDR saying that it is "to couple an acknowledgment that everyone bears some

⁸⁰Nevertheless, the contents of the information to be provided and the set time frames within which the reports must be produced are differentiated among countries.

⁸¹ See Honkonen, op. cit., p.131.

⁸²See Sands, et al, op. cit. p. 234-235.

responsibility for coping with large scale environmental problems with recognition of the fact that some members of international community are much better situated than others to provide the resources needed to address these problems”⁸³. Thus, the notion of differentiated responsibility derives from the different contributions of States and their different capacities to take remedial measures⁸⁴.

In case of the climate change regime, the distinction is made considering the different historical responsibilities and capabilities of industrialized countries and developing countries. As we have seen in previous pages, the first paragraph of the UNFCCC Article 3 establishes that “[t]he 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.**”⁸⁵

Thus, differentiated responsibility involves the establishment of different legal obligations of the country parties, in accordance with the criteria of differentiation state in the respective legal instrument. This is precisely the most contentious point of the principle of CBDR, in the context of the climate change regime. The International Law Association Committee provides an interesting analysis at this regard, noting that there is agreement on the existence of common responsibility and justice in the application of differentiated responsibilities, but there is no agreement on the criteria to make

⁸³ See Honkonen op. cit., p.2.

⁸⁴ See Rajamani (2000), op. cit., p.121.

⁸⁵ Emphasis added.

that differentiation. In the scope of the climate change regime, the disagreements are based on whether or not historical and per capita emissions are appropriate criteria for differentiation, and how commitments of developed countries to provide financial and technical assistance to developing countries relate to the principle of CBDR⁸⁶.

2.2. Role of the concept of Equity and Justice.

The philosophical basis for the principle of CBDR is the concept of justice and equity. In fact, the principle of CBDR seeks to compensate the differences between states through the application of principles of equity and fairness in the assignment of rights and obligations⁸⁷. Even when it is unclear what the extension of these notions with regard to this principle is, it is clear that equity and justice concerns are central to the global environmental debate⁸⁸, precisely because they represent the foundations of the burden sharing of many multilateral environmental agreements.

The Aristotle's classical definition of justice is "the unequal (proportional) treatment of unequals as much as the equal treatment for equals"⁸⁹. Meanwhile, Ulpian's definition of justice establishes that "it is the constant and unwavering determination to give unto each his due"⁹⁰. In the same sense, Aristotle defines special or particular justice like "acting so that each will have his own, treating equals equally and unequals unequally but in proportion to

⁸⁶ See Rajamani (2010), op. cit., p.15.

⁸⁷ See Honkonen op. cit., p. 82-83.

⁸⁸ Ibid., p.18.

⁸⁹ Rajamani (2010), op. cit., p. 22.

⁹⁰ Ibid.

their relevant differences”. Aristotle also acknowledges that finding appropriate criteria for differentiation is difficult⁹¹.

From the reading of these definitions, we see that proportionality is the key idea of the concept of justice. Aristotle noted that “what is just, then, is what is proportionate, and what is unjust is what is counter-proportionate”⁹². Nevertheless, the problem is to determine the right proportion in accordance with the different conditions or circumstances of the actors involved. Honkonen, citing Paul A. Freund, notes that: “proportionality requires that for some purposes differentiation must be made and requires that, when made, these be relevant to a legitimate avowed criterion, such as merit, need, contribution, or agreement”⁹³. Consequently, proportionality implies the existence of differences among the actors involved and a legitimate criterion to make that differentiation. This is an important consideration for the objective of this research, because the criterion of differentiation of the principle of CBDR, in the context of climate change regime, is being put into question. The importance of this subject lies in that “fairness increases the acceptability of a rule of policy, which may then increase its effectiveness”⁹⁴. This point is especially important in the international law arena, since the effectiveness of a rule mainly depends on its legitimacy. In international law, both legitimacy and justice induce parties toward voluntary compliance⁹⁵⁻⁹⁶.

⁹¹ See Honkonen op. cit., p. 11-12.

⁹² Ibid., p. 12.

⁹³ Ibid., p. 12-13.

⁹⁴ Ibid., p.22

⁹⁵ Ibid., p.91.

⁹⁶ It is important to note that it has been argued that the concept of justice is irrelevant to the international law system, because justice is not a tool for realizing the international law objectives. Honkonen, citing Cedric Grant, notes that the breadth on injustice prevailing at the national levels of countries makes difficult to translate domestic inequity into international equity. Ibid., p. 94.

It can be said that the concept of fairness or justice requires equity for proportional assignment of rights and obligations. In this case, the concept of equity pretends to compensate the inequalities among parties, which can be economic, social or environmental, usually combined with historical responsibilities⁹⁷.

Scholars and the ICJ jurisprudence have recognized three types of equity: equity *infra legem* (within the law), equity *praeter legem* (outside the law) and equity *contra legem* (contrary to the law)⁹⁸. Meanwhile, there are two meanings ascribed to equity in international environmental law:

- the equitable utilization of natural resources,
- the equitable cost-sharing in managing environmental concerns, especially in dealing damage or risk.⁹⁹

The latter is precisely one of the objectives of the principle of CBDR, as included in the climate change regime. As we have seen, Article 3 of the UNFCCC explicitly considers equity in the structure of the law, through the establishment of burden sharing according to the different responsibilities and capabilities of countries. There is no explanation about the form of application of equity, but the expression “accordingly” implies that this form is the role of developed countries taking the lead in climate change combat¹⁰⁰.

⁹⁷ See Honkonen *op. cit.*, p. 82-88.

⁹⁸ Rajamani (2010), *op. cit.*, p. 19.

⁹⁹ *Ibid.*, p.19-20.

¹⁰⁰ *Ibid.*, p.21

Rajamani notes that “equity, linked inextricably to the CBDRRC¹⁰¹ principle, could offer a substantive basis for burden sharing in the climate change regime. A better understanding of the various facets of equity that could potentially be engaged in the climate regime will lead to a better appreciation of the nature and limits of differential treatment in the climate regime an enduring site of conflict between countries”¹⁰². In the same sense, he adds that “if the ‘equality for equals and inequality for unequals’ notion were applied in the climate change regime, justice would require that the considerable differences between countries – the characteristics of developing countries, the inequalities in the international community, divergences in levels of economic development and unequal capacities to tackle a given problem – be taken into account in fashioning commitments under environmental treaty regimes”¹⁰³.

In my opinion, equity and justice are tools that have not been sufficiently used in the context of climate change negotiations and instruments, while the different conditions, capabilities and financial resources are not necessarily determined by the categorical differentiation between developed and developing countries. In addition, the UNFCCC and the Kyoto Protocol excludes commitments for developing countries and developed countries' commitments were not agreed through a methodical formula to set them up in proportion to their historical responsibility and capacities. Certainly, these circumstances are not consequent to the concepts of equity and justice, and it seems to respond to a political criterion, not to an equity criterion.

¹⁰¹ Principle of Common but Differentiated Responsibilities.

¹⁰² Rajamani (2010), *op. cit.*, p. 21.

¹⁰³ *Ibid.*, p. 23.

2.3. Role of the Precautionary Principle

The precautionary principle addresses how environmental decisions are made in the face of scientific uncertainty¹⁰⁴. This principle suggests that “regulation is required whenever there is a possible risk to health, safety or the environment, even if the supporting evidence is speculative and even if the economic costs of regulation are high”¹⁰⁵.

The precautionary principle is present in the UNFCCC, specifically in its Article 3 (3), which states that *“the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties”*. From this definition, it is possible to highlight some interesting considerations: first, there is an obligation to take action to prevent or minimize the causes and mitigate the effect of climate change, even when there is not a full scientific certainty. This means that a lack of decisive evidence of harm should not be a ground for refusing to regulate¹⁰⁶; second, it implies an efficiency criterion, since the policy actions should be “cost- effective” in preventing

¹⁰⁴Hunter, et al., op. cit., p. 478.

¹⁰⁵Rajamani (2010), op. cit., p. 27.

¹⁰⁶ibid., p. 26

environmental damage, which means to ensure global benefits at the lowest possible cost; and third, there is a consideration of the different socio-economic contexts in the obligation to take action to prevent or minimize the harmful effects of climate change. The principle of CBDR and its considerations of equity and justice may be present in this latter point. Indeed, the obligation to take action in case of threats of serious or irreversible damage may not be the same, because of the establishment of a differentiated criterion, which is the diverse socio-economic context. Nevertheless, the drafting of this article seems to be very vague, because there is not a clear explanation about the conditions when this principle is applied, there is not an establishment about the burden of proof, and moreover, there is no certainty about the legal status of precaution in the climate change regime, whether it is a principle or just an approach.

Now well, there are some interpretations of the precautionary principle that confront some criteria used under the principle of CBDR. In fact, Weisslitz states that the establishment of the precautionary principle is against the historical criterion of differentiation of the climate change regime. He says that the historical criterion, which implies the obligation of developed countries to remedy their past destructive behaviour, is opposed to a preventative approach to correcting the global warming problem, since it entails that efforts should “focus on potential for future harm as opposed to historical culpability”¹⁰⁷. He adds that “the precautionary principle establishes a duty of care in all potential polluters, requiring them to consider the

¹⁰⁷Weisslitz, M. (2002). Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context. *Colorado Journal of International Environmental Law and Policy*, 13, p. 491.

environmental impact of their actions with any practicable alternatives”¹⁰⁸. In my opinion, there are some interesting considerations in this point of view. In fact, the current problems of the climate change regime are related to the conflicts between developed and developing countries because of the burden sharing in each of its regulations, and especially because of historical criterion of responsibility. Thus, it has been lost sight of the ultimate goal, which is preventing and minimizing the harmful effects of the climate change over the Earth.

2.4. Interpretation and application of the principle of CBDR.

Generally speaking, there are three categories or types of legal norms in general international law: absolute, differential and contextual norms¹⁰⁹. Absolute norms provide identical treatment to all countries and do not require or permit consideration of factors¹¹⁰. The advantage of this type of norm is basically its easier administration. Meanwhile, differential norms take into account more than one type of interest, providing different standards for different groups of parties. These standards may be concretized through less demanding commitments for certain groups of countries, longer implementation periods, exceptions or treaty reservations. As it was mentioned, these norms are difficult to manage, and present major problems in determining the criteria for differentiation. Finally, contextual norms provide on their face identical treatment to all states affected but the application requires, or at least permits, consideration of characteristics that may vary from country to country. A good example of contextual norms is a treaty rule

¹⁰⁸ Ibid.

¹⁰⁹ Honkonen op. cit., p.113.

¹¹⁰ Ibid.

providing that the parties' burden have to be 'reasonable' or 'equitable'. To negotiate them is easier because of their lack of definition. However, it is difficult to ensure its compliance, because the vague criteria of differentiation¹¹¹.

In the following pages, I will try to define the interpretation and applications of the climate change regime regulations and other norms related to international environmental law, in order to better understand the problem that arises in this work and its possible solutions.

2.4.1. In the Climate Change Regime

Considering the above, the first question that it is necessary to make is related to the determination of the type of norm to be applied, in consideration to the final objectives of the climate change regime. Compliance with the ultimate goal should be the first feature to be taken into account in determining the type of standard to be set and how the obligations will be distributed. As we saw in previous pages, climate change is a problem that has its roots in the industrial revolution, in the nineteenth century, where human activity related to industry increased normal levels of GHG on the Earth, accelerating the normal process of global warming. This increase in globally averaged temperatures may have dire consequences for life on the planet as we know it. Because of these reasons, the international community became aware of the need for regulation to avoid this problem, if possible, and mitigate its harmful effects, enlivening

¹¹¹ Ibid.

the UNFCCC and all the climate change regulations¹¹². Now, considering this, it is worth asking if creating a differential type rule is consistent with the fulfilment of the ultimate goal of the climate change regime. Honkonen, referring to the Convention of Nuclear Safety, which main objective is to achieve and maintain a high level of nuclear safety worldwide¹¹³, notes that this convention has not differentiated norms, because “the issue being regulated is such that the purpose of the treaty would be defeated if concessions and exceptions are allowed to some parties”¹¹⁴. Is this the case of climate change? Compliance with the final goal and the application of the precautionary principle are some of the arguments that authors like Weisslitz have pointed out to say that is more appropriate to apply an absolute rule, not differential¹¹⁵. But, what happens to countries that have caused the problem? Are they equally responsible to those who have not contributed in the past?

As we have noted, developed countries have benefited disproportionately from their industrialization processes¹¹⁶. From this perspective, justice would demand that those who have benefited the most from the process that led to the creation of the problem bear an unequal burden for addressing the issue¹¹⁷. From this point of view, the application of different standards is legitimate, and this is the main argument to include a differentiated type of rule in the climate change regulations.

¹¹² At this point, the precautionary principle had an important role, since it established that regulation is required always when there is a possible risk to health, safety or the environment, even when the supportive evidence is speculative. See Rajamani (2010), *op. cit.*, p. 26-27.

¹¹³ See Article 1 (i) Convention of Nuclear Safety.

¹¹⁴ Honkonen, *op. cit.*, p. 114.

¹¹⁵ See Weisslitz, *op. cit.*, p. 473-509.

¹¹⁶ See Rajamani (2010), *op. cit.*, p. 22.

¹¹⁷ See Honkonen, *op. cit.*, p. 92-93.

Differentiation in state obligations has clearly been one of the key elements of several international environmental law regulations, and specially climate change regime.

The first approach to a concept of the principle of CBDR, in the context of the climate change regime, was in the Resolution 44/228 of the United Nations, in preparation for the 1992 Rio Conference, where it was stated that “the responsibility for containing, reducing and eliminating global environmental damage must be borne by the countries causing such damage, must be in relation to the damage caused and must be in accordance with their respective capabilities and responsibilities”¹¹⁸. This statement can be said to have laid down a foundation for CBDR under the international climate regime¹¹⁹.

After that, 1992 Río Declaration defines the concept of the principle of CBDR establishing in its Principle 7 that “*States shall co-operate 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*”¹²⁰. As we see, this principle was established attending to a notion of equity with clear differentiation between developed and developing countries, and assigning the leadership to developed countries. Meanwhile, the first report of the IPCC

¹¹⁸UNGA Res. 44/228 (1989), Preamble of the United Nations Conference on Environment and Development.

¹¹⁹Honkonen, op. cit., p.120.

¹²⁰ Emphases added.

(1990) made a clear reference to the historical responsibility of developed countries and the consequent responsibility and capacity to reduce emissions¹²¹.

In turn, the 1992 UNFCCC established in Article 3(1) that “*the parties should protect the climate system for the benefits of the 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*”. Again, it is clearly stated that the differentiation will be made between industrialized and developing countries, with emphasis in the special role and leadership of developed countries. It is also important to note that the UNFCCC, in its Preamble and Article 4(7), expressly recognized that economic and social development and poverty eradication are the first priorities of the developing country parties, not a particular environmental problem¹²².

The Berlin Mandate is another important milestone in the configuration of the principle of CBDR in the climate change context. In fact, the Berlin Mandate prescribed that the process for further negotiations on GHG emissions limitations after the UNFCCC should be guided by the legitimate needs of developing countries for economic growth and eradication of poverty on one hand, and the recognition that the largest share of historical and current global emissions originates in the industrial countries on the other¹²³. The special emphasis of the principle of CBDR in the UNFCCC and the Berlin Mandate

¹²¹Honkonen, op. cit., p.121.

¹²² Ibid., p. 93.

¹²³ Ibid., p.124

was probably the origin of the criteria used in the Kyoto Protocol, which totally excludes developing countries from any binding reduction obligations. In fact, under the Kyoto Protocol, developing countries are only committed to 'think about' making emissions reductions¹²⁴. Nevertheless, the three flexible mechanisms of the Kyoto Protocol - joint implementation (JI), clean development mechanism (CDM) and emission trading (ET) - can be regarded as a form of realizing CBDR, by engaging countries that in the current situation have no legally binding obligations for emissions reductions as such¹²⁵. In this way, it can be said that the flexible mechanisms promote in a better way the common concern that the climate change implies. However, flexible mechanisms were insufficient to get all industrial countries to accept the Protocol, because the binding obligations were still reserved exclusively to them.

From the reading of the clauses related to the principle of CBDR in the climate change regime, it is possible to conclude that the differentiation factors that have made the difference between developed and developing countries are essentially two: the criterion of historical responsibility of developed countries and the current economic and technological capabilities to address the problem of climate change.

The historical approach responds to the fact that developed countries have been major GHG emitters from the time of the Industrial Revolution, a fact that experts consider crucial to determining the severity of the problem.

¹²⁴ Ibid., p.126

¹²⁵ Honkonen, op. cit., p. 134-135.

Meanwhile, the criteria of economic and technological capabilities are defined by the current financial situation of the countries.

As we have seen, an important part of the disputes arising from the interpretation of the principle of CBDR are related to the application of the historical criterion of responsibility, in opposition to the current contribution to the climate change problem. In this regard, the views of scholars are divergent. For instance, Rajamani argues that the application of the historical criterion of responsibility respond to considerations of equity, since “the industrialized countries have benefited disproportionately from the industrialization process that led to the accumulation of greenhouse gases in the atmosphere, yet since the damage is universal, the cost are borne by everyone”¹²⁶. On the other hand, Weisslitz argues that the historical criterion of responsibility emphasizes a remedial, as opposed to a preventative approach, due to “developed countries must ‘remedy’ their past destructive behaviour, and developing nations should be given the same opportunity to exploit resources that developed states have enjoyed for so long”¹²⁷.

At this respect, we see that developed countries not only have a historical responsibility related to the climate change problem, but they also currently have technological and economic capacities to mitigate and solve this issue. In this context and in accordance with principles of equity and fairness, most of the obligations should be assigned to developed countries. However, the equation is not that simple. The rapid economic growth of large developing countries, like China, India, Brazil and South Africa, has brought them into

¹²⁶ Rajamani (2000), op. cit., p. 123.

¹²⁷ Weisslitz, op. cit., p.491.

the new list of big emitters of GHG. In fact, China has recently become the world's largest GHG emitter¹²⁸. However the criteria established in the foundations of the climate change regime do not provide the flexibility to assign them obligations that are consistent with their contribution to the problem. These countries do not have historical responsibilities, but they have economic and technological capabilities to face the climate change problem, and their contribution to this issue is bigger each day. Unfortunately, the principle of CBDR became the main argument of developing countries to avoid their obligations in the matter. Finally, the burden sharing is determined through political deliberations, and not considering the criteria of fairness and equity that inform the principle of CBDR.

2.4.2. In other Multilateral Environmental Agreements (MEAs).

The differentiation norms are not only a remarkable characteristic of the climate change regime. In fact, there are many MEAs that contain this kind of standards¹²⁹. In this item, I will mention two important MEAs and their experience in the interpretation and application of the principle of the CBDR.

2.4.2.1. Montreal Protocol

One important environmental treaty where the principle of CBDR is reflected is the Montreal Ozone Protocol. Even when it is not expressly mentioned, this

¹²⁸ Nevertheless, its emissions per capita remain significantly lower than most developed countries. See Bushey, et al., op. cit., p. 3.

¹²⁹ One example of a MEA that is not based in the principle of CBDR is the 1973 Convention on International Trade on Endangered species (CITES), which does not make a distinction between developed and developing country parties, since trade restrictions and other obligations apply to all parties equally. Nevertheless, this convention was negotiated in a period when the principle of CBDR and the differentiation norms had been not developed. See Honkonen, op. cit., p.113.

protocol was formulated recognizing the particular situation of developing countries and establishing some different treatment for them in the regime. In fact, the preamble of the Montreal Protocol establishes that parties are “*determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries (...)*”¹³⁰. The reference to an equitable control and the reference to the special development needs of developing countries reflect the intention to make a differentiated distribution of the obligations contained in the protocol, under equity considerations¹³¹.

Basically, the special consideration to the developing country parties was granted with:

- A ten- year grace period that temporarily excludes these countries from binding obligations to phase- out ozone depleting substances (ODS).
- The use of different base years that determine the phase- out commitments. Industrial countries have 1986 as the base-year. A developing country is allowed to use 'the average of its annual calculated level of consumption for the period of 1995-1997' for certain controlled substances and the average of its calculated level of consumption for the period 1998- 2000 for others as the basis for determining its compliance with the control measures.

¹³⁰ Emphasis added

¹³¹ See Honkonen, op. cit., p. 116.

- The establishment that parties that did not fall in the developing country category but had facilities for the production of the controlled substances under construction were allowed to complete the construction of such CFC plants. It's was a concession especially directed at countries with economies in transition.¹³²

The Montreal Protocol is an excellent example of differentiation norms that are applied in accordance with considerations of equity and fairness, taking into account the special characteristics and capabilities of the different country parties. Indeed, developing countries received a different treatment considering their particular circumstances, and this differentiation was made through the gradual application and different flexible formulas to calculate their commitments. The Montreal Protocol never excludes developing countries from binding obligations, which, in my opinion, is the great mistake of the climate change regime.

2.4.2.2. Acid Rain Regime

The Acid Rain Regime is an example where the principle of CBDR was applied gradually, through several international instruments. The first of them was the Long- Range Transboundary Air Pollution (LRTAP) Convention of 1979, where the principle of CBDR was not addressed. After that, the Protocol on Nitrogen Oxides of 1988 advanced towards the establishment of differentiation, stating that parties were allowed to choose another base- year for their reductions, but only following the requirements established in Article

¹³² Ibid., p. 114-118.

2 (1)¹³³. In the Volatile Organic Compound (VOC) Protocol of 1991 the advance in the application of the principle of CBDR was bigger. First, states were allowed to select in a more flexible way the base- year for their abatement efforts. And second, countries could choose between three sets of obligations: to adopt 30% cuts by 1999 using a base- year between 1984 and 1990; to realize 30% cuts in a 'Tropospheric Ozone Management Area (TOMA), that is, a specified region contributing to transboundary fluxes; and (for a class of lit emitters) to freeze emissions to their 1988 levels. After that, the second Sulphur Protocol of 1994 was especially advanced with regard to the principle of CBDR. In fact, this Protocol granted a longer period to achieve their emissions reductions, and included country- specific reduction targets that were based on the concept of critical loads, which implies geographical differentiation according to the vulnerability to acid deposition of each country's ecosystem¹³⁴.

Honkonen, citing Castells and Ravetz (2001), notes that the second Sulphur Protocol of 1994 has been described as making “a new milestone in the process by introducing a link between political will and economic rationality in environmental policy implementation”¹³⁵.

¹³³ Article 2 (1): *The Parties shall, as soon as possible and as a first step, take effective measures to control and/or reduce their national annual emissions of nitrogen oxides or their transboundary fluxes so that these, at the latest by 31 December 1994, do not exceed their national annual emissions of nitrogen oxides or transboundary fluxes of such emissions for the calendar year 1987 or any previous year to be specified upon signature of, or accession to, the Protocol, provided that in addition, with respect to any Party specifying such a previous year, its national average annual transboundary fluxes or national average annual emissions of nitrogen oxides for the period from 1 January 1987 to 1 January 1996 do not exceed its transboundary fluxes or national emissions for the calendar year 1987.*

¹³⁴ See Honkonen, op. cit., p. 137-139.

¹³⁵ Ibid.,p. 139.

As we see, in the Acid Rain Regime differentiation criteria are objective, since the rule provides a single criterion and election systems, within which countries can adapt according to their respective capabilities. Just as in the Montreal Protocol, the Acid Rain Regime does not exclude any country from any obligations, whether common or differentiated ones. In this way, the burden sharing is more according to equity and less according to political criteria.

FINAL NOTES AND CONCLUSIONS

It is undeniable that the principle of CBDR is of fundamental importance in the context of the climate change regime, since it forms the basis for the interpretation of existing obligations and the elaboration of future legal obligations within this regime¹³⁶. Moreover, some say that the climate change regime has so far been the most important regime within which that principle of CBDR has been discussed and applied¹³⁷. This is accurate as the principle of CBDR is the basis of the UNFCCC and the instrument that distributes the obligations contained in it, which is the Kyoto Protocol. The application of this principle, in the context of the climate change regime and other multilateral environmental agreements, respond not only to considerations of equity and justice, but also specialization and contextualization of the norms, that permits to assign responsibilities to the country parties in accordance with their respective responsibilities and capabilities¹³⁸. Nevertheless, the results of the application of this principle in the climate change regime have not been as good as expected.

As we have seen, the differentiation of commitments between developed and developing country parties, has created problems in the interpretation and application of the principle of CBDR, and has called into question the proper application of equity. In fact, the most controversial is the situation affecting large developing countries, like China, India, South Africa and Brazil, which

¹³⁶ See Rajamani (2010), *op. cit.*, p. 14.

¹³⁷ See Honkonen, *op. cit.*, p.338.

¹³⁸ *Ibid.*, p. 77-82.

now emit as much or more GHG than industrialized countries, benefiting today from their own industrialization processes and having no responsibilities associated to their current GHG emissions.

I think that an important part of the questions regarding the burden sharing in the climate change regime responds to a crisis of legitimacy of the criteria used to make the differentiation, all which results in a lack of effectiveness of the regulations. In fact, the principle of CBDR implies the application of considerations of equity and justice, but in this case, clearly the obligations have not been distributed equitably, in consideration to the respective capacities and responsibilities of countries. Unfortunately, in the context of the climate change regime, the principle of CBDR was conceived without attending proportionality criteria, and this situation not only affects justice and equity, also legitimacy and effectiveness. This aspect is of fundamental importance when it refers to international law, since lack of legitimacy and justice in the content of an international standard, will likely generate defaults or non-adherence by countries¹³⁹. Even though, the crisis of the climate change regulations are not only attributable to the questions about the legitimacy of the burden sharing. As we have seen in previous pages, the political and economic interests of the countries are an important part of this problem, since the negotiations are based basically in the pragmatism of the states, focused in the addressing of fewer responsibilities with the lower cost possible, instead of in the better fulfilment of the objectives purposed. This point of view only attends to a short term criterion, because in the long term, given the harmful consequences predicted, the cost of mitigation and adaptation measures will be much more than the cost to take these measures

¹³⁹ Ibid., p. 90-91.

today. Citing Hunter, Salzman and Zaelke, “the cost of mitigation may seem substantial with today’s technologies, but the costs of inaction are also high, and mitigating climate change will become cheaper as we learn and innovate”¹⁴⁰.

To summarize, I think that some of the specific problems that the principle of CBDR has in the context of the climate change regime are the followings:

- The differentiation between industrialized and developing countries not necessarily responds to considerations of equity and justice in the distribution of obligations to solve an environmental problem. In this case, the burden sharing is not proportional to the historical and current responsibilities and respective capabilities of the country parties. In fact, as we have noted in previous pages, proportionality implies the existence of differences among the actors involved and it necessarily requires a legitimate criterion of differentiation. In this case, climate change instruments do not have a legitimate criterion of differentiation, since large developing country parties have been excluded from the specific commitments, despite their economic and technological capabilities to face this problem. The differentiation criterion has been established responding to political considerations, not juridical.
- The criterion of differentiation is not clearly established. The lack of clarity occurs precisely because the differentiation responds to political considerations and not legal¹⁴¹. This situation creates problems of legal uncertainty. In addition, the criterion of differentiation is not flexible

¹⁴⁰ Hunter, et al., op. cit., p.641.

¹⁴¹ On this point, Honkonen notes that the lack of clarity affects not only the parties, but also those countries seeking to take part in the future. See Honkonen, op. cit., p. 339.

enough. In fact, the context that creates these differences may change over the years, and those changes can generate situations of injustice and inequity if the norm does not contemplate this possibility¹⁴². In my opinion, the differentiation criterion has to be clear, flexible and it should be treated as temporary.

- Differentiation should never imply not to assign duties to a certain type of parties. In fact, the common responsibility implies that all the parties must undertake commitments, always considering their respective responsibilities and capabilities. On this point, it is important to include assistance mechanisms for small developing countries to meet their duties, and they always should assume the obligation to modify their development patterns as far as possible in order to achieve the objectives of the agreement. In this sense, it is not legitimate to point out that the goal of development permits developing countries to not address the targets imposed.
- Within the objective criteria of differentiation, I think climate change instruments should include other variables besides the net GHG emission levels of each country. Among them, per capita GHG emissions. Indeed, many countries that currently do not have high net GHG emissions, do have high per capita GHG emissions. In my opinion, this must mean a warning to the international community. A country with high per capita level of emissions is an indicator that shows that the inhabitants of that country have living standards that may promote GHG emissions. Consequently, and under the precautionary

¹⁴² For instance, it can be named the situation of developing countries with increasing economic growth, which involves higher net GHG emissions or higher per capita GHG emissions. In these circumstances, those countries would be able to make specific commitments related to climate change because of their associated responsibility and their economic and technological capabilities, closer to that of developed countries.

principle and fairness/proportionality criteria of differentiation, I believe that this approach should be incorporated¹⁴³.

In conclusion, I think that the principle of CBDR involves establishing an element of the rule of law which creates difficulties for the process of creation, interpretation and application of an agreement, because it concretizes the establishment of differentiated commitments for each of the parties by reason of their associated liability. Well now, this element, although complex, responds to one of the founding principles of any rule of law, which is justice. This seems to be reason enough to give effect to the principle of CBDR, which involves not only the assignment of differentiated commitments, but also common commitments, solidarity and cooperation among countries. In fact, we must remember that the principle of CBDR not only deals with differentiation of responsibilities, but also common responsibilities. This common responsibility, as the preamble of the UNFCCC says, means reaching the ultimate goal based on cooperation and solidarity among countries. Without the common element, it is not possible to reach the final objectives. The challenge is to create a differentiation criterion that responds to considerations of equity that the principle of CBDR requires, without forgetting the meaning of the rule, its ultimate goal, which is matter of common concern.

In case of climate change regulations, reaching the agreements that are necessary to achieve its major objective requires the political will of the

¹⁴³ The incorporation of per capita GHG emissions within the criteria of differentiation has been discussed numerous times. However, there is a considerable resistance to this idea in the negotiations. See Rajamani, L. (2012). *Sofia Conference: The Legal Principles Relating to Climate Change*. Retrieved November 14th, 2012, from International Law Association Committee Web site: www.ila-hq.org, p. 11.

countries, in order to progress in the generation of legal and binding rules that incorporate major and more specific commitments to developed and developing countries, based on objective parameters, such as GHG emission levels each of the countries currently generate, and a subjective criterion that considers the historical responsibilities associated with the problem of climate change. In my opinion, the most urgent measure is to amend the Kyoto Protocol, by incorporating an Annex C, which includes commitments from major developing country parties, in accordance with their net GHG emissions, per country, and their per capita emissions. In order to safeguard the principle of equity and maintain the differences between developed and developing countries, it may be possible to apply the formulated grace period established by the Montreal Protocol, which has been successful until now.

Certainly, the task is not easy and its realization requires political commitment of countries, which until now seems to have not been enough.

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