Developing Country Participation in the Climate Regime—Applying Common but Differentiated Responsibility

This chapter documents and analyses the tensions generated in the international climate negotiations due to the provisions of differential treatment with respect to central obligations in the climate regime. It explores the case made for and against ‘meaningful participation’ of developing countries. It presents this as a case of competing legitimacies, and applies the CBDR principle, the legal and philosophical basis for the interpretation of existing obligations and the elaboration of future international legal obligations,¹ in the climate regime. The application of the CBDR principle offers a critical angle of vision in determining where the balance is to be struck between competing claims and interpretations. In tying up the various threads in this book, this chapter offers an interpretation of the current balance of commitments between industrial and developing countries, as well as CBDR-inspired guidelines for the future development of the climate regime.

I. The Undercurrents: A Climate of Discontent

(A) Tracing the Origins of the Debate on ‘Meaningful Participation’ of Developing Countries

The climate change negotiation process has been described as a ‘diplomatic poker game’ leading to different negotiating phases—FCCC, Berlin Mandate, Kyoto Protocol—that were simply ‘temporary “cease-fires” rather than accepted compromises on important points’.² One such important point relates to ‘meaningful participation’ of developing countries. In the negotiations leading up to the FCCC, the genesis of the conflict on developing country participation made its appearance. In keeping with their belief that most global environmental issues were largely the making of industrial countries, developing countries, led by China and India made clear that it would be the industrial countries that

¹ See generally Chapter 5.
would be obliged to take corrective action to avert climate change. Delphine Borione and Jean Ripert report that:

developing countries were unanimous in putting forward the ‘historical responsibility’ of the industrialized nations for exacerbating the greenhouse effect and refused to envisage any specific commitment to emissions reductions of their own. Nevertheless based on the principle of ‘common but differentiated responsibility’, they agreed to participate in the negotiation process on condition that their development priorities were recognized and that they received guarantees of financial and technological aid. They emphasized the need for reciprocal commitments. They sought binding commitments ensuring the mobilization of new and additional financial resources by the industrialized nations to correspond to specific commitments by the developing countries. In the absence of financial support, they would be bound only by ‘moral commitments’.

They were willing to take on commitments conditional on the provision of ‘new and additional financial resources’ to cover full incremental costs and transfer of the required technology on ‘non-commercial’ terms. Industrial countries, led by the United States, were however unwilling to link commitments to historical responsibility. They believed that participation of countries in the international response to climate change should be ‘in accordance with the means at their disposal and their capabilities’.

At COP-1 in Berlin 1995, several industrial countries sought to bring up the issue of ‘different commitments for different categories of developing countries’ but after overwhelming opposition from the G-77/China and a counter proposal from the Alliance of Small Island States (AOSIS) that current commitments of industrial countries were inadequate, the issue was dropped and the Berlin Mandate adopted. The Berlin Mandate specified that the process would not introduce any new commitments for non-Annex I Parties but would reaffirm and advance existing commitments for developed countries. At the eighth session of the Ad Hoc Group on the Berlin Mandate, the United States, following an announcement by President Clinton in Washington, said it would not assume binding obligations until there was ‘meaningful participation from key developing nations’.

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5 ibid 135.
8 Except for the OPEC countries. See ibid.
9 Decision 1/CP.1, The Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, subparagraph (a) and (b), of the Convention, including proposals related to a Protocol and decisions on follow-up, in Report of the Conference of Parties on its First Session, FCCC/CP/1995/7/Add.1 (1995).
Pursuant to proposals by Parties including the AOSIS, Armenia, the EU, Japan, Poland, Switzerland, and the United States, the Chair’s draft negotiating text for the Kyoto Protocol contained an article on ‘voluntary commitments by non-Annex I countries’. This article provided for voluntary country-specific emissions limitation or reduction commitments by developing countries. Non-Annex I countries taking on voluntary commitments could participate in JI and in the early stages of emissions trading. This article was transmitted to COP-3 at Kyoto, with a footnote indicating that the G-77/China did not wish to include it in the Protocol.

At COP-3 in Kyoto 1997, discussions on the voluntary commitments article were acrimonious. The strongest opposition came from China and India who questioned the legality of creating a new category of Parties under the Convention and the ‘voluntary’ nature of the commitments under discussion. Meanwhile the question of ‘evolution’ was raised as well. It had originally been introduced by the United States in its position papers, in 1996. The United States proposed that ‘the Parties shall adopt, by [2005], binding provisions so that all Parties have quantitative greenhouse gas emissions obligations and so that there is a mechanism for automatic application of progressive greenhouse gas emissions obligations to Parties based upon agreed criteria.’ At COP-3, New Zealand called for ‘progressive engagement of developing countries according to relative levels of development’. It recommended launching a review process in 1998, to be concluded in 2002, to set legally binding commitments for all Parties (except LDCs) for future commitment periods, and to decide on matters relevant to their implementation, including financial aid and technical aspects. This suggestion was rejected by the EU as it was ‘not helpful to the negotiations and contrary to the Berlin Mandate,’ and by the G-77/China as ‘it was not the time to discuss developing country commitments but strengthen developed country commitments.’ The G-77/China threatened to boycott the discussion if the proposal was not dropped. Their reaction to this dovetailed with their reaction on voluntary commitments and the voluntary commitments article as well as the New Zealand proposal on evolution was discarded. Commentators note that although many details and loopholes in the Protocol were determined

11 Although Article 10 was inserted pursuant to suggestions by the Parties referred to here, the actual text of the Article was drafted by Chair Raul Estrada. The Chair’s text differed considerably from the text put forward by the Parties. See Technical Paper, Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History, FCCC/TP/2000/2 (2000) at 80–3.
12 Completion of a protocol or another legal instrument. Consolidated negotiating text by the Chairman, Article 10, FCCC/AGBM/1997/7 (1997).
13 Supra note 10 at 5.
15 Supra note 11 at 83.
16 The proposal was supported by Australia, Canada, Japan, Poland, Slovenia, Switzerland, and the US, supra note 14.
17 ibid 6.
18 ibid 13. See also supra note 11 at 83. The proposal provoked forty-six interventions mostly from non-Annex I countries recording their strong opposition to it.
19 ibid 14. 20 See supra note 11 at 80–3.
by US demands, they suffered a ‘decisive defeat’ on the issue of new commitments for developing countries.  

At the Subsidiary Bodies Meeting in Bonn, 1998, some industrial countries sought to include the consideration of new commitments for developing countries in the agenda for COP-4, Buenos Aires.  

There was overwhelming opposition to this by the G-77/China with a clear statement from China that ‘developing countries would not accept new commitments under any guise’.  

At COP-4 in Buenos Aires 1998, debates on voluntary commitments were aired in various fora. Argentina placed an item on voluntary commitments for developing countries on the Provisional Agenda for COP-4, sparking a polarized debate at the opening session of the Conference. Although several industrial nations including Australia, Canada, Japan, New Zealand, Russia, and the United States supported Argentina’s bid to include the issue of voluntary commitments on the Agenda, this effort proved to be a non-starter. Some developing countries felt that a discussion of the issue at this stage would be divisive and distract from the discussion of compliance and continuing increases in industrial country emissions. China even suggested that this item was not intended to promote the FCCC but to help some countries avoid existing commitments. At the insistence of the G-77/China, the Provisional Agenda was adopted without the controversial item. The Argentine President of COP-4, Maria Julia Alsogaray, however, offered to facilitate informal consultations with the Parties that had expressed an interest in the item.

A similar debate occurred when Parties considered the adequacy of Annex I commitments. Whilst Parties quickly reached the conclusion that current commitments were inadequate, there was no consensus as to the way forward. Industrial countries suggested that any decision by the COP on the issue ‘should be forward looking and create an enabling environment that could include a broad range of commitments.’ The G-77/China viewed the proposals made by the industrial countries as attempts to extract commitments from developing countries and COP-4 neither reached a decision on the issue nor described the nature of future discussions to be had.

The issue resurfaced in the second week of COP-4 with Argentine President Carlos Menem’s announcement that Argentina would undertake a voluntary commitment to abate its GHGs. The nature of commitments Argentina had agreed to take on was unclear but Menem assured the delegates that Argentina

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21 See supra note 2 at 140–2.
23 ibid 7.
25 ibid.
26 ibid.
27 ibid.
28 ibid at 8.
29 ibid.
would define its goals before COP-5. He said the goals would be determined ‘with the participation of all social sectors through a broad national debate’. He vowed to keep working so that countries like Argentina that wanted to assume voluntary commitments could participate in all the mechanisms of the system. Stuart Eizenstat, Chief US Negotiator and Under Secretary of State welcomed the Argentinean announcement. In a statement he said, ‘[a]s the first developing country to make this pledge, Argentina demonstrates great leadership, real courage and a deep appreciation that climate change is a truly global challenge that demands a truly global solution.’

At COP-5 in Bonn 1999, the United States reiterated that it would take ‘meaningful participation from key developing countries’ for it to ratify the Protocol. It also hinted at rewards for developing countries that voluntarily reduce their emissions. The G-77/China however, in a pre-emptive move to shift the focus from the participation of developing countries to the implementation of Annex I commitments, sought to amend a COP-5 agenda item from the ‘second review of adequacy of FCCC articles 4.2(a) and (b)’ to the ‘review of adequacy of implementation of 4.2(a) and (b)’. Despite lengthy informal consultation on the issue no resolution was possible at COP-5. Parties deferred consideration of this item to COP-6. The notion of voluntary commitments, however, gained in content at COP-5, with the emergence of two distinct trends. Kazakhstan sought to add itself to Annex I and Argentina clarified that although it was assuming voluntary commitments it had no intention of abandoning its non-Annex I status. In the high-level segment Argentina called on Parties to create a ‘bridge’ to the Convention that would allow Argentina and other non-Annex I countries to participate in all the Protocol mechanisms. In the corridors, Argentina began to cautiously reveal that after the Kyoto Protocol had been ratified it might push for the adoption of a new Protocol to include developing countries wishing to take

31 ibid.
32 The US signed the Kyoto Protocol in the UN Office in New York less than twenty-four hours after Argentine President Menem’s speech.
33 At the Subsidiary Bodies Meeting held before COP-5, no overt references were made to voluntary commitments, but the issue was seldom far from the surface. In the discussions on national communications from non-Annex I countries, for instance, certain industrial countries proposed technical assessments of non-Annex I national communications to identify information gaps. They even expressed willingness to fund such assessments. Given the usual reluctance to part with finances, the G-77/China viewed this proposal as a desire to generate data to strengthen the US claim that without ‘meaningful participation’ from developing countries the climate change regime would be fundamentally flawed. See Lavanya Rajamani, ‘Kyoto to Buenos Aires, Bonn and Beyond’, 33 Tiempo: Global Warming and the Third World 20 (1999).
on commitments, different in form and nature from the industrial country commitments under the Kyoto Protocol.\textsuperscript{35}

At COP-6 in The Hague 2000, the United States sought to link ‘meaningful participation’ of developing countries to financial assistance. It circulated an \textit{Aide Memoir} indicating that it was not prepared to consider the provision of new resources without also considering ways to expand the participation of developing countries.\textsuperscript{36} This statement drew considerable ire from the G-77/China. The Chair of the G-77/China categorically rejected the attempt by a ‘key Annex I Party’ to tie the provision of financial resources to developing country commitments.\textsuperscript{37} In the discussion on financial resources, the Umbrella Group circulated an offer that expressed ‘an intent to seek...a significant increase in funding for international climate change related activities’.\textsuperscript{38} In addition, Annex II Parties declared their intent to establish a new window in the GEF, containing two funds, one for adaptation of the adverse effects of climate change and the other for mitigation of GHGs.\textsuperscript{39} The adaptation fund would be financed by levy on the CDM and voluntary contributions from Annex II Parties. The total amount of additional contributions was provisionally estimated to involve up to US$1 billion during the first commitment period.\textsuperscript{40} The G-77/China rejected the Umbrella Group’s offer, as in keeping with the sentiment behind the US \textit{Aide Memoir}, it made financial resources available for mitigation, which is currently a commitment for industrial countries alone.\textsuperscript{41}

The failure of COP-6 was followed by the United States rejection of the Kyoto Protocol. President George W. Bush went on record on 13 March 2001 expressing his opposition to the Kyoto Protocol. He based his opposition on ‘the incomplete state of scientific knowledge of the causes of, and solutions to, global climate change...’\textsuperscript{42} and the fact that the Protocol ‘exempts 80 percent of the

\textsuperscript{35} Argentina expressed interest in a proposal by the World Resources Institute suggesting that developing country participation could take the form of lowering the greenhouse gas intensity of economies rather than limiting absolute emissions. See Kevin Baumert et al., \textit{World Resources Institute, What Might A Developing Country Commitment Look Like?} (1999).

\textsuperscript{36} US \textit{Aide Memoir on Climate Change}, 9 November 2002 (on file with the author).

\textsuperscript{37} Sani Zangon Daura, Chair, G-77/China, Opening Remarks (11 November 2000) (on file with the author).

\textsuperscript{38} Draft Umbrella Group Offer on Financial Resources, 22 November 2000 (on file with the author).

\textsuperscript{39} ibid.

\textsuperscript{40} ibid. The EU also circulated an offer which the G-77/China disapproved of. The EU offer committed Annex II Parties to successful replenishment of GEF at a higher level than previously. It proposed the establishment of an Adaptation Plus Fund, funded through a levy on the CDM and voluntary contributions from Annex II Parties, to fund concrete actions agreed upon at COP-6, primarily adaptation measures but possibly technology transfer. Draft EU Offer on Financial Resources, 22 November 2000 (on file with the author).


world, including major population centers such as China and India, from compliance, and would cause serious harm to the US economy.

The exit of the United States from the Protocol negotiation process maimed but did not kill the question of developing country participation. At COP-7 the agenda item on second review of adequacy of Article 4 (2)(a) and (b) FCCC was again considered, but despite the fact that the President of the COP undertook to consult on the issue, consensus proved elusive and the COP agreed to include this item in the provisional agenda for COP-8.

At COP-8 in New Delhi 2002, the second review of adequacy of commitments was considered briefly and again held in abeyance. Parties discussed the issue of developing country participation in the context of the Delhi Declaration. While several industrial countries and the AOSIS stressed the need for a forward-looking declaration that would emphasize the need to broaden and deepen commitments globally in future commitment periods, most developing countries stressed the CBDR principle and opposed any process that would result in new developing country commitments. Indeed, the Indian Prime Minister argued against any such process on the grounds that both per capita GHG emissions as well as per capita incomes in developing countries were a fraction of those in industrialized countries. In a marked change in attitude to developing countries’ commitments, the United States stressed economic growth as the key to environmental progress and cautioned against burdensome targets for developing countries.

43 But see US Department of Energy Statistics available at: <http://www.eia.doe.gov/emeu/iea/tableh1.html> (revealing that between them, China and India have reduced their emissions by 10% in the period 1995–9 while the US has increased its emissions by 6%).
44 Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts, The White House, Office of the Press Secretary, 13 March 2001. President Bush writes, ‘...as you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the US economy. The Senate’s vote, 95–0, shows that there is a clear consensus that the Kyoto Protocol is an unfair and ineffective means of addressing global climate change concerns.’ He also refers elsewhere in his statement to ‘...the incomplete state of scientific knowledge of the causes of, and solutions to, global climate change...’.
45 Report of the Conference of the Parties on its Seventh Session, Part One: Proceedings, FCCC/CP/2001/13 (2001) at 18 footnote 4. At the first part of its sixth session the COP decided to include an item entitled ‘Second review of adequacy of Article 4 paragraphs 2(a) and (b) of the Convention’, together with a footnote containing the amendment proposed by the G-77/China in the provisional agenda for its seventh session (See FCCC/CP/2000/5/Add.1 (2000) at paragraphs 33–5). At the first plenary meeting of the seventh session on 29 October 2001 the conference decided to hold this item in abeyance, pending consultations of the President.
46 The President told Parties that consensus had proved elusive and the COP agreed to include the item in the provisional agenda for COP-8. The President undertook to continue consultations during the inter-sessional period and report to COP-8, ibid at 20.
47 ibid.
response praised the United States for its leadership which it said signalled ‘a good prospect for change in the dynamics of the COP’. One can only conjecture that this shift in attitude, given the United States is outside the Kyoto Protocol process, cost nothing, but might gain the allegiance of OPEC countries in a possible ‘war against terror’ in the Middle East. The United States was isolated, however, in that it was the only industrial country that expressed satisfaction with the Delhi Declaration which does not call for, or even express the need for, any further commitments. The EU submitted a statement of concern regarding the Declaration, calling on all countries to engage in a common dialogue with a view to further action consistent with the FCCC’s ultimate objective and based on the IPCC’s Third Assessment Report. The CG-11, the group of economies in transition, reserved its support from the declaration.

Yet again at COP-9 in Milan 2003, the second review of adequacy of commitments was considered but held in abeyance. Although Kyoto’s future, given mixed signals from Russia, was uncertain at this point, some Parties made an effort to advance the regime-building process by raising the issue of future commitments. The G-77/China resisted such efforts across the board, but in particular in discussions on the IPCC Third Assessment Report. Driven by the fear that a substantive discussion on this issue could lead to renewed calls for developing country mitigation commitments, the G-77/China vigorously opposed attempts by the EU to frame text such that it could lead to deliberation on next steps. Developing countries also resisted attempts led by the EU to discuss the timing and frequency of non-Annex I communications.

Instead, the G-77/China turned the spotlight on Annex I GHG emissions trajectories. Annex I reports, discussed at COP-9, indicated that although aggregate emissions in 2000 were below 1990 levels (as required by the Convention) this could be sourced principally to GHG reductions in EITs, and that, without further action from Annex I countries, aggregate GHG emissions would increase in the 2000–10 period. The United States meanwhile, continued to insist that the Kyoto Protocol is ‘unrealistic, unfair and poses serious and unnecessary risks to [our] economic well-being’. It tried to convince

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51 ibid.
53 See supra note 50 at 13.
57 ibid.
a largely sceptical international community that its technology-based alternative is a genuine (and sufficient) effort to address the looming threat of climate change. At COP-10 in Buenos Aires 2004, needless to say, the agenda item on second review of adequacy of commitments was again held in abeyance and the discussion on non-Annex I reporting too proved inconclusive. But Russia’s long-awaited ratification and the impending entry into force of the Kyoto Protocol infused new life into the negotiations, inspiring a few developing countries to break ranks with the G-77/China. Since attempts to discuss future commitments had been thwarted time and again in official negotiating fora, Argentina proposed holding an informal ‘seminar of governmental experts’ to consider future actions by the international community. This proposal, discussed primarily in informal consultations, and strategically presented to the plenary in the last few days, generated a furore of opposition. While most developing countries and the United States opposed this perceived surreptitious segue into a dialogue on future commitments, AOSIS, South Africa, and numerous industrial countries supported it. The final COP conclusion on this issue mandates an ‘informal exchange’ to ‘assist Parties to continue to develop effective and appropriate responses to climate change’, and it requests the Secretariat, whilst making the proceedings of the seminar available to the Parties, to bear in mind that ‘this seminar does not open any negotiations leading to new commitments’.

The seminar of governmental experts was held on 16 and 17 May 2005. Parties discussed numerous challenges before the climate community, and although the seminar proved to be a useful platform for engagement at this level, it did not narrow differences between the key interest groups.

A review of the historical documents relating to the climate negotiation process reveals that the nature and content of developing country participation has engendered controversy and discontent from the very inception of the international dialogue. It has been raised, under whatever garb, without fail at

59 See U S Delegation Press Briefing, COP-9, Milan, 10 December 2003 (noting the key features of US climate policy as: short-term actions, while maintaining economic growth; investments in science and technology as a basis for current and future action; and, international collaboration, both bilateral and multilateral), available at:<http://www.state.gov/g/oes/rls/rm/2003/27106.htm>.

60 See generally Tom Jacob, ‘Reflections on the Current State of Global Climate Response’ 4 Climate Policy 91, 93 (2004) (noting a broad-based emergent focus on technology questions, but a divergence between the U S and other industrial countries on the sufficiency of ‘voluntary supply-side energy initiatives alone’ to deliver the necessary change in a timely fashion).


62 ibid 18–19.


64 Seminar of Governmental Experts, in Report of the Conference of the Parties on its Tenth Session, supra note 61 at 39.

65 ibid.

every negotiating session since the INC. The issue moreover is a cross-cutting one. Industrial countries have explored various avenues that might lead to placing it on the negotiating table, from specific discussions on since-deleted articles on voluntary commitments, evolution, the second review of adequacy of Article 4(2)(a) and (b) FCCC, to the more guarded incidental references on discussions relating to financial resources, non-Annex I communications, and even the IPCC Third Assessment Report.

Much has changed in the fifteen years that the climate regime has been in evolution. The science is clearer than ever before. The legal texts are in force, have concrete content, and are binding. The infrastructure to facilitate the negotiation process, as well as to monitor compliance, is in place. Notwithstanding the United States’ rejection of the Kyoto Protocol, public awareness and political commitment to address climate change is higher than ever before. Yet the issue of developing country commitments is no closer to resolution than it was ten years ago. Although the United States, for its own curious combination of reasons, has backed away from its quest to obtain ‘meaningful participation’ of developing countries, the issue continues to be at the centre of the deadlock between industrial and developing countries. The nature, ambition, pace, and productivity of the climate dialogue has been significantly impaired by fundamental disagreements on this issue, and it will need to be carefully examined and gingerly addressed if there is to be any real progress in tackling climate change. A first step in this process is to examine both sides of the argument, i.e. the case for and against meaningful participation for developing countries.

(B) Competing Legitimi(ies): The Case for and Against ‘meaningful participation’ of Developing countries

One of the key factors in the creation and effectiveness of international environmental agreements is defensible equity. The term ‘equity’ refers to the quality of being fair or impartial. The term ‘fair’ refers to treatment that is just or appropriate in the circumstances. Nations need to perceive themselves as being treated fairly if they are to take on an international obligation. This is due to two factors. First, most international environmental decisions are taken by consensus and countries will rarely sign what they perceive to be unfair to their people. Second, an agreement perceived as unfair will not be ratified by the legislatures of the country and even if ratified will seldom be implemented. In the climate change arena most commentators have given pride of place to the concept of equity, believing it almost ‘axiomatic that an effective international agreement

to limit greenhouse gases will not be undertaken unless it is perceived as fair’.69 Henry Shue has even termed justice ‘unavoidable’ in the context.70 Most developing countries and some industrial countries however perceive themselves as being treated ‘unfairly’ under the climate regime. While developing countries believe the constant demands for their meaningful participation are unfair given their comparatively minimal contribution to the problem, the United States perceives the Kyoto Protocol as an ‘unfair and ineffective means of addressing global climate change concerns’.71 The fact that different sides consider themselves unfairly treated gives rise to the spectre of potentially competing legitimacies. The review of the developments in the climate regime showcases this sense of inequity.

The following paragraphs examine the arguments offered by the industrial and developing countries on ‘meaningful participation’ of developing countries, and analyse whether they do indeed represent competing legitimacies. In what follows there might appear to be a disproportionate focus on US policy, however there is a reason for this seeming favouritism. The United States is considered to be ‘the most important actor’ (or non-actor) in ongoing climate change negotiations.72 It is the largest emitter of GHGs, and thus has significant regime-destructive potential, but it also has significant resources and technology to bring to the table, and therefore could, in theory, lead the international negotiations on climate change. Until recently it exerted its influence to demand meaningful participation from developing countries, and today its rejection of the Kyoto Protocol is based in part on the fact the Protocol excludes major parts of the world from compliance.

(i) The case for ‘meaningful participation’

The arguments made by both industrial and developing countries rest on three main planks: fairness, economics, and law.

(a) The fairness argument

In framing its negotiating positions the United States, and lately Australia, has in part utilized the language of ‘fairness’. The United States has significant domestic policy constraints shaping its international negotiating position on climate change.73 In 1997, the US Senate unanimously passed the Byrd–Hagel


71 See supra note 44.


73 See The Kyoto Protocol and The President’s Policies to Address Climate Change, Administration, Economic Analysis (1998) (for an overview of US Policy on Climate Change during the
Resolution forbidding the United States from signing any legal agreement regarding the FCCC that would ‘mandate new commitments to limit or reduce greenhouse gas emissions for Annex I countries, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for developing country Parties within the same compliance period’.74 This Resolution was motivated by concerns among the US Senators that developing countries would have an unfair economic advantage if they did not face the same restrictions as the United States, there would be an export of jobs and industry to developing nations and the climate change treaty would prove ineffective without developing country participation.75 Paul Harris argues that the Byrd-Hagel Resolution represents a particular vision of fairness. A fair sharing of the burden to the United States Senate implies binding targets for the developing world that begin at the same time as the industrial world but incorporates flexibility for developing countries with regard to the targets, timing and breadth of commitments.76 Quoting extensively from Senate debates reflecting such views, Paul Harris argues that the Byrd–Hagel Resolution was not a renunciation of the CBDR principle but rather ‘an alternative interpretation of it, albeit a less robust one than the developing countries wanted.’77

During the Clinton Administration there were numerous Sub-Committee Hearings before the 105th United States Congress on the Kyoto Protocol. At these hearings the issue of unfairness vis-à-vis developing countries was seldom far from the surface. To take but one example of the particular vision of unfairness the United States believes itself to be a victim of, Representative David M. McIntosh (Indiana, Republican) states:

The Treaty is also patently unfair because it exempts 77 percent of all countries from any obligations. China, India, Mexico, and Brazil, just to name a few, are completely unfettered by the Treaty—these countries already have the competitive advantage of cheap labor, lower production costs, and lower environmental, health and safety standards. If President Clinton has his way, now these countries will be free to develop and pollute all they want, while the US economy goes into deep freeze.78


76 ibid.
A view echoed by the Australian Prime Minister, John Howard, who refused to ratify Kyoto on the ground that ‘it does not encompass the world’s largest emitters,’\(^79\) and that it affords ‘differential treatment and more liberal treatment’ to many of Australia’s competitors.\(^80\)

In 2001, when the United States rejected the Kyoto Protocol, the language of fairness was again in play. President George W. Bush argued that the Kyoto Protocol was an ‘unfair and ineffective means of addressing global climate change concerns’.\(^81\) By unfairness President Bush is again ostensibly referring to the lack of emissions reduction commitments for developing countries, although nowhere has President Bush explicitly spelt this out. The fairness argument in Bush-speak is intricately linked to the economic argument.

(b) The economic argument—effectiveness and efficiency\(^82\)
The United States argues that the Kyoto Protocol is ‘ineffective’ in addressing climate change because it excludes developing countries. Again, a view shared by Australia\(^83\) and other industrial countries. The United States, in its Climate Change Review 2001, highlights data indicating that developing countries’ net emissions (including emissions from land use activities) have already exceeded those of the developed world.\(^84\) And further that annual developing country emissions of CO\(_2\) will double between 1990 and 2010, ‘an increase that represents over twice as many tons of all of the reductions the United States


\(^81\) See supra note 44.

\(^82\) See generally David Victor, *The Collapse of the Kyoto Protocol* (2001) (arguing that the Protocol is fatally flawed because first, it requires allocating US$2 trillion in emission rights among and within nations, a highly politically charged task. Second, it would transfer billions of dollars from the US to Russia and Ukraine, funds that would then likely find their way to wealthy oligarchs. Third, it fails to engage developing countries whose cooperation is essential, and it cannot easily be adapted to include developing countries. Fourth, it will likely be impossible to enforce the assigned emission limits within some countries: Russia and Ukraine again come to mind, as do others. Finally, the US does not have enough time to meet its target of 93% of 1990 emissions (a 30% reduction from projected 2010 levels) without producing a major economic downturn).

This book made headlines when it was published shortly after the collapse of COP-6 and the US rejection of the Protocol. Although Victor makes a technically sound argument he ignores two critical arguments—the political economy and equity arguments. The loopholes he questions and offers as justification for the US rejection of the Protocol are loopholes the US negotiated into the Protocol to enable it to meet its commitments. Victor also makes no effort to tackle the fundamental equity concerns at the heart of the negotiations.


would be required to take under the Kyoto Protocol.\textsuperscript{85} The United States contends that it would be an exercise in futility for it to control its emissions while worldwide CO\textsubscript{2} emissions continue to grow.

The latest International Energy Outlook Report 2004, produced by the Energy Information Administration, US Department of Energy, predicts a ‘fast-paced growth in carbon dioxide emissions’.\textsuperscript{86} Much of this projected increase in CO\textsubscript{2} emissions is expected to occur in the developing world. An earlier report, in tune with the latest, noted that developing countries alone account for 77\% of the projected increment in CO\textsubscript{2} emissions between 1990 and 2010 and 72\% between 1990 and 2020,\textsuperscript{87} and that CO\textsubscript{2} emissions from developing countries will exceed those of the industrialized world between 2015 and 2020.\textsuperscript{88}

Needless to say there are differing accounts of when the GHG emissions of developing countries will catch up with those of industrial countries. A Brazilian study finds that if industrial countries’ emissions from the start of the industrial revolution are taken into account, developing countries will catch up with industrial countries only in the twenty-second century.\textsuperscript{89} The European Commission, taking historic and future contributions together, projects that the cumulative contributions of industrial and developing countries will reach parity between 2030 and 2065.\textsuperscript{90} Whatever the variations in terms of cumulative emissions, per capita emissions from developing countries are unlikely to catch up with those of the industrialized world in this century.\textsuperscript{91}

\begin{table}[h]
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\begin{tabular}{|c|c|c|}
\hline
          & Industrialized Countries & Developing Countries & Economies in Transition \\
\hline
2001      & 49                       & 38                    & 13                     \\
2025      & 42                       & 46                    & 12                     \\
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\end{tabular}
\caption{Relative Responsibility for CO\textsubscript{2} Emissions (\%)}
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\textsuperscript{88} See supra note 86.
\textsuperscript{89} Referred to in Anil Agarwal et al., \textit{Green Politics} (1999), 54.
\textsuperscript{90} Communication from the Commission to the Council, the European Parliament, the European Social and Economic Committee, and the Committee of the Regions, Winning the Battle Against Global Climate Change COM (2005) 35 final, at 4.
\textsuperscript{91} IPCC, \textit{Second Assessment Report: Climate Change 1995, Economic and Social Dimensions of Climate Change} (J. P. Bruce et al. eds., 1995), 97 See also IPCC, \textit{Special Report on Emissions Scenarios} (O. Davidson et al. eds., 2000), at section 4.5 (noting that there are ‘very large differences
The effectiveness argument dovetails nicely with the emphasis the United States places on efficiency—an emphasis which is evident in the architecture of the Kyoto Protocol. The mechanisms of the Kyoto Protocol are designed to reflect the economic intuition that emissions reductions must be made where it is most cost effective to do so. The Washington-based Pew Center on Global Climate Change in its report outlining ‘the complex elements of global fairness’ posits three criteria to guide negotiators in considering equity: standard of living, responsibility, and opportunity. Opportunity here refers to the opportunity some countries (developed and developing) have to make more cost-effective reductions in their future emissions (below a business-as-usual baseline). By suggesting that the cost-effectiveness argument is a dimension of fairness, this report fuses, as does President Bush, the economic and equity arguments: the Kyoto Protocol is ‘unfair and ineffective’.

(c) The legal context
Since the Umbrella Group, in particular the United States, view the fact that developing countries do not have mitigation commitments as both unfair and ineffective, for their argument to have any credibility it would need both a working definition of ‘developing countries commitments’ and the identification of legal avenues through which such commitments could be taken on board.

Defining voluntary commitments. The Umbrella Group led by the United States in the pre-Bush era envisioned developing countries as taking on, in certain cases, binding targets under the Kyoto Protocol. Former British Environment Minister, Michael Meacher, elaborating on ways to engage developing countries in the climate process, outlined two steps, first, to ‘allow developing countries to take on voluntary reduction targets under the Protocol’ and second, to ‘review under the FCCC the commitments of all Parties to it’. In the words of erstwhile US Under Secretary of State, Stuart Eizenstat, ‘developing countries may . . . voluntarily assume binding emissions targets through amendment to the Annex of the Protocol that lists countries with targets’. Similarly, the 1998 G-8 Ministers’ Communiqué stressed the need for ‘voluntary adoption of legally binding targets for all countries that do not already have them’. To shed further

in present per capita levels of economic activity and energy use, which require many decades, even a century, to narrow”).

92 As Kathy McGinty, Chair of the White House Council on Environmental Quality phrased it when addressing the House Science Committee, ‘The truth of our ideas won the day in Kyoto’. AP-Dow Jones News Service, 4 February 1998.
94 ibid 21.
light on the conception, former US Acting Assistant Secretary of State, Melinda Kimble, elaborated that meaningful participation could be accomplished by developing countries ‘taking on their own emissions targets’ consistent with economic growth.\textsuperscript{98} Former Ambassador Mark G. Hambley specified at COP-5 that the United States had in mind a ‘commitment which would perhaps be a growth target off a business-as-usual trajectory by one or two percent’. He added that the United States, when looking at the developing world was not ‘looking at one body of countries’. While for some countries a target would be appropriate, for others participation in the CDM or even the adoption of domestic measures to reduce GHG emissions would be sufficient to constitute ‘meaningful participation’.\textsuperscript{99} After the Bush Administration took over, the United States rejected the Protocol in part because the Kyoto Protocol excludes developing countries, but it failed to specify what, if any, kind of developing country participation could remedy the deficiencies in the Protocol.

**Legal avenues.** Although the dialogue, because of the acrimony this issue generates, has seldom proceeded beyond the stage of defining developing countries’ commitments, industrial countries have suggested a few avenues in the post-Kyoto negotiations for operationalizing developing countries’ commitments. One such avenue lies in Article 7(2)(a) FCCC which requires the COP to periodically examine the ‘obligations of the Parties’ with a view to taking decisions necessary to promote the effective implementation of the Convention.\textsuperscript{100} The phrase ‘obligations of the Parties’ could be construed to mean obligations of all Parties—Annex I and non-Annex I. The EU has in the past used this Article to further its argument for greater participation of developing countries.\textsuperscript{101} Australia, the EU, and the United States have combined the import of this Article with Article 4(2)(a) and (b), the Second Review of Adequacy of Commitments for Annex I Parties,\textsuperscript{102} to argue that the objectives of the Convention cannot be achieved simply through Annex I commitments as ‘scientific evidence indicates that such actions alone would be

\textsuperscript{98} Testimony of Melinda L. Kimble, Acting Assistant Secretary of State, before the Subcommittee on Energy and Power, House Committee on Commerce, 6 October 1998.  
\textsuperscript{99} Press Briefing by Ambassador Mark. G. Hambley, US Special Negotiator on Climate Change and Jeff Seabright, Executive Director of the White House Task Force on Climate Change, US Delegation to the Fifth Session of the Conference of the Parties to the UN Framework Convention on Climate Change, Bonn, Germany, 25 October 1999 (on file with the author).  
\textsuperscript{100} Article 7(2)(a) FCCC 1992.  
\textsuperscript{101} Supra note 22 at 6. In the lead up to COP-6, the EU backed down from its vocal support for the ‘meaningful participation’ of developing countries. EU Environment Commissioner Ritt Bjerregaard said that industrialized countries should demonstrate their domestic action before telling developing countries to take an active part in the battle against climate change. See ‘Conference on Climate Change Ends with No Progress’, CNN Interactive, 18 September 1998.  
Since COP-7, however, the EU has renewed its call for increased commitments from developing countries. See ‘Summary of the Eighth Conference of Parties to the UNFCCC: 23 October-1 November 2002’, 12(209) Earth Negotiations Bulletin 13 (2002).  
\textsuperscript{102} Article 4(2)(a) and (b) FCCC 1992.
Another avenue is to require developing countries to take on voluntary commitments under the Protocol, and perhaps provide technology transfer and financial incentives for them to do so. In the context of the Kyoto Protocol negotiations, this avenue was anchored in draft Article 10, which was eventually deleted. In the post-Kyoto negotiation phase it is unclear how, under what authority, and within what architecture such commitments could be taken up. Industrial countries have not elaborated on this suggestion.

(ii) The developing country case against ‘meaningful participation’

(a) The equity argument

Numerous strands of arguments based on equity—all intricately linked—have been brought into play by developing countries in arguing for status quo and ‘no new commitments for developing countries’. Reference has already been made to the first two: the purported distinction between survival and luxury emissions; and the overwhelming contribution of industrial countries to the problem of climate change. In Kyoto, the Chinese delegate argued against the New Zealand proposal on ‘evolution of commitments’ by asserting that such a proposal would destroy the two pillars of the Convention namely, the CBDR principle and the equity principle. He added that emissions by developing countries were ‘survival emissions’ and emissions by industrial countries, ‘luxury emissions’. If the two pillars of the Convention were destroyed, addressing climate change would be in grave danger. Here a link is carefully made between equity and the distinction between survival and luxury emissions, which then translates into a justification for lack of mitigation commitments for the developing world. The ‘survival versus luxury emissions’ rationale also forms the basis of the developing world’s insistence on quantitative limits for the use of the Kyoto mechanisms. A quantitative limit would ensure at least a certain level of domestic action in industrial countries, and prevent industrial countries from retaining their luxurious lifestyles at the expense of the subsistence lifestyles in developing countries.

The ‘survival versus luxury emissions’ argument with its moral overtones is often asserted in conjunction with the polluter pays approach. Developing countries argue that since industrial countries bear the overwhelming responsibility for historical GHG emissions they should bear the primary burden of averting climate change. Brazil proposed a burden-sharing arrangement at Kyoto which is a sophisticated vision of this position. The Brazilian proposal quantifies

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104 See supra note 33.
105 See supra note 12.
106 See Chapter 6, section I.B.
108 See Mark J. Mwandosya, Survival Emissions: A Perspective from the South on Global Climate Negotiations (1999), 74.
109 See supra note 41 at 215–18.
the sharing of the cost of combating climate change, according to the ‘effective responsibility’ of each country in causing the climate change problem. Brazil proposed the adoption of a model in which the responsibility of each country for inducing climate change is calibrated not to the causes, that is the GHG emissions of each country, but to the effects, that is the contribution of each country to the increase in the earth’s surface mean temperature—the effective climate change induced by these emissions. The proposal posits that it will take well over a century for the temperature increases due to developing countries emissions to equal the temperature increase due to industrialized countries emissions.

According to the Brazilian proposal, industrialized countries will have an individual ceiling that will stipulate the maximum increase in the global mean surface temperature that will be tolerated. This individual ceiling will be calculated taking as a basis the temperature reduction target for all the industrial countries, the calculation of which is based on the predicted temperature increase that results if the emissions of this group of countries remain constant and equal to 1990 emission levels throughout the whole period of the Protocol, that is, from 1990 to 2020.

Yet another dimension of the equity argument advanced by some developing countries is one that relates to per capita entitlements. India and China have been at the forefront of the campaign for per capita entitlements to the atmosphere. In the words of the former Indian Minister for Environment, Saifuddin Soz, at Kyoto, ‘[p]er capita basis is the most important criteria for deciding the rights to environmental space. This is a direct measure of human welfare. Since the atmosphere is a common heritage of humankind, equity has to be the fundamental basis for its management’. More recently at COP-8, New Delhi,

<table>
<thead>
<tr>
<th>Year</th>
<th>Annex I Countries</th>
<th>Non-Annex I Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>88</td>
<td>12</td>
</tr>
<tr>
<td>2010</td>
<td>83</td>
<td>17</td>
</tr>
<tr>
<td>2020</td>
<td>80</td>
<td>20</td>
</tr>
</tbody>
</table>

Source: Adapted from figures provided in the Brazilian Proposal, in Implementation of the Berlin Mandate, Additional proposals from Parties, Addendum, FCCC/AGBM/1997/Misc.1/Add.3 (1997).

111 ibid.
112 ibid.
113 ibid.
the Indian Prime Minister, Atal Bihari Vajpayee argued that, ‘[w]e do not believe that the ethos of democracy can support any norm other than equal per capita rights to global environmental resources’. The Non-Aligned Movement and the Africa Group have also on different occasions endorsed the per capita entitlement position. Numerous NGOs share this vision. The influential New Delhi based Center for Science and Environment, the Third World Network, as well as the Global Commons Institute have consistently advocated a position based on per capita entitlements.

A logical corollary to the argument for per capita entitlements to the atmosphere is the notion of ‘carbon debt’. The intuitive appeal of the per capita position lies in the fact that it is difficult, if not impossible, to find a principled basis for the claim that one person should be given a larger share of the world’s natural resources than another, whatever the realities of the relative worth of human beings. The notion of carbon debt flows from this: those countries and populations that use more than their fair share of the atmosphere, and contribute more to the damaging effects of global warming, are running up a debt to those countries that use less than their fair allocation. At COP-10, Argentina’s President Néstor Kirchner accused industrial countries of double standards, in that they as ‘financial creditors, who are relentless in demanding compliance from their debtors, refuse to take responsibility for the environmental debt they owe to the less developed countries’. Some even argue that the debt industrialized countries owe to the global community for climate change, ‘removes the

116 The heads of government of the Non Aligned Movement (NAM) in the Final Communiqué adopted at the NAM Heads of State Conference, Durban, September, 1998 noted, The Heads of State welcomes the Kyoto Protocol on legally binding commitments for the parties to the Framework Convention on Climate Change to reduce their emissions of GHG as contained in Annex B of the Kyoto Protocol. They called on developed countries to undertake urgent and effective steps to implement these commitments through domestic action. Emissions trading for implementation of such commitments can only commence after issues relating to the principles, modalities etc of such trading including the initial allocations of emissions entitlement on an equitable basis to all countries has been agreed upon by the Parties to the Framework Convention on Climate Change. They categorically rejected all attempts by some developed countries to link their ratification of the Protocol with the question of participation by developing countries in the reduction of GHG emissions.
117 The Africa Group Statement to the AGBM, Bonn, August 1997 in pertinent part reads, ‘[a] globally agreed ceiling of GHG emissions can only be achieved by adopting the principle of per capita emissions rights that fully take into account the reality of population growth and the principle of differentiation.’ See <http://www.gci.org.uk/cop3/africa.html>.
118 See note 89.
119 See John Broad, Contraction and Convergence (Third World Network, 1999).
120 See Aubrey Meyer, Contraction and Convergence: A Solution to A Global Problem (Global Commons Institute, 1996).
121 Who Owes Who: Climate Change, Debt, Equity and Survival (Christian Aid, 1999).
last shred of moral legitimacy to keep holding poor developing countries hostage to their own much smaller, but still unpayable, financial debts’. They also claim it provides moral legitimacy to claims for significant new resources and technology from industrial countries to help poor countries affected by the increasingly volatile and uncertain global environment.

The economic argument

Notwithstanding the equity concerns, if developing countries take on voluntary commitments and trade emissions with industrial countries, they would suffer adverse economic consequences. Emission reductions in developing countries today due to their energy inefficient economies are by and large inexpensive. Marginal investments in emissions reduction can yield significant decreases in emissions. Janet Yellen, Chair, White House Council of Economic Advisors in 1998 estimated the cost of domestic action in the United States as US$125 per ton of carbon equivalent and the cost of trading with developing countries as US$14–23 per ton of carbon equivalent. By trading their emissions reduction credits on the international market, developing countries will effectively use up their cheap options for reducing emissions. In future commitment periods when developing countries have tighter reduction targets and commitments that are no longer ‘voluntary’, they will be left with expensive emission reduction options that will be unlikely to create surplus credits. Even if surplus credits are created, if

Table 7.3 CO₂ Emissions Distribution

<table>
<thead>
<tr>
<th>Country</th>
<th>CO₂ emissions (% of world total)</th>
<th>Population (millions)</th>
<th>CO₂ emissions per capita (metric tons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>23.1</td>
<td>291</td>
<td>19.08</td>
</tr>
<tr>
<td>Australia</td>
<td>1.4</td>
<td>19.5</td>
<td>18.0</td>
</tr>
<tr>
<td>Canada</td>
<td>1.8</td>
<td>31.3</td>
<td>14.2</td>
</tr>
<tr>
<td>Germany</td>
<td>3.2</td>
<td>82.4</td>
<td>9.6</td>
</tr>
<tr>
<td>Russia</td>
<td>5.9</td>
<td>144.1</td>
<td>9.9</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>2.3</td>
<td>59.1</td>
<td>9.6</td>
</tr>
<tr>
<td>Japan</td>
<td>4.9</td>
<td>127.5</td>
<td>9.3</td>
</tr>
<tr>
<td>Italy</td>
<td>1.8</td>
<td>57.5</td>
<td>7.4</td>
</tr>
<tr>
<td>China</td>
<td>11.5</td>
<td>1294.9</td>
<td>2.2</td>
</tr>
<tr>
<td>Brazil</td>
<td>1.3</td>
<td>176.3</td>
<td>1.8</td>
</tr>
<tr>
<td>India</td>
<td>4.4</td>
<td>1049.5</td>
<td>1.1</td>
</tr>
</tbody>
</table>


123 Supra note 121. 124 ibid.
their price compares to the price that industrial countries would have to pay to make domestic reductions, they may not have a market for their credits. In a worst case scenario, since Annex B Parties have the ability to bank emissions reduction credits, industrial countries may buy up cheap emissions reduction credits from developing countries for use in future commitment periods, effectively delaying domestic action and leaving developing countries with expensive emissions reduction options for the future. While there is formal equality in as far as developing countries could both bank their own emission reduction credits and buy them from cheaper sources, there is no substantive equality. The demands on their fledgling economies and sparse budgets may not permit the poorer developing countries to indulge in such futuristic thinking and investment. They will of necessity value present gains more highly than possible future ones. Yet the significant economic gains to the developing countries from emissions trading may well be short-term gains bartered for their long-term economic and environmental health.

The legal argument
Another argument offered by developing countries relates to the historical pact made and embodied in the language of the FCCC and the Kyoto Protocol. The Kyoto Protocol is a product of the Berlin Mandate Process. The Berlin Mandate, adopted by COP-1, proposed strengthening the commitments of Annex I Parties through the adoption of a protocol or another legal instrument. The mandate further specified that the process not introduce any new commitments for non-Annex I Parties. Developing countries argue that the Kyoto Protocol, an offspring of the Berlin Mandate that specifically eschewed new commitments for developing countries, cannot take within its fold commitments for developing countries.

The cases for and against ‘meaningful participation’ for developing countries relate fundamentally to four questions: how contribution to environmental degradation/climate change is measured, who is to take responsibility, when, and on what basis. As the above discussion demonstrates, developing and industrial countries come to these questions from different ideological spaces and economic realities. The CBDR principle as the legal and philosophical basis for the interpretation of existing obligations (and the elaboration of future international legal obligations) in the climate regime offers critical angle of vision in determining where the balance is to be struck between competing claims and interpretations.

II. The Boundaries in the Climate Regime: Applying CBDR

The following section analyses the climate regime with reference to the contours of the CBDR principle. It weaves into the analysis the merits of the competing

126 Article 3(13) Kyoto Protocol. 127 See supra note 9. 128 ibid.
arguments presented above. It presents a reading of the balance of commitments contained in the FCCC and the Kyoto Protocol, and offers CBDR-inspired guidelines for the future development of the climate regime.

(A) Interpreting Existing Obligations

(i) The objects and purposes of the climate regime

As noted before the task of determining the object(s) and purpose(s) of a treaty/ regime is a difficult and inherently subjective one. It is an exercise however that is necessary in the light of the competing legitimacies aired in the climate dialogue, and the United States claim that differential treatment in the climate regime has gone too far. If differential treatment hinders the achievement of the object(s) and purpose(s) of the treaty it would indeed have gone too far.

Before embarking on the exercise of determining the object and purpose or indeed multiple objects and purposes of the climate regime, two initial points need to be borne in mind. First, the FCCC and the Kyoto Protocol will be read together as an organic whole. The Framework-Protocol structure requires this. The FCCC contains the guiding principles and the Kyoto Protocol the formula for translating these principles into practice. Second, in interpreting commitments under the regime, particular reliance will be placed on the language in the Preamble, containing a statement of the motives or objects of the parties in making the treaty, as a guide to interpreting the operative clauses. The practice of the ICJ supports this. Gerald Fitzmaurice notes that although it is sometimes thought that the Preamble is part of the text only in a physical or textual sense, in fact, the Preamble has ‘legal force and effect from the interpretative standpoint’.

The climate regime has two central objects and purposes. The first and incontrovertible object and purpose of the climate regime is the ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’. This object is found in Article 2 FCCC (Objective) and reference is made to it in the short Preamble of the Kyoto Protocol as well. Needless to say what constitutes ‘dangerous anthropogenic interference with the climate system’ is a value judgment
determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk.\textsuperscript{133}

The second and more controversial object and purpose of the climate regime is redistribution of the ecological space. The evidence for this exists in the plain terms of the FCCC and the Kyoto Protocol. The Preamble of the FCCC contains a recognition that ‘the share of global emissions originating in developing countries will grow to meet their social and development needs’.\textsuperscript{134} Elsewhere in the Preamble, the FCCC adds that in order for developing countries to progress towards sustainable social and economic development ‘their energy consumption will need to grow’.\textsuperscript{135} These preambular provisions do not provide developing countries, with a carte blanche to increase their emissions. The phrase ‘share of global emissions’ is critical. It implies that the FCCC countenances growth of emissions in developing countries relative to the emissions of industrial countries, not in itself.\textsuperscript{136} Further, the recognition of the need for increased energy consumption in developing countries is buttressed by references to ‘greater energy efficiency’ and ‘application of new technologies’.\textsuperscript{137} Despite the boundaries within which growth in developing countries’ emissions is countenanced, there is a clear signal that one of the objects of the FCCC is the redistribution of the ecological space.

This object is in keeping with GA Resolution 44/228 referred to in the Preamble of the FCCC which mandates that ‘the protection and enhancement of the environment must take fully into account the current imbalances in global patterns of production and consumption’.\textsuperscript{138} The recognition that the share of developing countries’ emissions will grow is to be read in conjunction with the first object to ‘stabilize GHG emissions’ and the emphasis in the CBDR principle and elsewhere\textsuperscript{139} that the industrial world is responsible for the largest share of historical and current GHG and must assume a leadership role in rising


Some Parties to the FCCC are reluctant to allow evolving scientific certainties to play a role in concretizing the objective of the FCCC. In SBSs,-16-June 2002, delegates considered the IPCC Third Assessment Report (TAR) and drafted conclusions on its relevance to the ongoing process. A paragraph linking the TAR to the Objective of the Convention proved unacceptable to China and Saudi Arabia (usually speaking on behalf of OPEC). The paragraph originally read, ‘TAR provides information that has long-term relevance to the UNFCCC’s ultimate objective, as defined in Article 2.’ After negotiations the phrase ‘long-term relevance’ was replaced with ‘general relevance’ and the reference to Article 2 was deleted. See ‘Summary of the Sixteenth Sessions of the UNFCCC Subsidiary Bodies, 5–14 June 2002’, 12(200) Earth Negotiations Bulletin 3–4 (2002). See also Report of the Subsidiary Body for Scientific and Technological Advice on its Sixteenth session, FCCC/SBSTA/2002/6 (2002).

One can only conjecture that this strategy aims to keep the ‘object’ of the FCCC too imprecise to merit serious discussion on future commitments for developing countries.

\textsuperscript{134} Paragraph 3.\textsuperscript{135} Paragraph 22.

\textsuperscript{136} The FCCC does not specifically accept or reject absolute growth in emissions.

\textsuperscript{137} See supra note 136.\textsuperscript{138} GA Res. 44/228 (1989).\textsuperscript{139} Preamble FCCC.
to the climate challenge. It follows that industrial countries are required under the climate regime to reduce the ecological space they occupy in favour of developing countries.

The climate regime as currently structured and the nature and extent of differential treatment it embodies furthers both these objects and purposes. The current balance of commitments in the FCCC and the Kyoto Protocol is explored below. In short, industrial countries have the primary (but not exclusive) responsibility to mitigate climate change and developing countries have the primary (but not exclusive) responsibility to achieve sustainable development coupled with adaptation to the adverse effects of climate change. Within this balance of commitments, for now the primary responsibilities of developing countries relate to sustainable development, adaptation, and cooperation. The FCCC recognizes that developing countries will seek to industrialize, and that their industrialization will leave ecological footprints. It recognizes the need developing countries have for ecological space. It recognizes also however that stabilization of the GHG emissions in the atmosphere is an ecological imperative. The FCCC chooses the obvious way out of the impasse. It provides developing countries an opportunity to increase their ecological space, with due sustainable development controls in place, at the expense of industrial countries, which it recognizes have contributed disproportionately to the climate change problem and occupy an excessive amount of the ecological space.

The division of responsibilities between industrial and developing countries will not fall foul of these objects and purposes merely because developing countries increase their share of GHG emissions. Indeed, that is part of the package. The division of responsibilities will however fall foul of the objects and purposes if, and only if, the overall target of stabilization cannot be achieved even if both industrial and developing countries faithfully implement their part of the bargain. If the agreement is structured such that, even if developing countries follow the sustainable development path to industrialization and industrial countries meet their Kyoto mitigation commitments, GHGs cannot be stabilized in the atmosphere, then the differential treatment embodied in the agreement will need to be re-evaluated.

It is impossible at this point to determine whether this is the case for, to date, few industrial countries have met their commitments under the FCCC, and

140 Following the principle of integration that treaties are to be interpreted as a whole. See supra note 132 at 9.
141 As an adjunct aid, the subsequent practice of parties can be relied upon, ibid.
142 See Information on National Greenhouse Gas Inventory Data from Parties including in Annex I to the Convention for the period 1990–2002, including the status of reporting, Executive Summary, FCCC/CP/2004/5 (2004) at 7, 8, and 12 (noting that total aggregate GHG emissions for Annex I countries decreased by 6.3% between 1990 and 2002, but this is mainly due to the 40% decrease in the fourteen economies in transition, and that for the rest of the Annex I countries emissions as a whole increased by 8.4%).
the Kyoto Protocol has at least one significant polluter outside the regime set to increase emissions by 14–38% above 1990 levels. Notwithstanding this rather bleak picture of industrial countries’ leadership, at some point in the future there may well be a need to re-evaluate the extent of differential treatment offered to developing countries in the climate regime. This need may arise in the context of increased scientific certainty in the causes for and effects of climate change, improved technology to address it, and a plateau in terms of energy efficiency opportunities in industrial countries. There may come a time when industrial countries and developing countries faithfully implement their commitments under the regime yet sense the need to do more to avert climate change.

The remaining part of this section is dedicated to interpreting the current balance of commitments and articulating some initial thoughts on possible future commitments under the climate regime within the CBDR framework.

(ii) The FCCC balance of commitments: mitigation and sustainable development with adaptation

Based on the CBDR principle, the FCCC contains a clear balance of commitments between nations. This balance of commitments requires developing countries to develop in a sustainable manner (industrial countries admittedly did not) and address the adverse effects of climate change through adaptation (caused overwhelmingly by industrial countries’ actions). This is a responsibility unique to developing countries in the sense that it requires developing countries to take on board sustainable development at a period in the trajectory of their development, a comparable period in which the industrial countries had no such restraints on their development. The balance of commitments further requires industrial countries to address climate change through mitigation commitments. Mitigation commitments herein are tied to historic and current responsibility and sustainable development with adaptation commitments to

143 This refers to the US. Australia is another industrial country outside the Protocol, and its emissions have increased 22.2% from 1990 levels. ibid.
144 See Malte Meinshausen and Steve Sawyer, Analysis of the Bush Climate Change Strategy (Greenpeace International, 2002) (estimating that US GHG emissions will rise to 38% above 1990 levels by 2010 and 45% above initial Kyoto targets); A. P. G. De Moor et al. Rivm, Evaluating the Bust Climate Change Initiative (2002) (estimating that the US GHG emissions will rise to over 32% above the 1990 level by 2012); and Climate Policy and CO₂ Scenarios in the US (World Resources Institute, 2002) (estimating that US GHGs will increase by 14% over the next ten years).
145 According to its National GHG Inventory data, US emissions are currently 13.1% above 1990 levels. See supra note 143 at 12.
146 In addition to the international law obligation to develop in a sustainable manner (Case Concerning the Gabčíkovo-Nagymaros Dam (Hungary/Slovakia), 1997 ICJ Rep. 7), climate-specific mandates exist in the FCCC as well, including in the Preamble, and Articles 3(4) and 4(1).
147 The IPCC noted that ‘the level of energy intensities in developing countries today is generally comparable with the range of the now-industrialized countries when they had the same level of per capita GDP,’ See IPCC, Special Report on Emissions Scenarios (Nebojsa Nakicenovic and Rob Swart eds., 2000), section 2.4.10.
necessity and projected future contributions to climate change. Given the fundamental discrepancy between the responsibility for and sharing of climate impact burdens, the significance of developing countries taking on, albeit by virtue of necessity, adaptation responsibilities cannot be overstated.

The FCCC begins with a clear acknowledgement that the change in the earth’s climate and its adverse effects are of common concern to mankind. Although the FCCC is aimed at addressing both climate change and its adverse effects, it is usually mitigation that is at the centre stage of international negotiations not adaptation. Adaptation is not a task that Parties can leave to some distant point in the future. Weather extremities, caused by the onset of global warming have taken their toll on the world in the past few years. Most developing countries due to poor infrastructure and response strategies are likely to lose more and more often to climate change than industrial countries. While mitigation costs are high in the industrial world, adaptation costs are high in the developing world. There is a ‘hierarchy of human needs’ in the developing world which places the environment lower down on the agenda. This is recognized and provided for within the climate regime. Even within the climate list of priorities, it is adaptation that is of pressing urgency and critical importance to the developing world. Interpreting the FCCC from the perspective of CBDR it can be argued that the mitigation of climate change is the primary (but not exclusive) responsibility of the industrial countries and sustainable development coupled with adaptation to the adverse effects of climate change is the primary (but not exclusive) responsibility of the developing countries.

The objective of the FCCC, contained in Article 2, read through the looking glass of the CBDR principle offers further insights into the breadth of responsibilities and their possible division between Parties. Article 2 outlines the objective of the FCCC as ‘the stabilisation of greenhouse gas concentrations in the atmosphere...achieved within a time frame sufficient 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’. In addition to adaptation, food production, and sustainable development—again, of primary import and relevance to developing countries—are the overriding priorities and responsibilities of developing countries.

147 See Benito Müller, Equity in Global Climate Change: The Great Divide (Oxford Institute for Energy Studies, 2002).
148 Preamble.
149 There are some indications that this position might be changing. The Delhi Declaration noted that ‘adaptation deserves urgent attention and action on the part of the international community.’ See supra note 52.
150 See generally supra note 147.
151 Article 4(7) FCCC (noting that economic and social development and poverty eradication are the first and overriding priorities of developing countries).
152 This is not to say that adaptation is not of relevance to industrial countries. Adaptation is a high priority for all countries but two factors make it a particular FCCC focus for developing countries. Developing countries for a variety of physical and economic reasons are likely to lose...
The commitments under the FCCC, contained in Article 4, buttress the argument that mitigation is the primary responsibility of industrial countries. While Article 4(1) relating, *inter alia*, to national inventories of anthropogenic emissions by sources and removals by sinks, 153 programmes containing measures to mitigate climate change, 154 and scientific and technological co-operation 155 is applicable to *all* Parties, Article 4(2) containing ‘specific commitments’ is limited to Annex I Parties. 156

The treatment meted out to EITs under the FCCC substantiates this division of responsibilities between industrial and developing countries. Under the FCCC, although EITs, like industrial countries, are expected to stabilize their GHGs, unlike industrial countries they assume no financial obligations towards developing countries and can benefit from technology transfers. 157 The similarities between developing countries and EITs are numerous: economic constraints, lack of appropriate technology, varied political stability, limited contribution to the present GHG emissions, and uncertainty as to future emissions. 158 The main difference between the two groups however is past emissions, which is very high for EITs and low for developing countries. 159 Since EITs have not been spared mitigation commitments, it can be inferred then that mitigation commitments under the FCCC are directly linked to historical and current responsibility.

Despite the division of responsibilities between industrial and developing countries, in the spirit of ‘common’ responsibility within the meaning of the principle, Parties must co-operate with each other in the achievement of each objective, mitigation of climate change, and adaptation to its adverse effects, in accordance with their ‘respective capabilities’. 160 Therefore while industrial countries are responsible for assisting countries particularly vulnerable to climate change to meet the costs of adaptation 161 and financing and promoting technology transfer, 162 developing countries are responsible for cooperating in efforts more and more often to climate change than industrial countries and developing countries have limited responsibility thus far for creating the problem. Given their limited resources, their primary focus should be adaptation.

to mitigate climate change.\textsuperscript{163} Cooperation is critical to the fulfilment of FCCC commitments, as is evidenced by Article 4(7) which links implementation of developing countries’ commitments to effective implementation by industrial countries of their commitments under the Convention related to financial resources and transfer of technology.

(iii) The Kyoto Protocol balance of commitments: mitigation and cooperation

The FCCC lays down guiding principles to help Parties find an acceptable formula to address the problem, and this formula is contained in the Kyoto Protocol.\textsuperscript{164} The Kyoto Protocol is a product of the Berlin Mandate Process. The Berlin Mandate, adopted by COP-1, reviewed the adequacy of Article 4(2)(a) and (b) FCCC and concluded that the commitments contained therein were inadequate. It proposed strengthening the commitments of Annex I Parties through the adoption of a protocol or another legal instrument.\textsuperscript{165} The mandate further specified that the process ‘shall’ be guided by, \textit{inter alia}, Article 3(1) (CBDR principle).\textsuperscript{166} It required the process to aim at setting quantified emissions limitation and reduction objectives within specified time frames for Annex I countries but \textit{not} introduce any new commitments for non-Annex I Parties.\textsuperscript{167} The Berlin Mandate reaffirmed the CBDR principle and in keeping with the FCCC division of responsibilities between industrial and developing countries, focused on mitigation activities and thereby primarily on commitments of industrial countries. An \textit{Ad Hoc} Working Group was set up to advance the ambition of the Berlin Mandate and as a result of its deliberations the draft negotiating text of the Kyoto Protocol emerged and was adopted at Kyoto. The decision adopting the Kyoto Protocol recalled the Berlin Mandate and the fact that the process would ‘not introduce any new commitments for Parties not included in Annex I’.\textsuperscript{168}

The Preamble to the Protocol pledges allegiance to both Article 3 FCCC and the Berlin Mandate. Further, Article 10 of the Protocol explicitly reaffirms the CBDR principle. It urges all parties to take into account ‘their common but differentiated responsibilities and their specific national and regional development

\textsuperscript{163} Article 3(3). In pertinent part, this Article reads, ‘[e]fforts to address climate change may be carried out co-operatively by interested Parties’. This is the foundation for Activities Implemented Jointly.

\textsuperscript{164} See generally Lawrence Susskind, \textit{Environmental Diplomacy} (1994), 34.

\textsuperscript{165} Decision 1/CP.1, The Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, sub-paragraph (a) and (b), of the Convention, including proposals related to a Protocol and decisions on follow-up, contained in Report of the Conference of Parties on its First Session held at Berlin from 28 March to 7 April 1995, FCCC/CP/1995/7/Add.1 (1995).

\textsuperscript{166} ibid.

\textsuperscript{167} ibid.

priorities, objectives, and circumstances, without introducing any new commitments for Parties not included in Annex I'. Accordingly, the Protocol requires certain industrial country Parties listed in Annex I to the FCCC to reduce their overall emissions of a basket of GHGs by at least 5% below 1990 levels in the commitment period of 2008–12.\textsuperscript{169} The Kyoto Protocol, an offspring of the process set in motion by the Berlin Mandate, focused on a review of Annex I mitigation commitments, can clearly not take within its fold mitigation commitments for non-Annex I countries. Within this limited historical context, the Kyoto Protocol requires Annex I countries to undertake quantified emission limitation and reduction commitments and developing countries, to the extent possible given their respective capabilities and developmental priorities, to cooperate with industrial countries to help them reach their commitments.

This stance is substantiated by the structure of the Kyoto Protocol. Article 3 (quantified emission limitation and reduction commitments), in keeping with the differentiated nature of Annex I commitments, applies exclusively to Annex I countries. Article 10 (continuing to advance the implementation of existing commitments) affirms the CBDR principle, decries new commitments for non-Annex I Parties, and lays out commitments on reporting, national inventories, and cooperation.

Developing countries’ commitments under the Protocol relate primarily to cooperation. The CDM exemplifies this point. The CDM facilitates joint emissions reduction projects between industrial and developing countries. While developing countries benefit from project activities in their countries, industrial countries benefit from the certified emission reduction units accruing from such projects, that they can use to contribute to compliance with their emission reduction or limitation commitments.\textsuperscript{170} Developing countries, based on their capacity to do so, cooperate with industrial countries in helping them achieve their emissions reduction commitments. They fulfil their share of ‘common responsibility’ by participating in the CDM, while the industrial countries fulfil their share of ‘differentiated responsibility’ by accepting and reaching their mitigation targets. The CDM is thus a direct emanation of the CBDR principle—it is based on a partnership between developing and industrial countries, with differing commitments under the climate regime, to solve a global problem.\textsuperscript{171}

(B) Guiding Future Obligations

The development of the climate regime is an evolutionary process that has as its ethical anchor the CBDR principle. The two measures of responsibility

\textsuperscript{169} Article 3(1).
\textsuperscript{170} Article 12(3).
identified in the principle, namely contributions to climate change and capacity
to solve the climate change problem, guide the burden-sharing arrangement
between states in an effective and equitable manner. The balance of commit-
tments between developing and industrial countries is, however, by no means a
static one. The next step in the evolutionary process, premised on the CBDR
principle, may well be another protocol or legal instrument to address specific
mitigation related commitments for developing countries. Indeed the evolu-
tionary nature of the climate regime as well as the extensive review provisions it
contains testify to the ability of the regime to tailor itself to emerging scientific
and economic realities.

There is a vast and growing literature on technical options for future com-
mitments under the climate regime.\textsuperscript{172} The following paragraphs seek to present
broad guidelines, based on the CBDR principle, for the future commitments
debate.

\textit{(i) The nature and stringency of commitments}

If and when developing countries take on mitigation commitments, the contours
of the CBDR principle would require that relevant differences (contribution and
capacity) between industrial countries and developing countries and within the
category of developing and industrial countries be taken into account. In practice
this would imply that developing countries take on mitigation commitments
different in nature and stringency to those taken on by industrial countries, and
that some developing countries take on commitments while others do not. A
variety of alternatives exist to the absolute emission limits embodied in the Kyoto
Protocol for industrial countries.\textsuperscript{173} Less taxing mitigation options include
emission intensity targets that vary across countries;\textsuperscript{174} optional emissions

\textsuperscript{172} See generally for a representative sample of current literature on future commitments,
Federal Environmental Agency of Germany and the DG Environment of the European
Commission, Future International Action on Climate Change Network Website at: <http://
www.fiacc.net/>. See also Building on the Kyoto Protocol: Options for Protecting the Climate (Kevin
A. Baumert et al. eds., 2002), 157; Beyond Kyoto: Energy Dynamics and Climate Stabilization
(International Energy Agency, 2003); Odile Blanchard et al., ‘Combining Efficiency with Equity A
ed.,. 2003); Liliya Zayalova and Axel Michaelowa, ‘Should Non-Annex I Countries Accept
Voluntary Targets?’, 6(1) Joint Implementation Q. 6 (2000); Zhongxiang Zhang, Meeting The
Kyoto Targets: The Importance of Developing Country Participation (University of Groningen, The
Netherlands, 2000); and Malik Amin Aslam, International Green House Gas Emissions Trading and
Issues Related to ‘Voluntary Participation’ by Developing Countries (UNCTAD, 1999).

\textsuperscript{173} Proposals for absolute emission limits typically establish a target for global emissions and
then distribute this target among countries using a formula that reflects one or more equity
principles. The focus is on the distribution of the global emissions target, rather than on how
the global target is set. Principles that have been proposed as the basis for establishing national
commitments include: historical responsibility; current contributions—emissions per capita; ability
to afford reductions—per capita GDP; and multi-sector emissions convergence. See ibid.

\textsuperscript{174} See Kevin A. Baumert et al., What Might a Developing Country Climate Commitment
Look Like? (World Resources Institute, 1999). See also Michael Lisowski, ‘The Emperor’s New
Clothes: Redressing the Kyoto Protocol’, 2 Climate Pol’y 161 (2002).
budgets that present a country with the ability to sell allowances equal to the difference between actual emissions and the budget;\textsuperscript{175} targets for specific sectors rather than the country as a whole;\textsuperscript{176} and policies and measures directed at climate mitigation.\textsuperscript{177} Indeed, different options could be used simultaneously by different countries to produce an equitable balance of commitments.

(ii) The temporal element

The contours of the CBDR principle would also require that a temporal element be built into the system. This can be built into the system at two levels. At one level, developing countries could be given certain latitude in time before they are required to take on mitigation commitments. The FCCC endorses the value of time-dependent commitments. The first commitment period for Annex I countries was set for 2008–12, a period of ten years after the adoption of the Kyoto Protocol. It is appropriate then that developing countries be given such, if not more, latitude, given their respective capabilities, when the time arrives for them to take on mitigation commitments. At another level, the obligation particular developing countries have to adopt commitments or graduate from a certain commitment to a more stringent one should be tied to their reaching a specified level of per capita emissions, per capita GDP, and historic and current contribution.\textsuperscript{178} A per capita rather than cumulative basis is the most accurate indicator of the state of development of a country or its contribution to climate change. In the past the per capita entitlements proponents have argued their case on the equity plank. While there is an intuitive appeal to equal rights of all individuals, a discussion of such a position cannot avoid the quagmire of competing legitimacies. The argument offered here is therefore based on accuracy rather than equity. A per capita rather than a cumulative basis is the most accurate indicator of difference. If cumulative rather than per capita GDP is taken into account in assessing the state of development of a country, Switzerland, for example, would emerge from such an assessment as poorer than India or China, a patently false result. By logical extension if cumulative rather than per capita emissions are taken into account in determining contribution to climate change, a patently inaccurate result would ensue. In the interests of calibrating the obligations and the point at which they are assumed to the relevant differences in the regime, the most accurate indicator of difference would need to be used, i.e. per capita emissions and per capita GDP.


\textsuperscript{176} See Cédric Philibert and Jonathan Pershing, ‘Considering the Options: Climate Targets for All Countries’, 1(2) Climate Pol’y 211 (2001).

\textsuperscript{177} ibid.

\textsuperscript{178} See Ann Kinzig and Daniel Kammen, ‘National Trajectories of Carbon Emissions: Analysis of Proposals to Foster the Transition to Low Carbon Economies’, 8(3) Global Environmental Change 183 (1998) (proposing that countries adopt commitments when their per capita emissions reach 0.73 tons of CO\textsubscript{2}. This is based on a target of global emissions of 2 GtC and a world population of 10 billion, giving per capita emissions of 0.2 tC or 0.73 tCO\textsubscript{2}).
(iii) The avenues—review procedures

One of the crucial facets of the climate regime, as discussed earlier, is its ability to evolve to reflect emerging realities. If increased mitigation efforts become necessary a series of avenues exist within the climate regime to review the existing commitments of Parties and extend commitments, of whatever nature and stringency, to a wider range of parties. The existing avenues under the FCCC are contained in Articles 4(2)(d), 4(2)(g) and 7(2)(a). In addition, the FCCC envisages the possibility of amendments both to its annexes and to its operational provisions. There is a certain degree of overlap between these various avenues. For instance, a review of the adequacy of commitments under Articles 4(2) and 7(2) could lead to an amendment of FCCC annexes or operational provisions. Articles 4(2) and 7(2) provide for a mechanism to review the commitments of Parties and their implementation. Article 4(2)(d) reads:

The Conference of the Parties shall, at its first session, review the adequacy of subparagraphs (a) and (b) above. Such review shall be carried out in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic information. Based on this review, the Conference of the Parties shall take appropriate action, which may include the adoption of amendments to the commitments in subparagraphs (a) and (b) above.\textsuperscript{179}

The COP is authorized under Article 4(2)(d) to review the adequacy of Article 4(2)(a) and (b) which relates to the commitments of ‘developed country Parties and other Parties included in Annex I.’\textsuperscript{180} Although it has been argued that this provision relates strictly to the commitments of industrial countries, it is possible to read this provision to include commitments for a wider range of parties. It is true that the COP is authorized to review the adequacy merely of Annex I commitments, however it is possible that based on a scientifically-grounded review the COP will conclude that Annex I commitments are insufficient to attain the objectives of the FCCC. The COP is then authorized to take ‘appropriate action’ which ‘may include’ the adoption of amendments to Annex I commitments. The use of the language ‘appropriate action’ and ‘may include’ incorporates considerable flexibility into the type of action the COP is authorized to take as a result of the review. Article 4(2)(d) could permit thereby the adoption of future commitments for a wide range of parties.

The first assessment under Article 4(2)(d) determined that the commitments under Article 4(2)(a) and (b) were inadequate to achieve the objective of stabilizing atmospheric concentrations of GHGs. This led to the negotiation of the Kyoto Protocol. A second assessment was due by 31 December 1998 with further assessments at regular intervals thereafter. However, as noted before, this discussion has been postponed from COP to COP, for want of consensus on a way to move forward.

\textsuperscript{179} Emphasis added. \textsuperscript{180} Article 4(2) FCCC.
Article 4(2) is buttressed by Article 7(2) which reads:

The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To this end, it shall:

(a) Periodically examine the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge.181

Article 7(2)(a) read with Article 4(2)(d) is an attractive avenue for the initiation of a dialogue on future commitments. The use of the phrase ‘regular review’ indicates a continuing process of evaluation. The phrase ‘decisions necessary’ implies flexibility in the choice of methods, and the term ‘effective implementation’ admits the possibility of an assessment that commitments from a wide range of Parties are necessary. The expression ‘obligations of the Parties’ could be construed to mean obligations of all Parties—Annex I and non-Annex I. And the term ‘institutional arrangements’ could be read to permit new ways of considering and institutionalizing the implementation of the FCCC. Under these provisions therefore parties could determine both the nature of commitments they will adopt as well as the method of institutionalizing it.

The Kyoto Protocol like the FCCC contains a series of review procedures which are to be read in conjunction with Articles 4(2)(d) and 7(2) FCCC. Article 9 requires the COP to ‘periodically review the Protocol in the light of best available scientific information and assessments on climate change and its impacts’ and Article 13(4) requires the COP serving as the Meeting of the Parties to keep under ‘regular review’ the ‘implementation’182 of the Protocol as well as the ‘obligation of the Parties under the Protocol’.183 The Kyoto Protocol review process, like the FCCC one, by its terms appears to permit flexibility in the nature of commitments that might be considered in future as well as the number and type of Parties implementing them. However when read in conjunction with Article 3(9) discussed below it appears that such flexibility in the nature of future commitments might only be afforded to non-Annex B Parties.

The Kyoto Protocol like the FCCC can be amended to incorporate commitments for a wider range of Parties. Article 20 provides that amendments may be adopted by a three-fourths majority vote of all Parties present and voting at the meeting. The Kyoto Protocol could be amended, for instance, to insert a specific article relating to future commitments or to add a new Annex containing commitments for non-Annex I Parties.184 The Kyoto Protocol Annexes could

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181 Emphasis added. 182 Article 13(4)(a) FCCC. 183 Article 13(4)(b) FCCC. 184 Some Parties have in the past suggested amending the Kyoto Protocol to insert an article on ‘voluntary commitments’. The Chair’s draft text for the Kyoto Protocol contained an article on
also be amended, subject to the requirements of Article 21, to reflect evolving commitments. Indeed the Protocol envisages the Annex-amendment method for updating commitments for Annex I Parties. Article 3(9) in pertinent part reads:

Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7.

Amendments to Annex B can however only be made with the written consent of the concerned Party, and are only valid, as with other amendments, with respect to the countries that have deposited their instruments of acceptance. Apart from the obvious bottleneck represented in the requirement for written consent, Article 3(9) presents a further constraint on the evolution of the climate regime—future commitments for industrial countries are limited to adjustments to their existing quantified emission limitation and reduction commitments.

The climate regime is a healthy dynamic regime containing numerous avenues for the negotiation of future commitments. The feasibility of adopting any particular avenue however will depend on its political palatability. An option that excludes the United States, which would be the case with any Kyoto Protocol avenue, would be both unpalatable and unwise for now. Unwise, given the need within the future commitments dialogue not only to extend commitments to new Parties but also to strengthen and diversify existing commitments for the United States and other Annex I Parties. An additional reason for favouring FCCC over Kyoto avenues is that the avenues under the Kyoto Protocol are limited in as far as Annex B Parties are tied in future commitment periods to quantified emission limitation and reduction commitments. For these reasons, FCCC avenues, such as perhaps the negotiation of a new protocol, appear to hold greater appeal.

III. Conclusion

In conclusion the following points emerge. The balance of commitments under the climate regime if read in the light of the CBDR principle is in keeping for now with the objects and purposes of the regime which include both stabilization of anthropogenic emissions in the atmosphere as well as redistribution of the voluntary commitments. Though the article was deleted due to staunch opposition from the G-77/China, it is nevertheless worth examining for its formulation. Under this article non-Annex I Parties could opt to take on commitments through a notification process. The notification would include a formal declaration of the Party’s chosen historical/base year and the level of limitation/reduction of greenhouse gas emissions it was ready to undertake, greenhouse gas emissions inventory for the base year and its projected future emissions. Parties acting under this Article were required to fulfill Annex I obligations relating to communication of information. Article 10, FCCC/AGBM/1997/7 (1997).

ecological space. If at some point in the future a re-evaluation of the balance of commitments becomes necessary certain CBDR-inspired guidelines need to be kept in mind in crafting new legal obligations. First, developing countries should be permitted to take on mitigation commitments different in nature and stringency from those taken on by industrial countries. It might also be the case that based on the CBDR differentiation markers, contribution and capacity, some developing countries are required to take on mitigation commitments while others are not. Second, developing countries should in general be given latitude in time before they are required to take on mitigation commitments. Further, the obligation of particular developing countries to adopt commitments or graduate from a certain commitment to a more stringent one should be tied to their achievement of a specified level of per capita emissions, per capita GDP, and historic and current contribution. Finally the re-evaluation of differential treatment should be a multilateral process channelled through the review procedures built into the system.