ROOTING THE CONCEPT OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN ESTABLISHED PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

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INTRODUCTION

We all live on the same planet. And climate change is real, dangerous, and imminent.[1] We now know with near certainty that anthropogenic greenhouse gas ("GHG") emissions are primarily to blame.[2] Accordingly, our efforts to mitigate the detrimental impacts of climate change have focused mainly on reducing GHG emissions.[3] Our *de facto* global goal has been to keep the increase in the planet's temperatures below two degrees Celsius—beyond which change, a dangerous impact on humans is expected.[4] However, all international attempts to date have fallen short of securing a path toward limiting global temperatures below the two degrees goal.[5]

At the core of the problem is the concept of "common but differentiated responsibilities" ("CBDR").[6] CBDR recognizes that climate change is a global phenomenon that warrants a global resolution, but that the allocation of responsibilities should differ depending on the capacity and historical contribution of each state.[7] It is widely used in international climate instruments and negotiations.[8] There has been considerable debate over the definition and scope of CBDR.[9] Particularly, the current climate regime allows emerging mega-economies such as China to continue polluting GHGs without legally binding reduction commitments.[10] This is because

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1. The effects of climate change are already being felt with measurable rising global temperatures, sea level rise, increased frequency of extreme weather events, and melting of Artic summer sea ice. *Global Climate Dashboard*, NOAA, https://perma.cc/ET6A-VS7T (last visited Oct. 3, 2015).

2. *See* John Cook et al., *Quantifying the Consensus on Anthropologic Global Warming in Scientific Literature*, 8 ENVTL. RES. LETTERS 1, 3 (2013) ("[A]mong abstracts that expressed a position on AGW, 97.1% endorsed the scientific consensus. Among scientists who expressed a position on AGW in their abstract, 98.4% endorsed the consensus.").

3. Ottmar Edenhofer et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE 4–6 (Cambridge Univ. Press 2014).

4. David G. Victor et al., *Introductory Chapter*, *in* CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE, *supra* note 3, at 113.

5. *See id.* ("[T]he current trajectory of global annual and cumulative emissions of GHGs is inconsistent with widely discussed goals of limiting global warming at 1.5 to 2 degrees Celsius above the pre-industrial level.").

6. Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 Am. J. Int'l L. 276, 280 (Apr. 2004).

7. TUULA HONKONEN, THE COMMON BUT DIFFERENTIATED RESPONSIBILITY PRINCIPLE IN MULTILATERAL ENVIRONMENTAL AGREEMENTS: REGULATORY AND POLICY ASPECTS 1 (Kurt Deketelaere ed., 2009).

8. *Id.*

9. *See*, *e.g.*, Stone, *supra* note 6, at 277–80 (arguing that CBDR is the main cause for stalemate in climate negotiations).

10. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22 art. 3 ¶ 1 [hereinafter Kyoto Protocol] (requiring only Annex I countries to reduce GHG emissions; China is not an Annex I party).

CBDR as currently applied in the latest binding instrument, the Kyoto Protocol, effectively exempts all developing countries from binding commitments to reduce GHGs.[11] Despite now being the world's largest GHG emitter, China justifies its unrestricted actions by pointing to the historical responsibility of the developed world in causing the current climate crisis.[12] Accordingly, China and other large emerging economies remain steadfast in arguing that the developed nations should shoulder the burden of mitigating climate change.[13] This historical contribution argument seems to have an appeal to equity at first glance.

However, it opens up the question: equitable to whom? In the context of interpreting CBDR, the definition of equity seems to depend on which country applies the term. China and other developing countries can point to historic contributions. However, the U.S. and other developed countries can point to the unfairness of having their mitigation efforts mooted by increased emissions from China and other developing countries. Thus, the fight over defining CBDR is really a fight over defining equity.

The purpose of this paper is to argue that CBDR should be defined by already established principles of international environmental law that are similarly rooted in equity. Part I provides an overview of CBDR's origin and development in international climate agreements. Part II examines existing and more established principles of international environmental law and argues that these principles set natural boundaries to any interpretation of CBDR. These principles include intergenerational equity, intragenerational equity, the precautionary principle, sustainable development, polluter pays, and state responsibility. Part III discusses what commentators expect in the upcoming 2015 Paris Conference of the Parties. It also provides recommendations that the parties should consider when negotiating a new climate agreement.

I. OVERVIEW OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN INTERNATIONAL ENVIRONMENTAL LAW

A. General Background

11. *Id.*

12. PIETER PAUW ET AL., DIFFERENT PERSPECTIVES ON DIFFERENTIATED RESPONSIBILITIES: A STATE-OF-THE-ART REVIEW OF THE NOTION OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN INTERNATIONAL NEGOTIATIONS, GERMAN DEVELOPMENT INSTITUTE 23–24 (June 2014).

13. *Id.*

The concept of CBDR, as applied in international environmental law, can be broken down into two main parts.[14] First, the word "common" requires that all states participate in addressing climate change because climate change is a global problem that requires a global solution.[15] Second, the words "differentiated responsibility" refer to the idea that states should have differing obligations in addressing climate change depending on their capacity, historical contribution to climate change, and prospective developmental objectives.[16]

The concept of differential treatment of states has long existed in international instruments.[17] However, the United Nations Framework Convention on Climate Change ("FCCC" or "Convention") first adopted the express term "common but differentiated responsibilities" in 1992.[18] Article 3(1) of the Convention states that "the Parties should protect the climate system . . . on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[19] Accordingly, subsequent multilateral agreements under the Convention have consistently adopted differentiating state obligations.[20] Most notably, the Kyoto Protocol of 1997 to the FCCC prescribed legally binding GHG emission reductions for Annex I parties (developed countries), but non-Annex I parties were not subject to reductions.[21] This dichotomy has been very controversial because it does not regulate sizeable, emerging (but still "developing") economies such as Brazil, South Africa, India, and China (collectively referred to as "BASIC")—all of which are now among the world's largest GHG polluters.[22]

The difficulty in addressing climate change under the current regime is clear: any legally required efforts by developed countries to reduce GHG emissions has a great chance of being offset by the quickly increasing GHG emissions of unregulated developing countries.[23] This obvious failure of the international climate regime in addressing climate change has called into question the utility and legitimacy of CBDR as a core and guiding principle

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14. HONKONEN, *supra* note 7.
15. *Id.*
16. *Id.*
17. *See*, *e.g.*, Constitution of the Int'l Labour Org. [ILO] art. 427, 49 Stat. 2712, 2733–34 (Jun. 28, 1919) ("[D]ifferences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment.").
18. United Nations Framework Convention on Climate Change, June 4, 1992, 31 ILM 849 [hereinafter FCCC].
19. *Id.* at art. 3(1).
20. *See* Kyoto Protocol, *supra* note 10, at art. 3 (requiring only Annex I countries to reduce GHG emissions).
21. *Id.* at art. 3 ¶ 1.
22. PAUW, *supra* note 12, at 17–29.
23. *Id.*

in climate agreements.[24] However, some argue that CBDR is arguably a sound principle that the international climate community has failed to apply correctly.[25]

B. The CBDR Continuum

CBDR is not self-defining and is open to various interpretations. As such, it is useful to think about CBDR as a continuum. At one end is "common responsibility."[26] The most extreme reading of common responsibility is allocating quantifiably equal obligations on all parties because the issue of climate change is a common problem that affects us all. An international scheme under this reading might require that all countries, regardless of capacity, historic responsibility, or size, reduce GHG emissions by twenty percent by 2020.[27] The fairness concerns are obvious. X, a large industrialized country, may have a greater capacity to address climate change than Y, a small underdeveloped island country. Perhaps, X also contributed the most to the problem, and it would be unfair for X and Y to contribute equally to resolving a problem caused primarily by X.

At the other end of the spectrum is "differentiated responsibility." The idea of differentiated responsibilities is a form of distributive justice, which in the context of climate change mitigation allocates the costs of GHG emission reductions based on fairness.[28] The most extreme reading of differentiated responsibility is a black and white view of responsibility allocation: X does everything; Y does nothing. The Kyoto Protocol reflects this interpretation.[29] The fairness concerns here are not as obvious as the situation created by an extreme common responsibility approach. It seems perfectly reasonable and fair to say that since X caused the problem, X should clean it up. This rationale stems from corrective justice, which "is the idea that liability rectifies the injustice inflicted by one person on

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24. Stone, *supra* note 6.

25. *See generally* Mary J. Bortscheller, *Equitable but Ineffective: How the Principle of Common But Differentiated Responsibilites Hobbles the Global Fight Against Climate Change*, 10 SUSTAINABLE DEV. L. & POL'Y 49 (2010) (advocating for a revised interpretation of CBDR that includes China in a binding emissions reductions scheme).

26. Stone, *supra* note 6.

27. Stone, *supra* note 6, at 277.

28. *See* Lukas H. Meyer & Dominic Roser, *Distributive Justice and Climate Change: The Allocation of Emissions Rights*, 28 ANALYSE & KRITIK 223, 246 (2006) (explaining that assigning less emissions rights to developed countries and more emissions rights to developing countries is fair because historically developed countries have already benefited from emissions).

29. *See* Kyoto Protocol, *supra* note 10, at art. 3–4, (highlighting that one country may hold more responsibility than others).

another."[30] However, placing no limitations on Y can lead to the perverse outcome of Y becoming the primary polluter.

The difficulty in climate policy is to find an interpretation of CBDR that falls somewhere in the middle of the continuum: a definition that acknowledges differentiating responsibilities while recognizing that it is in everyone's best interest to effectively address climate change as best as they can—a truly global effort. Finding that middle ground, however, is not new in international environmental law. The success of the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol")[31] illustrates this point and provides some useful lessons.[32] The Montreal Protocol and the Vienna Convention set into motion the phase out of chlorofluorocarbons ("CFCs") production.[33] The Montreal Protocol does not expressly mention CBDR but does have differentiating treatment of obligations. For example, it gives developing countries a ten-year grace period for compliance if their per capita consumption of ozone-depleting substances is below a prescribed level.[34] Once a country achieves a certain level of development, it no longer qualifies for special treatment.[35] This type of evolving responsibility does not exist in the Kyoto Protocol.[36]

C. Kyoto's Dichotomy and Controversy

30. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002).

31. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, T.I.A.S. No. 11,097, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol].

32. *See generally* Mario J. Molina & F.S. Rowland, *Stratospheric Sink for Chlorofluoromethanes: Chlorine Atomc-atalysed Destruction of Ozone*, 249 NATURE 810, 810 (1974) (discussing a theory that chlorofluorocarbons ("CFCs"—commonly used to manufacture aerosol sprays, as refrigerants, and solvents—were depleting the stratospheric ozone layer). The stratospheric ozone layer protects Earth's inhabitants from the sun's harmful ultraviolet radiation ("UV-B") the depletion of which can cause serious implications on human and animal health, agriculture, and the ecosystem from increased UV-B exposure. Richard Eilliot Benedick, *The Improbable Montreal Protocol: Science, Diplomacy and Defending the Ozone Layer*, RESEARCHGATE.NET 2 (2004), https://perma.cc/5VDN-JL34. In response to these alarming findings, forty-three nations (including 16 developing countries) convened in 1985 and established the Vienna Convention for the Protection of the Ozone Layer ("Vienna Convention"); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293 [hereinafter Vienna Convention] (focusing on researching the issue and collecting data, and set the foundation for which future protocols requiring action would be negotiated under); Montreal Protocol, *supra* note 31.

33. Vienna Convention, *supra* note 32, at arts. 6–10.

34. Montreal Protocol, *supra* note 31, at art. 5(1).

35. *Id.* at art. 5(2).

36. Susan Biniaz, *Common but Differentiated Responsibilities*, 96 AM. SOC'Y INT'L LAW PROCEEDINGS 358, 359 (2002).

The signing of the Kyoto Protocol marked the beginning of the controversial dichotomy between developed and developing countries[37]—a distinction that has given rise to numerous critiques questioning the utility of CBDR in guiding climate negotiations.[38] Susan Biniaz, a Deputy Legal Advisor with the Office of International Affairs at the U.S. State Department, opines that CBDR is "not necessary, and it is not helpful."[39] She points out that many other agreements, such as the Montreal Protocol, incorporated differentiated commitments without depending on such a principle.[40] Biniaz explains that this "so-called principle" has not been helpful because "(1) There is no agreement on what it means; (2) there is no agreement on when it applies; (3) it is over-argued; and (4) it breeds laziness in the negotiating process."[41] Other commentators have called for the reinterpretation of CBDR that more accurately reflects current realities regarding GHG emissions.[42]

The general idea of differentiating responsibilities seems uncontroversial. However, a climate regime based on a guiding concept of differentiating responsibilities, but is ineffective at actually lowering GHG emissions can be controversial; especially if that regime does not include binding commitments from the world's two largest GHG emitters.[43] With a rapidly growing economy, China recently surpassed the United States as the world's largest GHG emitter.[44] The United States remains the largest historical contributor of GHG emissions.[45] As noted above, the dichotomy created by the Kyoto Protocol allowed China, a developing nation, to escape signing onto binding commitments to reduce GHG emissions.[46]

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37. *See* Kyoto Protocol, *supra* note 10, at art. 3 (showing only Annex I or developed countries were required to reduce GHG emissions).

38. *See*, *e.g.*, Biniaz, *supra* note 36, at 361 ("[T]he CDR principle is not necessary, and it is not helpful."); *see generally* Stone, *supra* note 6, at 277 (arguing CBDR creates an arbitrary distinction).

39. Biniaz, *supra* note 36, at 361.

40. *Id.*

41. *Id.*

42. *See*, *e.g.*, Bortscheller, *supra* note 25, at 52–53 (advocating for "[a] new category for high-emitting, emerging economies"); Anita M. Halvorssen, *Common, but Differentiated Commitments in the Future Climate Change Regime—Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 247, 258–63 (2007) (proposing a new "Annex C" that would include parties such as China, India, and Brazil, with legally binding commitments with a delayed commencement period).

43. Fiona Harvey, *China and US Hold the Key to a New Global Climate Deal*, GUARDIAN (Dec. 12, 2012), http://perma.cc/5733-GQZN (indicating that China's and the United States's failure to sign the Kyoto Protocal made it difficult to solve greenhouse gas emission issues).

44. PAUW ET AL., *supra* note 12, at 23.

45. *Id.* at 27.

46. Kyoto Protocol, *supra* note 10.

As a result, the United States did not ratify the Kyoto Protocol, even though they were a party to the Convention.[47] In July 1997, the United States Senate adopted Senate Resolution 98 ("SR-98"), also known as the Byrd-Hagel Resolution, which formally declined ratification.[48] SR-98 provides that "the exemption for Developing Country Parties is inconsistent with the need for global action on climate change and is environmentally flawed."[49] The Resolution further states that the Senate will not ratify any Protocol under the FCCC "unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period."[50]

SR-98 seems like a repudiation of CBDR by the United States. However, as Professor Paul Harris points out, it is likely just another interpretation of CBDR, "albeit a less robust one than the developing countries wanted."[51] To support his thesis, Professor Harris recounts several statements made by senators.[52] For example, Senator Joseph Lieberman stated: "New commitments by developing countries regarding their performance under the [FCCC], of course, need to be consistent with their historic responsibility for the problem, as well as their current capabilities."[53]

The United States position on CBDR seems to fall toward the middle of the CBDR continuum.[54] It recognizes that developing countries need more time to comply with the mandates of the convention but also recognizes that they eventually need to take on legally binding commitments.[55] Nevertheless, the Kyoto Protocol did not adopt this interpretation. Instead, the dichotomy between developed and developing countries remains the only international climate instrument that legally reflects CBDR.

D. Post-Kyoto Developments: Moving Away from the Developed-Developing Countries Dichotomy

To date, the Kyoto Protocol remains the only legally binding instrument created under the FCCC. However, several subsequent Conferences of the

47. *See* Paul G. Harris, *Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27, 36–42 (1999).
48. S. Res. 98, 105th Cong. (1997) (enacted).
49. *Id.* ¶ 10.
50. *Id.* ¶ 15 § 1(A).
51. Harris, *supra* note 47, at 41–42.
52. *Id.* at 38–40.
53. *Id.* at 40.
54. PAUW ET AL., *supra* note 12, at 29.
55. Bali Action Plan, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

Parties ("COP") have resulted in non-binding multilateral climate agreements that hint at a changing interpretation and understanding of CBDR. These agreements move away from the hard dichotomy between developed and developing nations and toward a more inclusive responsibility-for-all approach to GHG emissions reductions.[56]

In 2007, the parties adopted the Bali Action Plan.[57] The Plan calls on all parties—both developed and developing—to implement "nationally appropriate mitigation actions" voluntarily.[58] Developed countries are to implement "[m]easurable, reportable and verifiable" actions related to emissions reductions, while developing countries are to adopt actions supporting sustainable development.[59] The Bali Action Plan arguably erodes the Kyoto Protocol's notion of CBDR by subjecting both developed and developing countries to requirements under the umbrella of "nationally appropriate mitigation actions."[60]

In 2009, a subset of the parties produced the Copenhagen Accord.[61] Because only a subset signed onto it, however, it has no legal standing in the FCCC process.[62] Nevertheless, under the Accord, developed countries voluntarily commit to GHG emission reductions targets and developing countries commit to undertake mitigation actions.[63] The Accord facilitates a system of making voluntary pledges to reduce GHG emissions.[64] Many countries, including developing ones such as Brazil and China, have made voluntary pledges under the Accord.[65] Although it was significant that developing nations departed from the Kyoto Protocol and made pledges to

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56. *See generally* Lavanya Rajamani, *Differentiation in the Emerging Climate Regime*, 14 THEORETICAL INQUIRIES L. 151, 152 (2013) (arguing that the Kyoto Protocol's interpretation of CBDR is eroding through soft law instruments).

57. United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties held in Bali, Indon. from 3 to 15 December 2007*, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter Bali Action Plan].

58. *Id.* ¶ 1(b)(i)–(ii).

59. *Id.*

60. Rajamani, *supra* note 56, at 156.

61. United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Addendum, Part Two: Action Taken by the Conference of Parties at its Fifteenth Session*, *Decision 2/CP.15: Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1, Mar. 30, 2010, http://perma.cc/4HUE-5JDH [hereinafter Copenhagen Accord]; *see also* Rajamani, *supra* note 56, at 159 (discussing that because the Accord was rejected by several parties, it "has no formal legal standing in the UNFCCC process").

62. FCCC, *supra* note 18, art. 15 (stating that the FCCC requires to formally adopt a decision); *see* Rajamani, *supra* note 56, at 159 (discussing that because there were objections to the Accord, the consensus agreement was not satisfied); *Copenhagen Accord*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://perma.cc/W295-659M (last visited Sept. 9, 2015).

63. Copenhagen Accord, *supra* note 61, ¶ 4–5.

64. *Id.*

65. *Who's On Board With The Copenhagen Accord?*, U.S. CLIMATE ACTION NETWORK, http://perma.cc/9MGN-YX8R (last visited Mar. 27, 2015).

reduce GHG emissions, it is important to note that the pledged reductions would fall short of meeting the two degrees Celsius goal, even assuming they are all properly and dutifully executed.[66] Nevertheless, the fact that several developing nations even *made* pledges suggests that the meaning of CBDR might be changing.[67]

In 2010, the parties effectively adopted the negotiation outcomes of Copenhagen, under the FCCC process in the Cancun Agreements.[68] The Cancun Agreements, like the Accord, "permit self-selection of mitigation targets and actions and auto-listing by Parties, thereby endorsing differentiation for all rather than differentiation for developing countries."[69]

In 2011, the COP launched the Durban Platform for Enhanced Action.[70] The Platform serves as "a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties."[71] The Ad Hoc Working Group, who will execute the Platform, has until December 2015 to complete its work in order to adopt a protocol in Paris.[72] The most significant feature of the Durban Platform decision is that it does not refer to CBDR or equity.[73] This was likely a deliberate omission.[74] However, the Platform recognizes that "fulfilling the ultimate objective of the Convention will require strengthening of the multilateral, rules-based regime *under the Convention*."[75] Including this in the text "implicitly engag[es] [the Convention's] principles, including the principle of common but differentiated responsibilities."[76]

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66. *The Emissions Gap Report: A UNEP Synthesis Report*, U.N. ENV'T PROGRAMME (Nov. 2013).

67. Rajamani, *supra* note 56, at 159–60.

68. United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010*, U.N. Doc. FCCC/CP/2010/7/Add.1 § IV (Mar.15, 2011), http://perma.cc/4GR4-SEAE.

69. Rajamani, *supra* note 56, at 161–63.

70. United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Seventeenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Seventeenth Session, Decision 1/CP.17: Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2011) [hereinafter Durban Platform].

71. *Id.* ¶ 2.

72. *Id.* ¶ 4.

73. Rajamani, *supra* note 56, at 164–65.

74. *Id.*

75. Durban Platform, *supra* note 70, at Preamble ¶ 3 (emphasis added).

76. Rajamani, *supra* note 56, at 164–65.

CBDR's disappearance was short lived. In 2012, the COP met in Doha and agreed on a timetable to adopt a universal climate agreement by 2015.[77] The very first sub-heading states that the Parties have "[a] shared vision for long-term cooperative action, including a long-term global goal for emission reductions, to achieve the ultimate objective of the Convention, in particular the principle of common but differentiated responsibilities and respective capabilities, and taking into account social and economic conditions and other relevant factors."[78] Doha made it appear that CBDR was here to stay.[79]

In November 2014, President Obama and President Xi Jinping of China signed the U.S.-China Joint Announcement on Climate Change.[80] The Announcement lays out the respective post-2020 actions that each party intends to take.[81] The United States intends to reduce GHG emissions, and China intends to try to peak its CO2 emissions by 2030 or earlier.[82] The interesting component of this Announcement is that it includes CBDR. The Announcement states that the United States and China "are committed to reaching an ambitious 2015 agreement that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances."[83] This might suggest that the United States is willing to implement CBDR in future climate instruments, so long as it is used in a manner that includes binding responsibilities for all parties. The Announcement may further signal China's willingness to move away from the Kyoto dichotomy and to entertain a revised interpretation of CBDR—although China zealously advocated for the dichotomy in the past.[84]

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77. United Nations Framework Convention on Climate Change, *Report on the Conference of the Parties on its Eighteenth Session, Held in Doha from 26 November to 8 December 2012*, U.N. Doc. A/CP18/8/Add.1 ¶ 3 (Aug. 8, 2015).

78. *Id.*; *United Nations Framework Convention on Climate Change, Status of the Doha Amendment*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://perma.cc/TWK2-2ULX (last visited Aug. 30, 2015) (stating how the Parties also agreed to amend the Kyoto Protocol to extend the second commitment period to end in 2020).

79. United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013,* U.N. Doc A./CP19/10/Add.2 ¶ 3 (Jan. 31, 2014) (noting that the Parties reconvened in Warsaw in 2013 to continue pursuing Durban Platform and strongly encouraged parties to ramp up domestic preparations for their intended nationally determined contributions).

80. *U.S.-China Joint Announcement on Climate*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Nov. 11, 2014) https://perma.cc/ZHL3-YMLX.

81. *Id.* ¶ 3.

82. *Id.*

83. *Id.* ¶ 2.

84. United Nations Framework Convention on Climate Change, *Lima Call for Climate Action*, U.N. Doc. Decision -/CP.20, (advance unedited version Dec. 2014).

Interestingly, in following month, the COP drafted the Lima Call for Climate Action ("Lima") that used almost identical language to that used in the U.S.-China Announcement in reference to CBDR.[85] In Lima, the COP "[u]nderscore[d] its commitment to reaching an ambitious agreement in 2015 that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances."[86] Accordingly, Lima calls on all parties to submit their "intended nationally determined contributions" voluntarily, (pledges to reduce GHG and/or act on climate) in anticipation of their next meeting in Paris in 2015.[87] On March 31, 2015, the United States submitted its pledge, which was identical to that made in the U.S-China Announcement.[88] As of April 1, 2015, China and the rest of the BASIC countries have yet to submit pledges.[89] What is interesting, however, is that Mexico and Gabon, two non-Annex I countries (developing countries), have submitted pledges. Both of these pledges contain commitments to reduce GHGs.[90]

CBDR seems to be an integral part of climate negotiations and agreements. Despite its occasional absence in COP documents, CBDR is likely here to stay and will probably reappear in some form in Paris 2015, where the Parties are set to hammer out a new climate deal that will hopefully be ambitious enough to stabilize the planet's climate.

II. INTERPRETING CBDR IN HARMONY WITH WELL-ESTABLISHED INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES OF EQUITY

As the preceding Part discusses, we may see a gradual shift in the use of CBDR in climate negotiations. It may move away from the Kyoto dichotomy, toward a more balanced interpretation that imposes responsibilities on all parties. This Part analyzes CBDR in light of other principles of international environmental law. It argues that established principles that similarly pursue equitable considerations should define CBDR. This will set limitations on interpretation and may prevent states from using principles as political tools to advance their self-interested goals, and promotes using CBDR to implement equity in climate instruments.

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85. United Nations Framework Convention on Climate Change, *Lima Call for Climate Action* (advanced unedited version Dec. 2014), https://perma.cc/UAB8-VFAA [hereinafter Lima].

86. *Id.* ¶ 3.

87. *Id.* ¶ 9–16.

88. *INDCs as Communicated by Parties*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://perma.cc/DQZ3-9QS7?type=image (last updated Aug. 8, 2015, 4:11 PM).

89. *Id.*

90. *Id.*

A. Background on Principles of International Environmental Law

International environmental law is a "system of norms."[91] Norms generally refer to "a community standard that aims to guide or influence behavior—traditionally, the behavior of states, but also, more recently, the behavior of institutions and private actors."[92] International instruments reflect these community standards that can come in the form of "hard law" or "soft law."[93] Hard law has legally binding force and includes instruments such as treaties and customs.[94] Both the FCCC and its implementing instrument, the Kyoto Protocol, are examples of legally binding treaties.[95]

"Soft law" refers to non-binding international instruments such as resolutions, declarations, statements, principles, objectives, guidelines, declaration of principles, action plans—and pretty much everything else not considered "hard law."[96] Soft law performs an important gap-filling function where hard law fails to extend, and is sometimes used to provide a reason for action.[97] All other multi-lateral and bi-lateral climate agreements made after the Kyoto Protocol are examples of non-binding soft law.[98]

Non-binding soft law sometimes becomes binding hard law. Customary law is an example of this process. It is "generated through the regular practice of states, engaged in out of a sense of legal obligation."[99] This paper does not discuss customs.

This paper is about principles, a type of soft law. Principles, unlike binding rules of law, generally "express a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence."[100]

People often use principles to interpret hard law instruments.[101] Sometimes, treaties even list principles meant to guide its interpretation. For example, Article 3 of the FCCC lists specific principles that apply to all

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91. DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 86 (2010).

92. *Id.* at 87.

93. *Id.* at 96–102.

94. *Id.* at 99.

95. *See generally*, FCCC, *supra* note 18.

96. *Id.* at 99.

97. *Id.*; Dinah L. Shelton, *Introduction to Commitment and Compliance: The Role of Non-Binding Norms*, *in* THE INT'L LEGAL SYS. 1, 13 (Dinah Shelton ed., 2000).

98. *Id*. at 12.

99. BODANSKY, *supra* note 91, at 98.

100. PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 189 (3d ed. 2012) (quoting Gentiti (It. v. Venez.) 10 R.I.A.A. 551, *in* VENEZULAN ARBITRATIONS BY INTERNATIONAL COURTS AND TRIBUNALS 376 (1953).

101. Rowena Maguire, *Incorporating International Environmental Legal Principles into Future Climate Change Instruments*, 6 CARBON & CLIMATE L. REV. 101, 103–04 (2012).

instruments created in pursuance of the Convention's objectives.[102] Article 3 clearly refers to the principles of intergenerational equity,[103] intragenerational equity,[104] precaution,[105] and sustainable development,[106] which this article will later discuss. The FCCC, also explicitly mentions CBDR with regards to commitments. It states that all parties to the Convention carry out its provisions "taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances."[107] However, as we have seen, CBDR is very difficult to apply as a guiding principle. Subsequent sections discuss how to make CBDR more useful by rooting it in notions found in other equitable principles.

B. Justification for Harmonizing CBDR with Other Equitable Principles

CBDR is amorphous. Its ill-defined boundaries allows for various, and often conflicting, interpretations. Developing and developed countries alike have used CBDR to advance their own narratives.[108] Due to this lack of definition and consensus, some commentators have questioned whether CBDR can truly be useful as a guiding principle in international environmental policy.[109] However, the problem seems to be with the interpretation of CBDR, and not with whether the concept is capable of ever being useful. For CBDR to be useful there must be some natural boundaries to its interpretation. Such boundaries are found in other more established principles of international environmental law.[110]

CBDR is rooted in the notion of equity.[111] Thus, in order to define the limits of interpreting CBDR, we have to figure out what equity means in the context of international environmental law. Luckily, many other principles are similarly rooted in the notion of equity and are often easier to apply. The problem these principles usually face is whether they apply at all in particular situations. The problem with CBDR is that no one agrees on *how* to apply it.

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102. FCCC, *supra* note 18, at art 3.
103. *Id.* at art. 3(1).
104. *Id*. at art. 3(2).
105. *Id*. at art. 3(3).
106. *Id*. at art. 3(4).
107. *Id.* at art. 4(1).
108. Biniaz, *supra* note 36, at 359–63 ("[T]he CBDR principle is not necessary, and it is not helpful."); *see also* Stone, *supra* note 6, at 277 (arguing CBDR creates an arbitrary distinction).
109. Biniaz, *supra* note 36, at 359–63 ("[T]he CBDR principle is not necessary, and it is not helpful."); *see also* Stone, *supra* note 6, at 277 (arguing CBDR creates an arbitrary distinction).
110. PAUW ET AL., *supra* note 12, at 6.
111. *Id.*

Nevertheless, rooting CBDR in other equitable principles will encourage consistency and harmony in international environmental law. These principles provide natural limitations on what equity means and can serve as a basis for an interpretation of CBDR. This will give CBDR more legitimacy as a guiding principle, and not just a political tool that can conform to the objectives of whoever is using it.

Moreover, CBDR already incorporates many principles of international environmental law such as the polluter pays principle and the precautionary principle.[112] However, interpretations that fall on the extreme ends of the continuum can cause CBDR to become inconsistent with these principles. Thus, examining these principles can help determine a suitable interpretation of CBDR.

C. Defining CBDR in Light of Other Equitable Principles

This section analyzes CBDR in light of established equitable principles of international environmental law. These principles provide natural boundaries to determine what equity means. The FCCC refers to some of these principles, while others are not referred to but may still help shed some light on interpreting CBDR. This section presents the principles found in the FCCC first in the order they appear. Then, other applicable principles in no particular order.

1. Intergenerational Equity

Intergenerational equity refers to the idea that there should be fairness in the allocation of environmental resources—here a habitable planet—between all generations—past, present, and future.[113] Edith Brown Weiss, a leading theorist and advocate for intergenerational equity, describes intergenerational equity as the following:

> [E]ach generation is both a custodian and a user of our common natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms. Our ancestors had such obligations to us. As beneficiaries of the legacy of past generations, we inherit certain rights to enjoy the fruits of this legacy, as do

112. *Id.*

113. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 21 (1989).

> future generations. We may view these as intergenerational planetary obligations and planetary rights.[114]

The FCCC addresses intergenerational equity in Article 3(1):

> The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[115]

The FCCC's formulation of intergenerational equity arguably does not establish any affirmative duties on the current generation to act on behalf of future generations. Instead, it encourages the former to recognize that the latter at least has an interest in the outcome of climate change policy.[116] Our current two-degrees-Celsius goal demonstrates intergenerational equity at play—the current generation is acting to reduce GHG emissions to slow down climate change so future generations can continue to inhabit the planet.[117]

Intergenerational equity, thus, places a limitation on the definition of CBDR. Any interpretation of CBDR that does not at least preserve the planet in a habitable state—as measured by our current two degrees goal—is inconsistent with the principle of intergenerational equity. The responsibilities can differentiate based on capabilities and historic contributions, but the allocation of responsibility must be in a manner that takes into account future generations. The Kyoto dichotomy seems to have failed in this respect because it allows countries to continue increasing their GHG emissions in a way that cuts against efforts at curbing climate change effects. This tells us that responsibilities under CBDR need to include all countries. Developed countries should lead the way and reduce the most, but developing countries should commit to developing in a manner that will not offset efforts made by developed countries.

2. Intragenerational Equity

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114. *Id.*

115. United Nations Framework Convention on Climate Change art. 3, May 9, 1992, 1771 U.N.T.S. 30822.

116. Maguire, *supra* note 101, at 103–04.

117. *Id.* at 17.

Intragenerational equity provides that there should be fairness in the allocation of environmental resources between different countries.[118] Climate change raises significant intragenerational equity issues because experts project that countries that contributed the least to climate change are the most impacted by it.[119] Intragenerational equity is similar to distributive or environmental justice as it recognizes that the effects of climate change will hit the poorest people in the world the hardest.[120]

The FCCC requires consideration of intragenerational equity. Article 3(2) states the following:

> The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.[121]

Article 4(8) further lists a group of vulnerable countries most likely to suffer the harshest consequences of climate change and provides that "the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology."[122] The list includes, among others, small island countries, countries with low-lying coastal areas, and countries that are prone to natural disasters, drought, and desertification.[123]

The Kyoto Protocol carries out the responsibility to consider intragenerational equity through its Clean Development Mechanism ("CDM"), which allows for capacity building, infrastructure, and technology transfers from developed to developing countries.[124] However, CDM has arguably failed to achieve intragenerational equity for the most vulnerable developing countries.[125] Although CDM has been widely used by developing countries, mostly large emerging economies, such as China,

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118. TOMILOLA AKANLE ENI-LBUKUN, INTERNATIONAL ENVIRONMENTAL LAW AND DISTRIBUTIVE JUSTICE 19 (2014).

119. *Id.* at 17.

120. Maguire, *supra* note 101, at 106.

121. *See* FCCC, *supra* note 18, at art. 3(2).

122. *See* id. at art. 4(8).

123. *Id.*

124. Maguire, *supra* note 101, at 106.

125. *See* Marie Blévin, *The Clean Development Mechanism and the Poverty Issue*, 41 ENVTL. L. 777, 783 (2011) (arguing that CDM did not do much in the way of addressing poverty of most vulnerable countries).

India and Brazil, have implemented the projects.[126] Further, CDM, a mechanism especially designed to help the most vulnerable countries, has primarily benefited China. However, predictions indicate that China may be one of the least adversely affected by the impacts of climate change.[127]

Intragenerational equity as manifested in the FCCC seems primarily focused on ensuring care for the most vulnerable countries such as the poor island nations because they will be the most impacted by climate change. This focus suggests that the world should not treat developing countries as a monolithic group. However, the implementation of CDM under the Kyoto Protocol operates as though they are all the same.[128] In the eyes of CDM, poor island states are equivalent to mega-economies like China. This demonstrates how intragenerational equity, especially as it is put forth in the FCCC, with a focus on protecting the most vulnerable nations, is not being properly carried out in the current climate regime. Thus, any interpretation of CBDR must give special treatment to the states that are the most vulnerable to the impacts of climate change. Such states should bear the least responsibility in reducing GHG emissions. Large developing states with thriving economies such as China, however, should not receive the same special treatment.

3. Precautionary Principle

The precautionary principle is included in virtually every modern international environmental agreement.[129] Indeed, Article 3(3) of the FCCC incorporates the precautionary principle:

> 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

126. *See* CTR. ON ENERGY, CLIMATE & SUSTAINABLE DEV., *CDM Projects By Host Region*, http://perma.cc/W3K4-DL8T (last visited Apr. 25, 2015) (showing that a few countries host most of the CDM projects).

127. Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1580–81 (2008).

128. *See* Kyoto Protocol, *supra* note 10, at art. 12 (treating all non-Annex I countries the same under CDM).

129. David Freestone & Ellen Hey, *Introduction*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 3 (David Freestone & Ellen Hey eds., 1996).

cost.[130]

The precautionary principle and intergenerational equity intersect.[131] The application of the precautionary principle to prevent irreversible damage to the environment is the central condition to guaranteeing the right of future generations.[132] Thus, similar to how intergenerational equity sets limits on interpreting CBDR, the precautionary principle reinforces that limitation by imposing onto the present generation the duty to ensure there is a habitable planet left for future generations. The interpretation implications on CBDR with regards to responsibility allocation should, thus, be the same limitation as intergenerational equity.

4. Sustainable Development

The principle of sustainable development integrates economic development with environmental considerations.[133] The Brundtland Report, widely considered as coining the phrase "sustainable development," describes it as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[134] Similarly, Article 3(4) of the FCCC recognizes a right to develop sustainably:

> The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.[135]

Sustainable development reflects certain substantive and procedural obligations such as (1) the mandatory consideration of present and future generational needs; (2) the limitations on exploiting and using natural

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130. FCCC, *supra* note 18, at art. 3(3).

131. Alexandre Kiss, *The Rights and Interests of Future Generations and the Precautionary Principle*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION, *supra* note 129, at 27.

132. *Id.*

133. FCCC, *supra* note 18, at art. 3(4) (stating that parties should intergrage climate policies and economic delevlopment when approaching sustainable development).

134. GRO HARLEM BRUNDTLAND ET AL., REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 43 (1987).

135. FCCC, *supra* note 18, at art. 3(4).

resources in the name of environmental protection; (3) the fair allocation of burdens in addressing environmental problems; and (4) the integration of the environment and development.[136]

The limitations sustainable development places on interpreting CBDR seem clear. Poor developing countries may continue to prioritize development in order to eradicate poverty and grow their economies but must do so sustainably. Further, when countries use CBDR to allocate responsibilities for reducing GHGs, they must do so in a manner that ensures future generations can still benefit from a habitable planet. CDM in theory is arguably one way to achieve sustainable development. However, in practice, CDM is not necessarily carrying out sustainable development. For example, China implements many projects under CDM, but it continues to increasingly emit GHGs over and above all other nations.[137] Thus, CBDR must allocate at least some obligations to countries like China to actually promote sustainable development that will preserve the benefits of a habitable planet for future generations.

5. Polluter Pays

The polluter pays principle stipulates that the costs of pollution should be borne by the polluter.[138] Principle 16 of the Rio Declaration on Environment and Development states the following:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest, and without distorting international trade and investment.[139]

The polluter pays principle reflects the notion of corrective justice, which corrects the injustice that results from polluters who injure others by assigning liability on the polluter.[140] The rationale behind the principle is that requiring polluters to pay for their pollution would disincentivize pollution production generally.[141] The FCCC does not include the polluter

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136. SANDS ET AL., *supra* note 100, at 217.
137. CTR. ON ENERGY, *supra* note 126.
138. SANDS ET AL., *supra* note 100, at 228.
139. Rio Declaration on Environment and Development, Aug. 12, 1992, UN Doc. A/CONF.151/26 (Vol. I) 31 I.L.M. 874, 879.
140. Weinrib, *supra* note 30, at 349.
141. Maguire, *supra* note 101, at 110.

pays principle, probably, because it is difficult to apply it in the context of climate change.

Trail Smelter Arbitration applied polluter pays principle.[142] There, a smelter in Canada emitted trans-boundary smoke that allegedly damaged crops in American farms.[143] The arbitration imposed responsibility on Canada to ensure that individuals in the United States were not harmed by acts committed in Canada.[144] The tribunal also required Canada to abate pollution to prevent further damages.[145]

CBDR's consideration of historic contributions seems to reflect the polluter pays principle.[146] Developed countries primarily caused climate change, so developed countries should bear the cost of addressing it. However, there is a potential issue to note. Will BASIC countries pay to address exacerbation of climate change in the future? Further, there are issues of allocating responsibility because it is impossible to determine whether Country X's historic emissions caused island Country Y to incur damages due to sea level rise. It is also impossible to figure out whether Country Z's current increase in GHG emissions exacerbated Country Y's damage.

To be sure, however, countries must interpret CBDR in a reasonable manner that does not exacerbate the climate issue. Under an extreme reading of *Trail Smelter*, all nations would have to stop emitting GHGs to prevent future climate change related damages. Such a strict application of the polluter pays principle would obviously be impossible. Thus, a reasonable use of the polluter pays principle would be to impose limitations on emitting GHGs on all major emitters regardless of developmental status.

III. ROAD TO PARIS 2015: TOWARD A COOPERATIVE AND EFFECTIVE CLIMATE REGIME?

The Conference of the Parties will meet in Paris from November 30 to December 11, 2015.[147] France, the host nation, describes the upcoming conference's main agenda as follows:

> The stakes are high: the aim is to reach, for the first time, a universal, legally binding agreement that will enable us to combat

142. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1966 (Arb. Trib. 1941).
143. *Id.* at 1905.
144. *Id.* at 1965.
145. *Id.* at 1980.
146. Maguire, *supra* note 101, at 110.
147. *Paris 2015 U.N. Climate Change Conference*, COP21 MAIN ISSUES, http://perma.cc/G7DM-XE7Z (last visited Apr. 20, 2015).

> climate change effectively and boost the transition towards resilient, low-carbon societies and economies.
>
> To achieve this, the future agreement must focus equally on mitigation - that is, efforts to reduce greenhouse gas emissions in order to limit global warming to below 2°C - and societies' adaptation to existing climate changes. These efforts must take into account the needs and capacities of each country. The agreement will enter into force in 2020 and will need to be sustainable to enable long-term change.[148]

There is a lot of speculation as to what needs to happen in Paris. This part describes what commentators are saying. It also recommends what the author believes should result from the Paris Conference, at least with regards to the application of CBDR.

A. What Commentators Are Saying

Academics have long debated over what a post-Kyoto climate agreement should look like. Commentators have focused on imposing binding commitments on BASIC countries. For example, Professor Anita Halvorssen proposed to amend the Kyoto Protocol to include an "Annex C."[149] The new Annex would impose binding emission reductions on all emerging developing nations including all BASIC countries.[150] She also recommends the creation of an "Annex C Mitigation Fund," that would assist emerging developing countries in complying with their commitments.[151] Similarly, Aiten Musaeva McPherson recommends amending the Kyoto Protocol to impose reduction obligations on the top twenty-five GHG emitters regardless of developmental status.[152]

Some commentators question the utility and effectiveness of international climate agreements in actually addressing climate change. Ruth Bell advocates against the current top-down approach to climate policy:

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148. *Id.*
149. Halvorssen, *supra* note 42.
150. *Id.*
151. *Id.*
152. Aiten Musaeva McPherson, Note, *Let Them Eat Carbon: The End of the Kyoto Protocol*, 41 GA. J. INT'L & COMP. J. 219, 250 (2012).

> Negotiators have, apparently, uncritically accepted the proposition that a huge basket of climate-related issues—each of them very complex and requiring for their execution the cooperation of many parties with often wildly disparate views—can (indeed, must) be resolved in one comprehensive agreement. They also assume that such agreements, should they be signed and ratified, will lead to assured changes in the GHG emission practices of the many parties to the agreement.[153]

Bell recommends a "fragmented, bottom-up implementation vision of how to tackle climate change."[154] For example, the biggest emitting states could hammer out the terms of pollution targets together. Developing countries could work together to negotiate GHG reductions, and states could sign more bi-lateral agreements such as the 2014 U.S.-China Announcement.[155]

B. What We Need to See

Although a fragmented approach to climate policy has its merits, there eventually needs to be a global framework to accurately reflect the real cost of GHG pollution. An international framework would encourage information sharing and help in distributing benefits and burdens more equitably.

CBDR is probably going to make an appearance in Paris. Thus, parties need to come to terms with a definition of CBDR that gains acceptance in both developed and developing countries. Established principles of international environmental law provide natural limitations on interpretation. Any interpretation of CBDR must remain within these bounds. Such an interpretation may fall in the center of the CBDR continuum. Perhaps, developing countries, particularly those that are emerging economies, could have a delayed compliance period similar to that found in the Montreal Protocol. Adding a new Annex imposing binding reductions will also fall within the center of the CBDR continuum. Negotiators in Paris should keep these principles in mind when applying CBDR at the conference and attempt to use CBDR in a manner that will not be contrary to these principles.

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153. Ruth Greenspan Bell, *Climate Change Policy Through the Rear View Mirror*, 27 GEO. INT'L ENVTL. L. REV. 91, 93 (2015).

154. *Id.* at 116.

155. *Id.* at 116–19.

CONCLUSION

This paper examined what seems to be an obstacle in achieving a meaningful international climate agreement: the concept of common but differentiated responsibilities. Countries have used CBDR to advocate for conflicting goals, calling its utility into question. An extreme reading of CBDR resulted in an extreme Kyoto Protocol that only imposed binding commitments from developed countries and exempted developing countries. The core of the problem has to do with the definition of equity. This paper argued that CBDR should be interpreted in light of established principles of international environmental law that are similarly rooted in this concept of equity. The established principles create natural boundaries that limit the interpretation of CBDR. With these limitations in mind, countries should interpret CBDR to impose binding reductions for emerging economies. Countries should not use CBDR as a protectionist tool but rather as one that accurately and fairly allocates burdens in addressing climate change. Rooting CBDR in established principles can bring it a step closer to possibly achieving a meaningful international climate agreement.