

Towards a New Era of Differential Treatment in the Climate Regime:

Possible Adjustments of the Current Differential Treatment to Enhance Mitigation Actions in Developing Countries in a Post-2012 Agreement

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PART I

1. Introduction

There is now a worldwide consensus that climate change has become a global challenge that requires international action to be solved. Due to the international legal principle of state sovereignty, which declare that states have sovereign right to exploit their own resources, and, consequently, the right to be free from interference over their exploitation¹, the different states in the world must be in consensus regarding the content of an international treaty addressed to tackle the climate change in order to ensure global participation.

International legal matters are complex, and cannot be considered or addressed properly without taking account of different states' political, cultural, economical and scientific concerns². One main question of international law-making is whether or not the rules and standards in agreements should be set on a uniform basis or be differentiated to take account of these political, cultural, economic, scientific and ecological circumstances.³

The latter technique, where the regulations in a treaty recognise and respond to real differences by instituting different standards for different states or groups of states, is referred to as 'differential treatment', and has been defined as “...*the use of norms that provide different, presumably more advantageous, treatment to some states.*”⁴ Differential treatment has been described as “the most effective as well as the most controversial” of the techniques available to integrate countries from divergent spaces into international environmental regimes.⁵

When studying differential treatment, the United Nations Framework Convention on Climate Change⁶ (UNFCCC) and the Kyoto Protocol⁷ to the Convention, generally referred to as the climate regime, are especially interesting as differential treatment in favour of developing countries serves as a cornerstone herein. Today, the climate regime serves as an operational platform of principles, rules and mechanisms addressed to meet the challenges of climate

¹ Phillippe Sands: Principles of International Environmental Law, Cambridge University Press, 2005, at 237.

² Ibid., at 5.

³ Id.

⁴ See Lavanya Rajamani: Differential treatment in International Environmental Law, Oxford University Press, 2006 [Hereinafter *Rajamani*], at 1.

⁵ Id.

⁶ United Nations Framework Convention on Climate Change, U.N. Doc. A/AC.237/18(Part II)/Add.1, Rio de Janeiro, 29 May 1992[Hereinafter *UNFCCC*].

⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/1997/L.7/Add.1, Decision 1/CP.3, Annex, Kyoto, December 1997 (entered into force 16 February 2005). [Hereinafter *Kyoto Protocol*]

change. The UNFCCC have received 194⁸ instruments of ratification, and 190⁹ states, as well as the EC, have ratified the Kyoto Protocol. With almost universal involvement, the climate regime is generally considered to be the most successful international environmental agreement – for which the extensive differential treatment favouring developing countries is a core explanation. With the current differentiated treatment, developing countries are not committed to reduce their greenhouse gas (GHG) emissions under the current climate regime.

However, according to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) there is “. . . *high agreement and much evidence that with current climate change mitigation policies and related sustainable development practices, global GHG emission will continue to grow over the next few decades*”.¹⁰ This clearly calls for a more efficient approach in order to meet the ultimate objective of the Convention, set out in Article 2, which is to stabilise “. . . *greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”. Although there is no consensus among the parties on what should be considered ‘dangerous interference’, the IPCC has forecasted that a rise of global temperature higher than 2 degrees Celsius over the next century is the upper limit.¹¹ This limit was recently recognised by several head of states when signing the Copenhagen Accord.¹² In order to prevent a global temperature rise higher than 2 degrees Celsius, enhanced mitigation actions in both developed and developing are necessary, which again call for adjustments of the current differential treatment.

In 2007, at the thirteenth session of the Conference of the Parties (COP.13) in Bali, the Bali Action Plan was adopted to define new issues to prepare for the negotiations on a new agreement. One important element in this process was to consider new ways to include emission reductions in developing countries in the climate regime. Therefore, The Bali Action Plan and later negotiations indicates a willingness of the developing countries to take on further commitments under the regime, which again give a general expectation of further involvement from the developing countries to limit or reduce their emissions of GHGs. A new agreement was expected to be adopted at COP-15 in Copenhagen in December 2009, however no consensus was reached. Yet, the COP stated that it is still the aim to adopt a new agreement at the next COP in Mexico.

As the first commitment period of the Kyoto Protocol expires in 2012, and amendments to the UNFCCC or the Kyoto Protocol needs at least three fourths of the parties to ratify the

⁸ For updated status of ratification, see:

http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (Last visited May 28, 2010.)

⁹ For updated status of ratification, see: http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (Last visited May 28, 2010.)

¹⁰ IPCC: Climate Change 2007: Synthesis Report, Summary for Policymakers, available at http://www.ipcc.ch/publications_and_data/ar4/syr/en/spms3.html.

¹¹ At the official UNFCCC website it is stated that the IPCC has recognised a upper limit of 2-2.4 degrees Celsius temperature rise, see http://unfccc.int/press/fact_sheets/items/4988.php.

¹² In Decision 2/CP.15 the Conference of the Parties took note of the Copenhagen Accord, and it was presented in the Report of the Conference of the Parties on its fifteenth session, (FCCC/CP/2009/11/Add.1), at 5-7.

amendments before they enter into force¹³, which is a time consuming process, the outcome of the next meeting, the sixteenth Conference of Parties (COP.16) in conjunction with the sixth session of Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP.6), will be of immense importance in order to avoid a gap between the first and the second commitment periods. If developed countries commit themselves to take on mitigation commitments, or ‘mitigation actions’ in a so called ‘post-2012 agreement’, this would represent adjustments to the current differential treatment in the climate regime that could enable a more efficient approach to tackle the climate change.

2. Presentation of the paper

A. The purpose and the scope

In light of the scientific research indicating that the current mitigation policies are insufficient in order to meet the objective of the UNFCCC, the purpose of the paper is to study the current differential treatment in the climate regime and assess if it has gone too far according to the boundaries of differential treatment identified in the literature. If this is the case, and enhanced mitigation action in developing countries therefore is needed, what are the future options as approaching a new agreement under the climate regime?

In order to assess the current differential treatment, one must study *what* differential treatment is, *why* it has such a central role in the climate regime, and *how* this has affected the architecture and development of the regimes provisions. The ‘what’ and ‘why’ will be the contents of Part II, while the scope of Part III is to show how the present differential treatment has lead to differential commitments for the parties, and secondly, how the differential treatment has influenced the design of the Kyoto Protocol’s compliance mechanism. The *boundaries* of differential treatment will be presented and assessed in part IV with the aim to see if the current differential treatment has gone too far and needs adjustments. Finally, in part V, I will present *three possible future options* for enhanced mitigation action in developing countries, one already existing mechanism and two proposed new regulations, and try to assess how these new options could *represent adjustments* to the current differential treatment.

B. Limitations, definitions and sources

The climate regime is indeed complex, with many regulations, procedures, mechanisms and institutions. To give a comprehensive explanation of all elements would be far outside the scope of this paper. When presenting the current differential treatment in the climate regime, the focus will thus be on the most relevant provisions that differentiate between developed and developing countries. However, in Part IV and V, where the boundaries of differential treatment and new proposals are assessed, I will also look at other options for differentiation among the parties. Further limitations or clarifications are presented below in the paper when

¹³ UNFCCC, supra note 6, art. 15(4) and the Kyoto Protocol, supra note 7, art. 20(4).

considered necessary.

The terms ‘developing countries’ or ‘non-Annex I countries’ are not defined in the UNFCCC nor the Kyoto Protocol, but are used within the climate regime and in the literature as a reference to the countries which are party to the Convention but not included in the Annex I of the UNFCCC. The terms ‘developed countries’, ‘industrialised countries’, ‘industrial countries’ or ‘Annex I countries’ are used as a reference to the countries included in Annex I of UNFCCC. The Annex I countries consists of countries that were members of the Organisation for Economic Co-operation and Development (OECD) in 1992, and several states with economies in transition (EITs).¹⁴ In full recognition of the dangers of over-generalisation and reductionism, these terms will be used in the paper in the same sense. The word ‘countries’ may also be replaced with ‘nations’ or ‘states’ without changing the meaning of the terms. The Annex II countries are those countries who are party to the Convention and listed in Annex II, which consists of Annex I countries except those with economies in transition. (EITs). Those countries listed in Annex I in the UNFCCC that are committed to limit or reduce their emissions under the Kyoto Protocol and therefore are listed in Annex B herein, will in this paper be referred to as ‘Annex I countries with commitments under the Kyoto Protocol’ or any similar term, or simply called ‘Annex I countries’ or ‘developed countries’ if it is clear out of the context that it is these ‘Annex B countries’ I refer to.

Mitigation is defined as ‘human interventions to reduce the emissions of greenhouse gases by sources or enhance their removal from the atmosphere by “sinks”,¹⁵ and “sink” refers to forests, vegetation or soils that can reabsorb CO₂.¹⁶ This is the also the meaning of the term in this paper.

The paper will be based on relevant literature, the treaty texts and the later adopted amendments. Additionally, the negotiation text prepared for the parties towards a new agreement will be used in the last part. The interpretation of these the international legal¹⁷ documents, will be based on the general principle of Article 31 of the 1969 Vienna Convention which reads that a treaty is to be interpreted ‘in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose’.¹⁸ Regarding the literature, the work of Rajamani and Honkonen are especially relevant, as they have studied ‘differential treatment’ and ‘the common but differential responsibility’ in international environmental law.

PART II: A Deeper Study of Differential Treatment

1. Defining ‘differential treatment’

¹⁴ Facts from the UNFCCC’s webpage, available at http://unfccc.int/parties_and_observers/items/2704.php.

¹⁵ This is the definition used within the UNFCCC, See fact sheet available at http://unfccc.int/press/fact_sheets/items/4988.php

¹⁶ Id.

¹⁷ Even the negotiation text is not a part of the treaties, the same principle will be used.

¹⁸ The Vienna Convention on the Law of Treaties, 23 May 1969, reprinted in 8 ILM 679, 1969.

Differential treatment is defined as “the use of norms that provide different, presumably more advantageous, treatment to some states.”¹⁹ Differential treatment in international treaties is sometimes needed since the alternative, equal rules for all parties to a treaty, could lead to substantively unjust outcomes because this approach overlooks the situation of the more disadvantaged parties.²⁰ With differentiated treatment, the need for worldwide participation can be balanced with the need to address and be sensitive to individual countries’ special and relevant conditions.²¹ In other words, the aim with differential treatment is to ensure effective and efficient implementation of international treaties and at the same time achieve justice and substantive equality.²² In order to ensure just outcomes, the differential treatment must recognise and respond to real differences between the countries.²³

Norms embodying differential treatment can have a number of legal characters and varieties. According to Rajamani, differential treatment can be expressed through soft law or hard law, be implicit or explicit, and, it can have inherent and/or instrumental value.²⁴ The differential treatment in the climate regime consist of all these elements, as now will be illustrated with examples.²⁵

In the climate regime, the notions of differential treatment is reflected in the part of the regulations that are to be considered soft law,²⁶ such as the preamble, but also in the commitments which are only legally binding for Annex-I countries.²⁷ Norms of differential treatment is implicit when “...the norms themselves provide identical treatment to all states but their application permits considerations of characteristics that might vary from country to country”²⁸. In the climate regime, there are implicit differential norms as, for instance, the same type of non-compliance could be treated with different consequences because the Facilitative Branch is to take into account the parties common but differentiated responsibility,²⁹ and explicit as the quantified emission limitation and reduction obligations are only applicable to specific countries.³⁰ Differential treatment has inherent value when it is applied either to recompense to some states for past injustices or to reflect enhanced responsibility of other states for past wrongs, and instrumental value if it is instituted to further equality between states³¹. In the climate regime the differential treatment has inherent value because developing countries, who are responsible for the historic emissions of

¹⁹ Rajamani, supra note 4, at 1.

²⁰ Tuula Honkonen: *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects*, Kluwer Law International, 2009, at 39.

²¹ *Ibid.*, at 4

²² *Id.*

²³ Rajamani, supra note 4, at 1.

²⁴ Lavanya Rajamani: *The Nature, Promise, and Limits of Differential Treatment in the Climate Regime*, in *Yearbook of International Environmental Law*, Volume 16, Oxford University Press, 2007, [hereinafter Rajamani in YbIEL] at 86-87.

²⁵ Please note that the examples will be further elaborated below in the paper.

²⁶ ‘Soft law’, unlike ‘hard law’ are not legally binding *per se*, but point to “...the likely future direction of formally binding obligations, by informally establishing acceptable norms of behaviour...”, see Sands, supra note 1, at 124.

²⁷ Kyoto Protocol, supra note 7, art. 3.

²⁸ Rajamani, supra note 4, at 8.

²⁹ See Part III.2 of this paper.

³⁰ Those listed in Annex B of the Kyoto Protocol.

³¹ Rajamani, supra note 4, at 8.

greenhouse gases, must take on stringent commitments to make up for their contribution to the climate change problem. The differential treatment in the climate regime has also instrumental value as it recognises that different states have dissimilar ability to contribute in the fight against climate change and therefore commit those with the necessary resources to support those without.

Furthermore, there are three types of differential treatment, which are all contained in the regulations of the climate regime.³² These are: provisions that differentiate with respect to central obligations³³; provisions that differentiate in relation to implementation³⁴; and, provisions that grant assistance.³⁵

The differential treatment is, as now explained, truly a cornerstone in the climate regime. It contains all types and variety of differential treatment. Furthermore, the effectiveness of developing countries' implementation is linked with the developed countries' implementation of their commitments to support the developing countries' implementation with financial resources and technology.³⁶ The differential treatment in the climate regime is for these reasons unlike any other environmental treaty.³⁷ This can primarily be explained by the central role of the principle of common but differential responsibility in the regime. This principle and the other explanations of the extensive use of differential treatment in the climate regime will now be presented below.

2. Reasons for the extensive use of differentiated treatment in the climate regime

A. The legal basis

The principle of common but differentiated responsibilities (CBDR) serves as the doctrinal basis for differential treatment, as the essence of differential treatment within international environmental law is captured by the CBDR principle.³⁸ In other words, when a treaty provides differential treatment to different parties this is a result of the application of this principle. In general, the climate regime is seen as 'the clearest attempt to transform, activate and

³² Ibid., at 191.

³³ Id. Rajamani explains that central obligations refer to those, when executed, fulfill the purpose and objective of the treaty, which in the climate regime are the mitigation commitments. Only the developed countries are legally bound by mitigation commitments in the climate regime, as will be further elaborated in Part III.1. of this paper.

³⁴ For example, the softer approach to non-compliance for developing countries, explained in Part III.2 of this paper.

³⁵ E.g. the commitments of Annex II parties to provide financial resources and technology transfer to developing countries, see UNFCCC, supra note 6, Art 4.3 and 4.5. This will be presented in Part III.1 of this paper.

³⁶ UNFCCC, supra note 6, art 4.7, see Part III.1 of this paper.

³⁷ Rajamani, supra note 4, at 192.

³⁸ Id.

operationalize common but differentiated responsibilities from a legal concept into a policy instrument? ³⁹

(i) *The CBDR principle in general*

The principle of common but differentiated responsibilities, accepted as ‘the pillar of equity’⁴⁰, is a relatively new principle in international law. It has developed from the application of equity in general international law, and the recognition that special needs for developing countries must be considered and reflected in the architecture process, application and interpretation of rules of international environmental law.⁴¹ The roots of the principle can be traced back to the ideas expressed in the Stockholm Declaration,⁴² however, the 1992 Rio Declaration⁴³ was the first international instrument to express the phrase, followed by the UNFCCC the same year, and five years later, the principle was stated again in the Kyoto Protocol.⁴⁴

Principle 7 of the Rio Declaration reads that “*States shall cooperate in a spirit of global partnership, to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressure their societies place on the global environment and the technologies and financial resources they command.*”

This principle crystallises the regulations in previous instruments which encourage universal participation in treaties by providing incentives in the form of differentiated standards and ‘grace periods’, and financial provisions to meet at least some of the costs of implementing the treaty obligations.⁴⁵ The phrase recognizes two indicators of differentiation between

³⁹ See Rajamani in YbIEL, supra note 24, at 97, where she refers to Christopher C. Joyner, in Common but Differentiated Responsibilities (2002), at page 358.

⁴⁰ Sanya Vashist: CBDR Principle and Recent Developments at the UNFCCC: Ensuring Fairness to Developing Countries, Centad, 2009, in Foreword.

⁴¹ Sands, supra note 1, at 285.

⁴² Declaration of the United Nations Conference on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Document: A/CONF.48/14/Rev.1 (Stockholm, 1972). For example, Principle 1 recognise that man has the “. . . responsibility to protect and improve the environment . . .”; Principle 21 expresses that states have “. . . responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”; Principle 23 that stress the importance “. . . in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social costs for the developing countries.”; and, finally, Article 24 which reads “International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing.”

⁴³ The Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Rio de Janeiro, 1992), generally referred to as the Rio Declaration.

⁴⁴ Albert Mumma and David Hodas: Designing a Global Post-Kyoto Climate Change Protocol that Advances Human Development, 20 Geo. Int’l Envtl. L. Rev. 619, 2008, at 629.

⁴⁵ Sands, supra note 1, at 56.

developed and developing countries, namely the ‘different *contribution*’ to the environmental degradation, and different *capacity* to take the response measures,⁴⁶ as it is stated that developed countries command ‘technologies and financial resources’.

The principle of common but differentiated responsibilities can be seen as a recognition of all states’ responsibility to cooperate in developing the law addressed to protect their common interest in the global environment, yet, the degree of their responsibility is differentiated among them, based on their actual differences – in particular their different contribution to the creation of an environmental problem and their different ability of states to respond to the environmental problem.⁴⁷

There two elements in the CBDR principle: the common responsibility and the differentiated responsibility, will now be explained individually.

(a) Common responsibility

The term ‘common’ have been interpreted to reflect that all countries are, or risk to be, affected by global environmental problems,⁴⁸ and is rooted in the principle of cooperation⁴⁹, which indicates that states are obliged, in the spirit of solidarity, to cooperate in preventing transboundary environmental degradation.⁵⁰ The notion of ‘common responsibilities’ originated from well established notions in international environmental law which indicate the existence of collective interest, such as ‘common concern’ and ‘common heritage of mankind’.⁵¹ Despite the different formulations, they share the common consequence that certain legal responsibilities are attributable to all states,⁵² including the legal responsibility to prevent damage to the ‘commonality’, the specific environmental problem, in question. However, the extent of this common responsibility and the legal consequences of the responsibilities will vary for each resource and instrument in question.⁵³

A general definition of ‘common responsibility’ is that it “. . . *describes the shared obligations of two or more states towards the protection of a particular environmental resource, taking into account its relevant characteristics and nature, physical location, and historic usage associated with it.*”⁵⁴ ‘Common responsibility’ calls for universal participation in the international community and for each state to take their individual share of the burden to improve the global environmental problems.⁵⁵ As global environmental problems cannot be solved effectively without global participation, corresponding common responsibilities arise

⁴⁶ Rajamani, supra note 4, at 130.

⁴⁷ The definitions of the CBDR principle vary to a certain degree in the literature, but the reality of them are the same, See: Sands, supra note 1, at 286, Rajamani, supra note 4, at 130, Mumma and Hodas, supra note 44, at 629, Honkonen, supra note 20, at 1 and Birne, Boyle and Redgewell: International Law and the Environment, Oxford University Press, 2008, at 133.

⁴⁸ Honkonen, supra note 20, at 1.

⁴⁹ The principle is for example stated in Principle 24 of the Stockholm Declaration, and Principle 7 of the Rio Declaration.

⁵⁰ Rajamani, supra note 4, at 134.

⁵¹ Id.

⁵² Sands, supra note 1, at 287.

⁵³ Id.

⁵⁴ Sands, supra note 1, at 286.

⁵⁵ Honkonen, supra note 20, at 1.

as a fundamental part of the CBDR principle.⁵⁶ When applied, the common responsibility entitles, or may require, all concerned states to participate in international response measures aimed at addressing environmental problems.⁵⁷

(b) Differentiated responsibility

The differentiated responsibility is a direct response to the differences between states in regards of how they are, or are anticipated to be, affected by an environmental problem and their capacity to take action to respond to this problem.⁵⁸ In addition to different capacities of states, the term ‘differentiated responsibilities’ originates from the differing contributions of states to environmental problems.⁵⁹

Differentiation seeks to balance the need for universal participation and cooperation regarding global environmental problems, on one hand; and the need to be sensitive to individual states’ special and relevant circumstances, on the other. Consequently, differential treatment does not only seek to ensure justice and substantive equality, but also more effective and efficient implementation of international environmental agreements.⁶⁰

Common and differentiated responsibility must be seen together, despite the word ‘but’ between the two elements in the principle. ‘Common’ responsibility does not mean that the responsibilities have to be the same for all.⁶¹ Differentiated responsibility indicates that the grade of common responsibility is individual for each state.

When applied, the differentiated responsibility transforms into differentiated environmental standards based on various factors relevant to the scope of the specific treaty.⁶² In simple words, the application of the CBDR results in differential treatment in form of differentiated obligations for different parties to a treaty. In addition, it has been argued that the CBDR principle entitles developed countries to give certain countries assistance in the implementation of the treaty through financial assistance and by technology transfer.⁶³ This latter type of differential treatment can be referred to as ‘re-distribution of resources’⁶⁴ or ‘provisions that grant assistance’, as mentioned above. In this relation, the principle arguably can lead to an undesirable ‘double-duty’ for developed countries.⁶⁵ For instance, in the climate regime developed countries are not only obligated to take on the more stringent standards but also significantly contribute to the reduction of GHG emissions in developing countries. Yet, others argue that it is unclear whether the responsibility for developed

⁵⁶ Id.

⁵⁷ Sands, *supra* note 1, at 286.

⁵⁸ Honkonen, *supra* note 20, at 2.

⁵⁹ Rajamani, *supra* note 4, at 136.

⁶⁰ Honkonen, *supra* note 20, at 4.

⁶¹ *Ibid.*, at 2.

⁶² Sands, *supra* note 1, at 288-289.

⁶³ Honkonen, *supra* note 20, at 3. See also Birnie, Boyle and Regdewell, *supra* note 47, at 133, where they state that the CBDR principle can be ‘seen to define an explicit equitable balance between developed and developing states in at least two senses: it allows for different standards for developing states and it makes their performance dependent on the provisions of solidarity assistance by developing states’.

⁶⁴ Honkonen, *supra* note 20, at 3 and 148.

⁶⁵ Id.

countries to assist developing countries actually can be regarded as a responsibility embedded in the CBDR principle.⁶⁶ This can be supported by the fact that neither of the references to CBDR principle in the Rio Declaration and the UNFCCC addresses this issue.⁶⁷ However, even if the responsibility to assist developing countries cannot be interpreted out of the CBDR principle alone, developing countries unquestionably have such assistance responsibilities. The parties to the UNFCCC have agreed to adopt assistance commitments,⁶⁸ and, furthermore, it is expressed in the Convention that effective implementation of developing countries are dependent on the implementation by developed countries regarding their obligations to support developing countries.⁶⁹ However, many developed countries prefer to see assistance to developing countries as ‘a matter of pragmatism or benevolence, rather than an outgrowth of the CBDR’.⁷⁰

(ii) *The CBDR principle in the context of the climate regime*

The UNFCCC have been said to be ‘based on the principle of CBDR’.⁷¹ In the current regulations under the climate regime, the CBDR principle is expressed in the recognitions in the preamble; stated as one of the core principles;⁷² explicitly expressed in the commitment provision;⁷³ and it has been stated in numerous COP decisions.

In the context of the climate regime, the ‘common responsibility’ of all parties is to cooperate and participate in the fulfilment of the ultimate objective: to prevent ‘dangerous interference with the climate system’,⁷⁴ by implementing their common obligations.⁷⁵ At the same time, the parties’ responsibility is clearly differentiated, as I will present below in part III.

In the climate regime, the CBDR-principle is stated in a similar language in Article 3.1 of the UNFCCC: “*The parties should protect the climate system . . . on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*”

The formulation of the CBDR principle in Article 3 of the UNFCCC have ‘prompted various interpretations regarding what the leadership role of the North actually entails’.⁷⁶ The softer language in this article compared to Article 7 of the Rio Declaration is a result of the general uncertainty regarding the legal status of principles that are incorporated into the operative parts of a treaty.⁷⁷ As Sands sums up, principles “*embody legal standards, but the standards*

⁶⁶ Jutta Brunné: Climate Change, Global Environmental Justice and International Law, in Environmental Law and Justice in Context, Ebbesson and Okowa (Eds), at 326.

⁶⁷ Id.

⁶⁸ See for example: UNFCCC, supra note 6, art. 4.3 and 4.5.

⁶⁹ UNFCCC, supra note 6, art.4.7. This will be further discussed below in Part II.1.

⁷⁰ Brunné, supra note 66, at 326.

⁷¹ Honkonen, supra note 20, at 122.

⁷² UNFCCC, supra note 6, art 3.1.

⁷³ Ibid., art. 4.1.

⁷⁴ UNFCCC, supra note 6, art 2.

⁷⁵ Which primarily is stated in UNFCCC, supra note 6, art. 4, and Kyoto Protocol, supra note 7, art.10.

⁷⁶ Honkonen, supra note 22, at 122.

⁷⁷ Compared to principles states in the preambular sections of treaties.

they contain are more general than commitments and do not specify particular actions, unlike rules.”⁷⁸ The fact that legal principles can have legal consequences coloured the negotiations on whether a section on ‘Principles’ should be adopted or not.⁷⁹ Heated discussions, where the United States and some other ‘common law’ countries expressed their concern that the requirements included in Article 3 might be subject to the dispute settlement or create specific obligations beyond those set out in Article 4 and other commitments provisions under the Convention,⁸⁰ resulted in the adoption of a text where the CBDR principle is written in ‘discretionary and guiding’,⁸¹ rather than prescriptive language, and applies only to the parties to the UNFCCC.⁸²

Despite the fact that the principle stated in Article 3.1 itself does not represent a substantive legal obligation, it has significant force within the climate regime⁸³, and it is not without legal effects.⁸⁴ First, the principle is relevant a relevant tool to interpret and implement the current provisions under the climate regime. Secondly, the common but differential treatment principle is, inter alia, recognised in the preamble; adopted as one of the core principles of the Convention;⁸⁵ and expressed in the commitment provision.⁸⁶ Because the CBDR-principle was adopted in, and now serves as, a core principle of the framework convention – the starting point and building blocks for further development of the climate regime – the CBDR principle will continue to be the primary principle guiding the architecture of new provisions under the climate regime, and, therefore, continue to be the core foundation of the burden-sharing arrangements.⁸⁷ This can be supported by pointing at some examples of the CBDR principle’s major influence on the development of the climate regime so far, for instance the statement of the principle in relation to the compliance mechanism and the arrangement of this mechanism,⁸⁸ as well as the reference to, and application of, the principle in the Kyoto Protocol to the Convention⁸⁹

B. The practical basis: Achieving universal participation

From the beginning of the international environmental dialogue, there has been a sharp dissonance between developed and developing countries, based on the different historical, economic, and political realities.⁹⁰ The primary disagreement between developed and developing countries has been on who should take the responsibility, in what measure, and

⁷⁸ Sands, supra note 1, at 232 where he refers to D.Bodansky: The United Nations Framework Convention on Climate Change: A Commentary. 18 Yale Journal of International Law 451, at 501 (1993).

⁷⁹ Sands, supra note 1, at 233.

⁸⁰ Id.

⁸¹ For instance, the use of ‘should’ instead of ‘shall’ indicates the softer legal status.

⁸² Rajamani in YbiEL, supra note 24, at 102.

⁸³ Id.

⁸⁴ Birnie, Boyle and Redgewell, supra note 47, at 358.

⁸⁵ UNFCCC, supra note 6, art. 3.1.

⁸⁶ Ibid., art. 4.1

⁸⁷ Rajamani in YbiEL, supra note 24, at 103.

⁸⁸ See Part III.2. of this paper.

⁸⁹ This will be presented in Part III.1 of this paper.

⁹⁰ Rajamani, supra note 4, at 54.

under what conditions to contain global environmental degradation⁹¹. This so-called North-South division have existed since the origins of modern international environmental law at the UN Conference on the Human Environment held at Stockholm in 1972. While the industrialised countries' focused on global environmental ethic and protection, developing countries' focused on their need for further development.⁹² Over the time, this ideological deadlock has been solved through the compromise that environmental protection is not necessarily incompatible with economic development.⁹³ The principle of common but differentiated responsibilities can be seen as a way to formally integrate the environment and development at the international level.⁹⁴ The recognition of the CBDR principle, resulting in the use of differential treatment in favour of developing countries in the climate regime, has therefore served as the key element in achieving almost universal participation. When developing countries' challenges, such as lack of resource, capacity and insufficient infrastructure were taken into account, and, their need for further development was acknowledged, developing countries were willing to sign the climate change treaties.

C. The factual basis: Relevant differences

As explained above, differential treatment shall recognise and respond to relevant differences between countries. The principal differences that existed at the time where the UNFCCC was constructed and thereby were relevant to the question of how the differential treatment should be divided between countries, have been identified in the literature. This was summarised and presented in the Second Assessment Report of the Intergovernmental Panel on Climate Change (IPCC).⁹⁵ Based on this, I will now present the core differenced between developed and developing countries that at the time were considered relevant differences, which can explain the current division between developed and developing countries in the climate regime.⁹⁶

The differential treatment in favour of developed countries is first and foremost based on their different levels of wealth.⁹⁷ Out of this, other core differences arise due to the connection between wealth, consumption and emissions of green house gases. High level of wealth enables consumption of resources that involve emissions of greenhouse gases in their extraction, processing and application.⁹⁸ Since the ultimate objective⁹⁹ of the UNFCCC calls

⁹¹ Id.

⁹² Ibid, at 55.

⁹³ Ibid, at 56.

⁹⁴ Honkonen, *supra* note 20, at 11, and 4-8, where she points out that the CBDR principle has essential links to, and should be used to promote, the principle of sustainable development which advocates that the preservation of the environment is part of the development process.

⁹⁵ See generally: IPCC: Second Assessment Report: Climate Change 1995, Working Group III: Economic and Social Dimensions of Climate Change, (Metz Et al. (Eds.),1996, [Hereinafter IPCC's Second Assessment Report] at 91-99.

⁹⁶ Because the current differential treatment is still based on the division that was made between developed and developing countries in the UNFCCC. This will also be discussed in part IV.1.

⁹⁷ IPCC's Second Assessment Report, *supra* note 95, at 91.

⁹⁸ Id.

⁹⁹ Stated in UNFCCC, *supra* note 6, Art 2.

for reduction of GHG emissions, differences regarding the nature of countries' GHG emissions, and consequently, differences regarding the effort and affects emission reduction obligations would impose,¹⁰⁰ are of special relevance. While rich nations' GHG emissions primarily is related to use of personal cars, central heating and energy embodied in a wide variety of manufactured goods, emission from poor countries generally are linked to basic needs such as energy for cooking, keeping warm and agricultural activities.¹⁰¹ In other words, there is a division between 'luxury emissions in developed countries and 'survival emissions' in developing countries, and, as a result, the affects of mitigation action will be fundamentally different.¹⁰² This serves as a main explanation why the climate regime imposes stricter obligations on the developed countries and softer treatment to developing countries.

Furthermore, the differential treatment was a respond to the industrial countries contribution to climate change. The historic emissions of GHGs are relevant since cumulative past emissions account for the build-up of gases in the atmosphere and therefore contributed to the climate change.¹⁰³ The historic contribution to the total build-up from the poorer regions have been modest.¹⁰⁴ That this was considered relevant is supported by the recognition in the preamble of UNFCCC which states that: "[...] the largest share of historical and current global emission of green house gases has originated in developed countries". Historically developed countries are responsible for two-thirds of the cumulative emissions.¹⁰⁵ When the provision of UNFCCC was designed, the industrial countries also counted for the largest share of the GHG emissions at that time.¹⁰⁶

The countries' capacity to respond to climate change also differs widely. Developed countries, because of their technical development and economic wealth, will tend to find it easier to deal with the costs of the affects of climate change, as well as the cost for measures to halt climate change.¹⁰⁷ Developing countries must deal with their immediate economic and social problems, their short-term needs, before they can make investment to avert a global problem that might manifest itself in the future.¹⁰⁸ Therefore, a general concern of developing countries is that strict mitigation obligations could limit their further development. Developing countries special needs and priorities are recognised in the climate regime through favourable treatment. It is even stated in the operational part of the Convention that: "economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties".¹⁰⁹ In addition, as expressed by the IPCC, some countries are "*. . . strong nationstates, with a large degree of societal consensus and strong institutions that can formulate and implement policy effectively [while others] might be riven by internal differences and have fragile governing institutions that may be unable, or*

¹⁰⁰ IPCC's Second Assessment Report, supra note 95, at 91-92.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Ibid., at 94.

¹⁰⁴ Id.

¹⁰⁵ Rajamani, supra note 4, at 178.

¹⁰⁶ Id.

¹⁰⁷ IPCC's Second Assessment Report, supra note 95, at 92.

¹⁰⁸ Id.

¹⁰⁹ UNFCCC, supra note 6, art. 4.7.

*unwilling, to formulate and implement effective policy. . . ”.*¹¹⁰ Evidence that such considerations were relevant when forming the climate regime can be found in the preamble of UNFCCC, which reads: “standards applied by some countries may be inappropriate and of unwarranted economic and social costs to other countries, in particular developing countries”.

In close relation to the different capacities are the differences between developed and developing countries regarding how, and to what degree: their natural resources will be affected by climate change; how dependant countries are on these affected natural resources; and their institutional and social capacities to adapt to climate change.¹¹¹ In short, developing countries are generally more vulnerable to the affects of climate change.

When designing the UNFCCC, the parties responded to these differences between developed and developing countries through the extensive differential treatment in favour of developing countries in the treaty. This differential treatment has continued along with the further development of the climate regime. The negotiations for the Kyoto Protocol was founded on the principle of CBDR¹¹² and the Protocol therefore furthered the differentiation.

The reasons for the division between developed and developing countries are generally summed up as differences regarding their (nature and degree) of contribution to the climate change, and their capacity to tackle it. In other words, the differences embedded in the CBDR principle regarding their differentiated responsibilities.

D. The philosophical basis: Justice

Notions of fairness and equity rooted in traditional moral philosophy have been referred to by, and served as inspiration for, negotiators in the global environmental debate. Even if fairness and equity notions are not openly expressed, moral notifications serves as fundamental justification for the CBDR principle and differential treatment.¹¹³

(i) Equality for equals, inequality for unequals

Rajamani, as well as Honkonen, points out that differential treatment can be sourced to the visions of philosophers like Aristotle, Nietzsche and Freund, which all stressed the importance of unequal treatment of unequals and equal treatment of equals in order to achieve justice.¹¹⁴ This vision implies proportional treatment, and, as Freund has formulated: “Proportionality requires that for some purposes differentiation must be made and requires that, when made, these should be relevant to a legitimate avowed criterion, such as merit, need, contribution, or agreement”.¹¹⁵

¹¹⁰ IPCC’s Second Assessment Report, *supra* note 95, at 99.

¹¹¹ *Ibid.*, at 97.

¹¹² Honkonen, *supra* note 20, at 126.

¹¹³ *Ibid.*, at 11, and Rajamani, *supra* note 4, at 150.

¹¹⁴ *Id.*

¹¹⁵ Paul A. Freund: *Philosophy, Moral Reasoning, and Law*, in Thompson, Kenneth (ed.): *Ethic and International relations* (1985), at 25, referred to by Honkonen, *supra* note 49, at 13.

This philosophical notion of achieving justice through proportional treatment can be seen as a key idea behind the differential treatment in the climate regime, where the CBDR principle is applied to make a country's commitment more just in relation to those of others.¹¹⁶ Since the regulations under the climate regime take account of different states' contribution to the climate change and their different capabilities, the CBDR principle and the differential treatment in the climate regime, Rajamani notes, is in keeping with this vision of justice that requires that those similarly situated are treated similarly and those dissimilarly situated are treated dissimilarly to the extent of dissimilarity.¹¹⁷

(ii) *Restoring equality*

The philosophical basis for the CBDR principle can also be traced to the notion of restoring equality. Developed countries industrialised and hereby became the main contributors to climate change at time when developing countries went through colonisation and therefore not had the same socio-economic benefits. Yet, developing countries are equally, or even more, affected by the climate change caused primarily by developed countries industrialisation and are now need to share the burden of limits on economic development in order to prevent dangerous interference with the climate system.¹¹⁸ Justice in this relation would require that 'those who have benefited the most from the process that lead to the creation of the problem bear an unequal burden for addressing the problem.

The use of differential treatment in the climate change and the justification for applying differential commitments has been oriented towards making up for past wrongs and giving developing countries the same opportunities to make use of resources as the developed countries enjoyed for so long without any restrictions related to emissions of GHGs.¹¹⁹ The differential commitments for the parties to the climate regime, where developed countries are subject to more stringent obligations, may therefore be seen as an reflection of the notion of restoring equality.¹²⁰

The elements of justice and equity embedded in differential treatment have also been a promoter for the practical reason to apply differentiated treatment: universal participation. As Rajamani explains, "*When a regime is perceived as being just, it encourages grater faith in, and voluntary compliance with, it. The burden-sharing arrangement in the climate regime is in essence an equitable compact, and it should, in theory, promote voluntary compliance*".¹²¹

Despite the fact that differential treatment 'in theory' ensures justice for all parties and therefore should promote voluntary compliance, it has been, and still is, controversial to some states. The differential treatment in the climate regime does not represent an internationally unified understanding on how and why mitigation and adaption burdens should be apportioned.¹²² For instance, the differentiated commitments for developed and developing

¹¹⁶ Honkonen, *supra* note 20, at 12.

¹¹⁷ Rajamani in YbIEL, *supra* note 24, at 91.

¹¹⁸ See Honkonen, *supra* note 20, at 92 and Rajamani, *supra* note 22, at 152 and 154.

¹¹⁹ Honkonen, *supra* note 20, at 321.

¹²⁰ This is supported by Rajamani, *supra* note 4, at 154.

¹²¹ *Id.*

¹²² Brunnée, *supra* note 66, at 327.

countries in the Kyoto Protocol was one of the main reasons why the United States, declined to ratify the Kyoto Protocol.¹²³ The United States expressed that it failed to secure the “meaningful participation” of key developing countries in emissions caps.¹²⁴ President Bush expressed that the Kyoto Protocol “exempts 80 per cent of the world, including major population centers such as China and India, from compliance”.¹²⁵ The US Senate voted 95-0 not to support the Kyoto Protocol unless developing country commitments to reduce GHGs emissions were included in the treaty.¹²⁶ Furthermore, countries like Australia, Canada, Japan, New Zealand, Russia, and the EC have all been sceptical to the extent of differential treatment offered to developing countries, arguing that developing countries should take on further commitments¹²⁷.

Therefore, as Brunnée concludes: “The concept of common but differentiated responsibilities sketches the parameters of a debate *about* global justice. However, it does not currently constitute a genuine principle *of* global justice.”¹²⁸ One could therefore say that differential treatment can be rooted in notions of justice and be applied with the aim to ensure global justice, however, all parties will not automatically agree that the differential treatment actually ensures justice for all.

To sum up, differential treatment in the climate regime is applied to enable and motivate universal participation by giving favourable treatment to developing countries, based on relevant differences between the parties – of which their different contribution to climate change as well as their different capacity to tackle it is of core relevance. Finally, as it is built on notions of justice, it should result in a more just outcome than what equal rules for all parties would achieve.

PART III: Differential Treatment in the Climate Regime

1. Differential commitments under the UNFCCC and the Kyoto Protocol

A. The commitments for all parties under the UNFCCC

The commitments of the parties to the UNFCCC are stated in Article 4. According to Article 4.1, which is addressed to all parties, the common commitments are, inter alia, to: register their national emissions of GHGs;¹²⁹ formulate, implement and publish national programs containing measures to mitigate climate change and measures to facilitate adaptation to climate

¹²³ One could therefore argue that the differential treatment in the climate regime actually have contributed to the insufficiency of the regime to meet the objective of the Convention, since it was an important factor why the US, responsible for about 20-25 percent of the global emission of GHGs, did not ratify the Kyoto Protocol.

¹²⁴ Joyeeta Gupta, *International Law and Climate Change: The Challenges Facing Developing Countries*, in *Yearbook of International Environmental Law*, Volume 16, 2007, at 126.

¹²⁵ Rajamani in YbIEL, supra note 24, at 82, with reference to Letter from the President to Senators Hagel, Helms, Craig, and Roberts, White House, Office of the Press Secretary, 13 May 2010.

¹²⁶ See para. (1)(A) of The Byrd-Hagel Resolution, S. Res. 98, 105th Cong., 143. Cong. Rec. S8138 (1997), available at <http://www.nationalcenter.org/KyotoSenate.html>

¹²⁷ Rajamani in YbIEL, supra note 24, at 84.

¹²⁸ Brunnée, supra note 66, at 317.

¹²⁹ UNFCCC, supra note 6, Article 4.1 (a).

change;¹³⁰ promote sustainable development and conservation and enhancement of sinks and reservoirs of GHGs;¹³¹ promote and cooperate regarding technology,¹³² and research;¹³³ to take to take climate change considerations into account in their policies and actions;¹³⁴ and to communicate information related to implementation to the Conference of the Parties (COP).¹³⁵

Article 4.1 is written in an obligatory language, ‘shall’. However, it also states that the parties should take into consideration their “. . . common but differentiated responsibilities and their specific national and regional development priorities, objective and circumstances. . . ’. By including the CBDR principle and that certain circumstances are to be taken into account, the language herein indicates that the requirements of the parties, and their responsibilities to implement the listed commitments, are differentiated among the parties, even though the commitments are addressed to ‘all’. The language is also vague and without clarifying definitions and standards. There is no detailed information on, for instance, what is required of a ‘national program’ in order to comply with this commitment. In other words, these commitments have a soft law approach,¹³⁶ and thereby permit different implementation by different states. Even though the principle of *pacta sunt servanda* states that all treaty obligations are legally binding,¹³⁷ the imprecise and contingent nature of these commitments makes them unenforceable from a practical standpoint.¹³⁸ Consequently, one could say that these commitments are voluntary and contingent.¹³⁹

Another common obligation is stated in Article 12, namely reporting to the Conference of the Parties (COP).¹⁴⁰ However, the requirements regarding the contents of the information to be reported and the time frames for when these reports shall be communicated to the COP, are differentiated through softer requirements of the non-Annex I countries.¹⁴¹

B. The additional commitments for developed countries under the UNFCCC

The additional commitments in Article 4 are only applicable to the Annex I and Annex II countries. The Annex I parties are committed to limit their anthropogenic GHG emissions, and to protect and enhance their greenhouse gas sinks and reservoirs to “. . . *demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic*

¹³⁰ Ibid., para. 1(b).

¹³¹ Ibid., para. 1 (d).

¹³² Ibid., para. 1 (c).

¹³³ Ibid., para. 1 (g).

¹³⁴ Ibid., para. 1 (f).

¹³⁵ Ibid., para. 1 (j).

¹³⁶ Kevin A. Baumert: Participation of Developing Countries in The International Climate Change Regime: Lessons for the Future, in 38 *Goe. Wash Int’l L Rev.* 365, 2006, at 383.

¹³⁷ It is stated in the Vienna Convention on the Law of Treaties art 26 that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”, Vienna Convention, 23 May 1969, in force 27 January 1980, reprinted in 8 *ILM* 679 (1969).

¹³⁸ Baumert, *supra* note 136, at 383

¹³⁹ Ibid, at 382.

¹⁴⁰ UNFCCC, *supra* note 6, Article 12.1.

¹⁴¹ Ibid., para 3 to 5.

emissions. . .”¹⁴² Furthermore, the Annex-I countries are, inter alia, committed to: communicate information to the Conference of the Parties (COP) on their ‘policies and measures’ to reduce emission of GHGs with the aim of returning to their 1900 levels;¹⁴³ to coordinate relevant economic and administrative instruments with other Annex I countries;¹⁴⁴ and, identify and review their own policies and practices “. . . which encourage activities that lead to greater levels of anthropogenic [GHG emissions] that would otherwise occur.”¹⁴⁵

These commitments are also written in obligatory language, however, there are no quantified targets on how much the countries should limit or reduce their emission reduction, no timetables or details on how it should be carried out. In other words, even these commitments are not enforceable. This must be seen in relation to the fact that the UNFCCC is a framework convention, in other words a first step in the architecture of a new climate regime. The UNFCCC is generally considered a ‘quasi-target’ or ‘quasi-timetable’¹⁴⁶. Despite the lack of legally binding obligations, the commitments clearly encourage parties to reduce and limit their GHG emissions, and it could be regarded as an important statement of the general aims of what should be achieved by the parties to the treaty.

In addition to mitigation commitments, the Annex I countries listed in Annex II (Annex II countries) are committed to provide ‘financial resources’ to the developing countries in order for them to be able to fulfil their commitments to communicate with the COP¹⁴⁷, and resources needed by the developing countries to implement their commitments covered by Article 4(1).¹⁴⁸ Annex II countries are also obligated to “. . .*take all practicable steps to promote, facilitate and finance, as appropriate, [technology transfer to other parties], particularly to developing countries, to enable them to implement the provisions of the Convention.*”¹⁴⁹ The Annex II Parties shall also financially assist developing countries that are particularly vulnerable to adverse effects of climate change¹⁵⁰.

In line with the other commitments in Article 4, these provisions are written in a language that makes their precise content limited, including phrases like ‘all practicable steps’ and ‘as appropriate’. The provisions do not define precise terms and conditions, which makes it unclear how far any real obligations are created,¹⁵¹ and, consequently, the ‘effectiveness of their implementation is difficult to monitor’.¹⁵²

Therefore, the actual obligation regarding this provision is not to ensure that technology transfer actually takes place, but that Annex II countries take practicable steps to transfer technology.¹⁵³ Furthermore, the commitment to provide financial resources is limited to the

¹⁴² Ibid., art. 4.2 (a).

¹⁴³ Ibid., para. 2 (b).

¹⁴⁴ Ibid., para 2 (3) (i)

¹⁴⁵ Ibid., para. 2 (e) (ii).

¹⁴⁶ Rajamani in YbIEL, supra note 24, at 92.

¹⁴⁷ As required in UNFCCC, art. 12.

¹⁴⁸ UNFCCC, supra note 6, art 4.3

¹⁴⁹ Ibid, art. 4.5

¹⁵⁰ See the fourth paragraph of Article 4

¹⁵¹ Birnie, Boyle, Redgewell, supra note 47, at 134.

¹⁵² Gupta, supra note 124, at 127.

¹⁵³ Rajamani in YbIEL, supra note 24, at 106.

developing countries implementation of specific commitments, such as reporting, and the costs must be ‘agreed’ to by the developing country in question and the operational entity of the financial mechanism.¹⁵⁴ This diffuse requirement makes it difficult to determine non-compliance. Birnie, Boyle and Redgewell conclude that it is ‘doubtful whether at the best’ these requirements embody more than very weak commitments on the developed countries.¹⁵⁵

C. The link between developed and developing countries implementation

Developing countries ensured to include their expectations of strong obligations from developed countries to assist them, as it is stressed in Article 4.7 that: “*the extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology*”.

This provision, referred to as the climate regime’s ‘linking-clause’, was accepted without much debate and without information on how it should be interpreted.¹⁵⁶ Therefore, it is unclear whether this provision withdraws the commitments of non-Annex I countries as long as the Annex I countries fail to provide them the necessary financial and technical assistance, or whether the non-Annex I countries would still be committed to comply regardless of the Annex I countries’ implementation of their assistance commitments.¹⁵⁷ Rajamani points out that, in order to be in line with the CBDR principle, the non-Annex I countries would still have the responsibility to fulfil their commitments,¹⁵⁸ because the ‘common responsibility’ to protect the environment still exists, even if Annex-I countries fails to fulfil their commitments.¹⁵⁹ Some say that the linking-clause, at least, give means to developing countries to put pressure on developed countries to provide assist.¹⁶⁰ From this perspective, they see it as irrelevant to what extent developed countries are bound by these assistance commitments.¹⁶¹ – If developed countries want developing countries to actively participate in the regime and effectively implement their commitments, they must provide them with the necessary resources.¹⁶²

Another important element in Article 4.7 is that it notes that the success of developing countries implementation of their commitments is related to their economic and social development, and that poverty eradication is their ‘first and overriding priorities’. By including this phrase, it underlines the recognition in the preamble with the similar contents. It has been argued that this phrase in the operational part of the treaty could be read as an exception from the commitments, so that developing countries will be able to claim that they

¹⁵⁴ Birnie, Boyle, Redgewell, supra note 47, at 134

¹⁵⁵ Id.

¹⁵⁶ Rajamani in YbIEL, supra note 24, at 103.

¹⁵⁷ Ibid., at 103.

¹⁵⁸ Id.

¹⁵⁹ Ibid., at 103-104.

¹⁶⁰ Birnie, Boyle, Redgewell, supra note 47, at 135.

¹⁶¹ Id.

¹⁶² Id.

must refrain from implementing their commitments because overriding priorities had come in the way.¹⁶³

D. Differential commitments under the Kyoto Protocol

Since the framework convention needs to be supplemented with more detailed rules and regulations, Article 15 opens for amendments to the Convention, and Article 17 made it possible for the COP to adopt protocols at any ordinary session. Such a protocol, namely the Kyoto Protocol, was adopted at the third COP session, COP-3, and was signed in 1997, although it was first set into force in 2005.

There are overall little references to the developing countries in the Kyoto Protocol, once again clearly reflecting that the developed countries are to ‘take the lead’¹⁶⁴ in the fight against climate change. Although Article 10 of the Kyoto Protocol commits ‘all parties’, it is emphasised that it does not represent new commitments for developing countries. Rather, it ‘reaffirms’ the common commitments in Article 4.1 of the Convention, and re-state the introduction phrase herein¹⁶⁵, and seeks to advance the implementation of these commitments ‘taking into account Article 4, paragraphs 3, 5, and 7, of the Convention.’¹⁶⁶

The core article in the protocol is Article 3, which provide many of the Convention’s Annex I countries with individual quantified emission limitation and reduction obligations (QUELROs). The Annex I countries listed in Annex B of the Protocol received individual targets referred to as ‘assigned amounts’, with “the view to reducing their overall emission of [the six Annex-A-listed GHGs]¹⁶⁷ by at least 5 percent below 1990 levels in the commitment period 2008 to 2012”.¹⁶⁸ With the adoption of these quantified targets and timetables, the mitigation commitments of the developed countries hereby became substantial and legally binding.

In order to enable observation of compliance with the emission reduction targets, Annex-I Parties are also committed to put in place a national system for estimating anthropogenic emission¹⁶⁹, and, to provide the information needed in their annual inventory and national communication to the COP to ensure and demonstrate compliance with their commitments¹⁷⁰. This implementation of the parties will then be review by the expert review teams.¹⁷¹

¹⁶³ Rajamani in YbIEL, supra note 24, at 107.

¹⁶⁴ As stated in UNFCCC, art 4.2, as presented above.

¹⁶⁵ Article 10 of the Kyoto Protocol also starts with the phrase: “All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances ...”

¹⁶⁶ Kyoto Protocol, supra note 7, art. 10(1). The Kyoto Protocol thus also re-affirms the ‘linking clause’ and consequently furthens both types of differential treatment: differentiated commitments and ‘re-distribution of resources’.

¹⁶⁷ These are the green house gases I refer to in this paper when speaking of GHGs.

¹⁶⁸ See Kyoto Protocol Article 3.1.

¹⁶⁹ Kyoto Protocol, supra note 7, Article 5.1.

¹⁷⁰ Ibid., Article 7.1 and 7.2

¹⁷¹ Ibid., art 8.

When the Kyoto Protocol required developed countries to limit or reduce their greenhouse gas (GHG) emissions according to the quantified targets, the implementation of the commitments got severe economic impacts. Compliance would demand costly domestically behavioural changes and affect the future economic development.¹⁷² To facilitate Annex I countries in meeting their emission targets, and at the same time promote the private sector, the Protocol included three market-based mechanisms,¹⁷³ referred to as flexible mechanisms, namely Joint Implementation¹⁷⁴ (JI), Emission Trading¹⁷⁵ and the Clean Development Mechanism (CDM).¹⁷⁶ The CDM is so far the only regulation in the climate regime that involves mitigation activity in developing countries. This mechanism will be further elaborated in Part V.I of this paper.

To sum up, while all parties are required to undertake certain activities, including forming national programmes, cooperate and exchange relevant information, only the developed countries are committed to provide financial resources and technology transfer and obligated to limit and reduce their GHG emissions under the current climate regime.

Even though the many of the commitments under the Kyoto Protocol are not enforceable, non-compliance with these commitments may be subject to compliance procedures, as will be elaborated below.

2. Differentiated non-compliance consequences

‘Compliance’ refers to the degree to which countries in fact implement their obligations under the legally binding treaty.¹⁷⁷ Non-compliance can include failure to give effect to substantive norms; or to fulfil procedural requirements; or to fulfil an institutional obligation.¹⁷⁸ The commitments in a treaty is not much worth unless the parties implement them, and thus, one could say that equally important as creating the commitments, also effective mechanisms and procedures must be designed in order to ensure compliance of the commitments. As stated by Sands: “*Non-compliance . . . limits the effectiveness of legal commitments, undermines the international legal process, and can lead to conflict and instability in the international order.*”¹⁷⁹ Due to the principle of state sovereignty, no state or international institution can legally force another state to comply with international law or apply consequences of non-compliance unless the non-complying state has agreed to such consequences. The parties to a treaty must therefore develop and agree on how non-compliance should be regulated in relation to the specific treaty.

¹⁷² Greenhouse gas production are directly connected with energy, transport, agriculture and industrial policy, see Birnie, Boyle and Redgewell: *International Law & the Environment*, at 355.

¹⁷³ UNFCCC's webpage, available at <http://cdm.unfccc.int/about/index.html>.

¹⁷⁴ The Kyoto Protocol, supra note 7, Article 6.

¹⁷⁵ Ibid, Article 17.

¹⁷⁶ Ibid, Article 12.

¹⁷⁷ Joyeeta Gupta: *International Law and the Climate Change: The Challenges Facing Developed Countries*, in *Yearbook of International Environmental Law*, Volume 16, 2005, at 133.

¹⁷⁸ Sands, 127.

¹⁷⁹ Sands, at 172.

Under the UNFCCC, where the commitments are vague and non-legally binding, the Conference of the Parties (COP) was tasked to establish a multilateral consultative process¹⁸⁰ with the mandate to resolve questions regarding implementation through a non-judicial process ‘conducted in a facilitative, cooperative, non-confrontational, transparent and timely manner’, under which the parties (or the COP) may bring in questions concerning the parties’ implementations.¹⁸¹

Therefore, the compliance mechanism under the Kyoto Protocol with the objective to “. . . facilitate, promote and enforce compliance with the commitments under the Protocol”¹⁸² represented a large step forward. This mechanism is considered the principal mechanism for disputes concerning compliance with the Kyoto Protocol and any subsequent commitments.¹⁸³ It was designed at the seventh session of the Conference of the Parties (COP.7), in what has been known as the Marrakesh Accord, and adopted at the first Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP.1).

The Kyoto compliance mechanism is a result of a long negotiation process, based on the division of political interests in developed countries and developing countries.¹⁸⁴ As the commitments under the Kyoto Protocol clearly distinguish between Annex I countries and non-Annex I countries, this has also coloured the design of the rules, procedures and institutions of its compliance mechanism. As explained by Ulfstein and Werksman, the Kyoto compliance system has elements of both the traditional dispute settlement in international treaties and the compliance mechanisms often found in international environmental agreements.¹⁸⁵ The former solve cases of bilateral disputes and has enforcement powers. The latter is a compliance mechanism, often with specialised bodies and procedures, where the parties report on their implementation and promote resolution of compliance problems in a cooperative, rather than adversarial, manner where potential non-compliance are addressed rather than a later formal case of compliance.¹⁸⁶ In simple words, procedures designed to facilitate rather than enforce compliance. In relation to Kyoto Protocol, which has the aim to tackle the global problem of climate change, a case of non-compliance is best suited to be resolved in an international context rather than through third party arbitration or adjunction.¹⁸⁷ However, the “all facilitative” compliance mechanism can be criticised for not ensuring efficient implementation of binding obligations, as the consequences of non-compliance are too soft. The compliance system’s enforcement

¹⁸⁰ UNFCCC, *supra* note 6, Article 13.

¹⁸¹ Decision 10/CP.4 and Annex para 3. (FCCC/CP/1998/16/Add.1)

¹⁸² See the Annex to decision 24/COP.7, (FCCC/CP/13/Add 3 at page 65).

¹⁸³ Birnie, Boyle and Redgewell: *International Law & the Environment*, 2009, at 370.

¹⁸⁴ See Jacob Werksman: *Negotiation of a Kyoto Compliance System*, in *Implementing the Climate Regime: International Compliance*, Stokke, Hovi and Ulfstein (eds), 2005, at 19.

¹⁸⁵ See generally Ulfstein and Werksman: *The Kyoto Compliance System: Towards Hard Enforcement*, in: *Implementing the Climate Regime: International Compliance* (Stokke, Hovi and Ulfstein eds.), 2005, [hereinafter Ulfstein and Werksman] at 39-41.

¹⁸⁶ *Ibid*, at 39.

¹⁸⁷ *Id*.

measures and its due process guarantees¹⁸⁸ are comparable to those applied by judicial bodies.¹⁸⁹ The Kyoto compliance, thus include both facilitative and enforcement elements.

Two main institutions are involved when identifying non-compliance, namely the Expert Review Teams (ERTs) and the Compliance Committee.¹⁹⁰ The ERTs are mandated tasked to perform a technical assessment¹⁹¹ of the information given by the parties regarding implementation¹⁹², as well as requested additional or clarifying information¹⁹³, and assess ‘all aspects of implementation’ to identify ‘and ‘any potential problems in, and factors influencing, the fulfilment of commitments’.¹⁹⁴ The Compliance Committee operates through a plenary, a bureau and two branches.¹⁹⁵ The bureau’s role is to ‘allocate questions of implementation to the appropriate branch’.¹⁹⁶ The two branches, the Facilitative Branch and the Enforcement Branch, therefore carry out the actual assessment and decisions regarding cases of non-compliance. The Compliance Committee consists of twenty members, divided into ten members in both branches.

Especially the composition of the Enforcement Branch was a controversial issue in the negotiations regarding whether individuals from non-Annex I parties, which have no quantified commitments under the Protocol and who are not subjects for enforcement consequences, should sit in judgement of Annex I parties commitments.¹⁹⁷ However, both branches have equally many members from Annex I and non-Annex I countries.¹⁹⁸

A. The Facilitative Branch

The Facilitative Branch has the overall task to give advice and facilitation to *all* the parties in implementing the Protocol, and to promote compliance with the commitments ‘taking into account the principle of common but differentiated responsibilities and respective

¹⁸⁸ See *Ibid.*, at 40: The mechanism was designed to ensure due process, which is when procedures and institutions are well suited to handle every individual case, for instance, that the decision making body possess the information, expertise and authority necessary to take the decisions assigned to it. Due process is also described as the treatment the parties are entitled to receive as a matter of fairness and justice, *ibid* at 40. Due process is therefore considered to ensure both effectiveness and fairness. The two interests in due process, effectiveness and fairness, often come in conflict. Yet, fairness can also be an important element to ensure effectiveness. As Ulfstein and Werksman state: “[*I*n the international context, where sovereigns remain strong and techniques for enforcement weak, it is all the more important that parties found to be in non-compliance perceive that they have been treated fairly and objective, so that arguments about illegitimacy of the institutions and procedures are removed as an excuse for ignoring decisions taken against them.”

¹⁸⁹ *Ibid.*, at 41.

¹⁹⁰ Ulfstein and Werksman, *supra* note 185, at 41.

¹⁹¹ Kyoto Protocol, *supra* note 7, Art 8, para 3.

¹⁹² *Ibid.*, para 1. Parties are committed to submit information according to Art. 7 and Article 12 of the UNFCCC, *supra* note 6.

¹⁹³ Decision 23/CP.7. Annex, para. 5. (FCCC/CP/2001/13/Add.3.)

¹⁹⁴ Kyoto Protocol, Art. 8, para 3.

¹⁹⁵ Decision 24/CP.7, Annex:, Chapter II, para. 2 (FCCC/CP/13/Add 3).

¹⁹⁶ *Id.*, Chapter VII, para 1.

¹⁹⁷ Ulfstein and Werksman, *supra* note 185, at 42.

¹⁹⁸ *Ibid.*, at 46-47.

capabilities' and 'the circumstances pertaining to the questions before it'.¹⁹⁹ This branch makes no legally binding determinations of non-compliance.²⁰⁰

Two questions of implementation related to Annex I countries' commitments are under this branch's exclusive jurisdiction. The first is Annex-I countries' commitment to strive for minimized adverse impacts on developing countries when implementing their emission reduction commitment in Article 3 of the protocol²⁰¹. The second is regarding the Annex-I countries duty to provide of information on the use of the flexible mechanisms.²⁰²

In addition, the Facilitative Branch has the mandate to promote compliance and provide for 'early warning of potential non-compliance' by providing advice and facilitation related to compliance with the emission reduction commitment of Annex I countries in Article 3(1) of the Protocol up to the second commitment period.²⁰³ This responsibility is designed not to overlap with the tasks of the Enforcement Branch which will have the exclusive mandate to deal with the parties implementation of the emission limitation and reduction commitments after the end of the first commitment period.²⁰⁴

Regarding non-compliance consequences, the Facilitative Branch is responsible to apply consequences 'taken into account the principle of common but differentiated responsibilities and respective capabilities', by deciding on the application of one or more possible consequences.²⁰⁵ These consequences are: to provide advice and assistance to an individual party regarding implementation;²⁰⁶ to facilitate financial and technical assistance to any Party including technology transfer and capacity building;²⁰⁷ and, to formulate recommendations to the Party concerned, taking into account the link between developed countries compliance and developed countries implementation, as stated in Article 4.7²⁰⁸ of the Convention.²⁰⁹

As the Facilitative Branch is to take into the CBDR principle and the parties' capacities when choosing the type of consequence, as well as the circumstances in the specific case, it is thereby possible for them to treat a similar case of non-compliance differently. It is thereby opened for differentiation between developing and developed countries.²¹⁰

B. The Enforcement Branch

¹⁹⁹ See the Annex to Decision 24/COP.7, section IV, paragraph 4.

²⁰⁰ Ulfstein and Werksman, *supra* note 185, at 45.

²⁰¹ Decision 24/COP.7, Section IV, para. 5(a). This commitment is stated in the Kyoto Protocol, Article 3.10.

²⁰² *Id.* Para. 5(b).

²⁰³ *Id.* Para. 6(a).

²⁰⁴ Ulfstein and Werksman, *supra* note 185, at 46.

²⁰⁵ *Id.*

²⁰⁶ Decision 24/COP.7, Annex, Section XIV, paragraph (a).

²⁰⁷ *Id.*, para (b) and (c).

²⁰⁸ As explained above in part II.1.

²⁰⁹ *Ibid.*, para (d)

²¹⁰ Rajamani, *supra* note 4, at 204.

While both branches apply compliance consequences, only the Enforcement Branch can apply ‘enforcement consequences’ meaning that it can enforce penalties to a non-complying party.²¹¹

The Enforcement Branch has, unlike the Facilitative Branch, exclusively jurisdiction over the legally binding commitments of the Annex-I countries,²¹² as it has the mandate to determine whether an Annex I country is in compliance with its emission reduction commitments²¹³, the methodological and reporting requirements²¹⁴ of the Protocol,²¹⁵ and the eligibility requirements in relation to the flexible mechanisms.²¹⁶

If the Enforcement Branch determines that there is a case of non-compliance, the Enforcement Branch is responsible for applying consequences with the aim to restore the compliance to ensure environmental integrity, and must provide for an incentive to comply.²¹⁷ There are several consequences to be applied, dependent on the type of non-compliance. Unlike the available consequences that the Facilitative Branch chose to apply, the obligatory language “shall” indicates that the Enforcement Branch do not have the mandate to select what consequences they may find suitable for a specific case of non-compliance.²¹⁸ Even though this makes the consequences more foreseeable and prevents abuse of powers, it will mean that all similar types of compliance will be treated similarly, despite the special circumstances in the specific case.²¹⁹

There are specific consequences to be applied whether it is non-compliance with the methodological and reporting requirements, non-compliance with the requirements of the flexible mechanisms, or non-compliance with the quantified emission limitation and reduction obligation targets.

In case of non-compliance of the methodological and reporting requirements, the Enforcement Branch shall form an official declaration of non-compliance and the party will be asked to develop a plan consisting of analysis of the reason for non-compliance, measures intended to be implemented in order to remedy the non-compliance, and, a timetable for implementing such measures. The Party must also provide a progress report on the implementation of the plan on a regular basis.²²⁰

If there is non-compliance concerning the requirements of the use of flexible mechanisms, the Enforcement Branch shall suspend the eligibility of that Party. This could mean that party lost

²¹¹ *Ibid.*, at 203.

²¹² Although, until the time the mandate period of the Facilitative Branch expires, some questions of compliance will fall outside the mandate of the Executive Branch. As the first commitment period is started, this only concerns questions of compliance with Article 3(14) of the Kyoto Protocol, see Decision 24/COP.7, Section IV, paragraph 6.

²¹³ *Id.*, Section V, paragraph 4(a)

²¹⁴ These requirements are stated in the Kyoto Protocol, *supra* note, 7, in Article 5.1, 5.2, 7.1 and 7.4.

²¹⁵ Decision 24/COP.7, Annex, Section V, para (b)

²¹⁶ *Id.*, para (c)

²¹⁷ *Id.*, paragraph 6.

²¹⁸ Ulfstein and Werksman, *supra* note 185, at 55.

²¹⁹ *Id.*

²²⁰ See Decision 24/COP.7, Annex, Section XV, para 1 (a) and (b), 2 and 3.

its right to use all the flexible mechanisms, but presumably this consequence only refers to the flexible mechanism in question.²²¹ As described above in part III.1, the use of flexible mechanism are aimed at providing low-cost supplements to domestic emission reductions. If this right is suspended, this consequence thereby represents economic loss for the non-complying party.²²² However, at a party's request, the eligibility can be reinstated under certain circumstances.²²³ This is if the Enforcement Branch decides that there no longer is a question of implementation with respect to that Party's eligibility, or otherwise also in certain circumstances.²²⁴

The hardest consequences are those applicable in case of non-compliance with the emission reduction obligations. If the Enforcement Branch declares non-compliance with these commitments, they shall apply deduction from the Party's assigned amount in the second commitment period with 1.3 times the amount in tonnes of excess emissions,²²⁵ and suspend the possibility of emission trading²²⁶ until the Party is reinstated.²²⁷ The party is also required to develop a compliance action plan.²²⁸ This consequence would obviously have a great economic impact as the country would not only be obligated to even stringent mitigation commitments²²⁹, and at the same time would have to undertake all the mitigation actions domestically.²³⁰

C. Differential treatment under the compliance mechanism

By dividing the Compliance Committee into two branches of which only the Enforcement Branch have mandate to apply enforcement consequences on the Annex I countries, the possible consequences applicable for the parties were differentiated. Furthermore, as the Facilitative Branch can apply different consequences to similar types of non-compliance, taking into account the CBDR principle and respective capabilities, it is possible to differentiate the parties non-compliance consequences under this Branch too. For instance, developing countries can be given more financial and technical assistance than a developed country, based on their different capacities. Thus, in the creation of this mechanism, the parties included both implicit and explicit norms of differential treatment.²³¹

²²¹ Ulfstein and Werksman, *supra* note 185, at 56.

²²² This is also supported by Ulfstein and Werksman, *id.*, where they state that ". . . the suspension of eligibility may be of considerable economic and political importance for the party concerned, and should thus be considered a hard sanction."

²²³ Decision 24/COP.7, Annex, Section XV, para. 4.

²²⁴ *Ibid.*, Section X, para. 1 and 2.

²²⁵ Decision 24/COP.7, Annex, Section XV, para. 5(a).

²²⁶ Regulated in the Kyoto Protocol, Article 17.

²²⁷ Decision 24/COP.7, para5(c).

²²⁸ *Ibid.*, para. 5(b).

²²⁹ That is, however, if the parties agree to a second commitment period of the Kyoto Protocol.

²³⁰ However, it should be noted that the Marrakesh Accords only prohibit parties from selling, not buying quotas, see Ulfstein and Werksman, *supra* note 185, at 57.

²³¹ Rajamani in YbIEL, *supra* note 24, at 95.

Generally, since a party's non-compliance to a treaty can be due to a variety of different reasons, it is widely recognised that the underlying causes require further attention in order to design the commitments to ensure that they are effectively implemented.²³² Subsequently, these underlying causes can therefore also affect the design of the compliance mechanism.²³³

This is also the case with the Kyoto Protocol's compliance mechanism as it recognises and responds to the parties' differences. Since the developed countries generally lack resources, strong institutions and other relevant issues to be capable of undertaking actions to comply with a treaty, one could presume that these issues often will be the underlying causes of non-compliance. On the other hand, the developed countries generally have better wealth and development and therefore should be more capable of implementing their commitments. This taken into account as only the Facilitative Branch has the mandate to apply 'soft' consequences.

The division could also be seen in light of the purpose of giving parties commitments: to meet the ultimate objective of the treaty, which in the climate regime is to prevent dangerous interference with the climate system. If developing countries should be subject to 'hard' consequences, this would not be an efficient approach. If the underlying problem was lack of capacity, penalties would not fix this problem. On the contrary, the negative economic and political effects of enforcement consequences would only make it even more difficult for the developing countries to comply with its commitments. Giving advice, financial and technical assistance, on the other hand, could improve the reasons that lead to non-compliance, and thereby contribute to the fulfilment of the ultimate objective. Consequently, the 'soft' approach on non-compliance would be a much more efficient method to ensure implementation of the developing commitments. Since the Kyoto compliance mechanism recognises the problems of developing countries, it thereby takes a sympathetic approach.²³⁴

Regarding the enforcement consequences only applicable for Annex I countries, this must be seen as reflection of the parties' differentiated commitments. When the Annex I countries' commitments became legally binding under the Protocol, they thereby became enforceable. In addition, since a core reason for the differentiated commitments were that the Annex I countries had better capacity to take on mitigation action, they should also be able to comply. For these countries, economic consequences could in fact improve the efficiency of the climate regime as the risk of being "punished" could motivate them to implement their commitments. As the main contributors to the climate change problem, it is also decided that the Annex I countries should 'take the lead'.²³⁵ One could therefore also say that their responsibility could legitimise that they are subjects to harder consequences. Furthermore, as they are the only countries who are committed to reduce their GHG emissions, which is directly linked to the ultimate objective of the climate regime, it could therefore be argued

²³² Sands, *supra* note 1, at 172.

²³³ *Id.*

²³⁴ Gupta, *supra* note 124, at 134.

²³⁵ This is stated in UNFCCC, *supra* note 6, art. 3 (the principles) and art. 4.2 (in relation to Annex I countries commitments). The Kyoto Protocol reaffirms this principle in the preamble.

that it is even more important that these countries comply, and thus, that the enforcement consequences are a way to ensure this.

When the Protocol's compliance mechanism builds on the different capacities and responsibilities of developed and developing countries, which is the core of the CBDR principle, it therefore designed to ensure an efficient implementation of the commitments. However, it has been pointed out in the literature that even though the compliance mechanisms builds on the same elements that are embedded in the CBDR principle, it cannot be seen as another type of assistance for implementation integrated in this principle.²³⁶ The compliance procedures cannot be considered 'burden-sharing' because the compliance mechanism will not be used if the parties implement their commitments. In fact, the CBDR principle should ensure that the burdens were allocated so that there would be no case of non-compliance.²³⁷

During the negotiations, developing countries negotiators remained united and insisted on having a strong enforcement system which was applicable for industrial countries only.²³⁸ This could be seen as the developing countries expected that they would be without emission reductions indefinitely, so that this compliance mechanism would never apply to them.²³⁹ However, as the text regulating the Enforcement Branch is addressed to the Annex I Parties with commitments in the Kyoto Protocol, it depends on the status of a party if it can be subject for the 'enforcement consequences', rather than if it is considered a developing country or not.²⁴⁰ Therefore, if a non-Annex I country would be listed in the Annex I in the future, the Enforcement Branch will have the mandate over this country's compliance automatically.²⁴¹ Yet, as pointed out by Rajamani, it remains to see what the compliance consequences will be if the developing countries take on mitigation commitments without including themselves in Annex I.²⁴²

PART IV: The Boundaries of Differential Treatment

The current differential treatment in the climate regime builds on the same distinction that was made between developed and developing countries when the UNFCCC was formed. However, almost two decades later one can question if the differences that were considered relevant at that time, and thereby formed the division between these two groups of countries, still is relevant today. One could argue that based on the changed factual situation, the same reasons are no longer valid to justify that developing countries should be without any substantial commitments to undertake mitigation action on their territories, and that all

²³⁶ Honkonen, *supra* note 20, at 150-152.

²³⁷ *Id.*

²³⁸ Werksmann, *supra* note 184, at 27.

²³⁹ *Id.* Jakob Werksman finds it reasonable to conclude in this way.

²⁴⁰ *Id.*

²⁴¹ This is also supported by Gupta, *supra* note 124, at 134

²⁴² Rajamani, *supra* note 4, at 205.

developing countries should be treated the same. In other words, one can question if it is time to adjust the differential treatment in the climate regime.

Even though the CBDR principle legitimise differential treatment, it does not imply differential treatment ‘ad infinitum’.²⁴³ As Honkonen underlines: “*It is evident that situations and circumstances of states change over time, and this should be reflected in their international commitments. Regimes should never remain static.*”²⁴⁴ This has led to many heated discussions in the international community regarding which countries should be entitled to differential treatment, why, how, and for how long.²⁴⁵ Accordingly, the application of the CBDR principle, differential treatment, must be based on and applied within certain boundaries.

Rajamani has defined the boundaries of differential treatment.²⁴⁶ According to her, differential treatment must be ‘measured against three yardsticks’: differential treatment should not ‘detract from the overall object and purpose of the treaty’; ‘it should recognize and respond to differences across pre-determined categories’; and, ‘it should cease to exist when the differences cease exists’.²⁴⁷ I will in the following part use these identified boundaries to assess whether the current differential treatment in the climate regime has gone too far.

1. Does the current differential treatment in the climate regime detract from the overall objective and purpose?

Rajamani explains this boundary by stating that: “*The CBDR principle recognizes the existence of a common environmental goal and the need to differentiate between countries in the actions required to achieve the common goal. It follows logically that the tasks countries undertake, however these are divided between the parties, should in their totality further the common environmental goal. If the actions taken in their totality detract from the common environmental goal then the differential treatment has gone too far.*”²⁴⁸ The objective of a treaty, in which the common goal of the parties are embedded, will thus set the limits for the differential treatment so that it cannot be applied in a wider extent than what is needed to enable the fulfilment of the objective. In relation to the climate regime, Rajamani has also stated that: “*The division of responsibilities will 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.*”²⁴⁹

Thus, in order to assess the limits of differential treatment in the climate regime in line with this boundary, one could only conclude that the differential treatment had gone too far if all

²⁴³ Honkonen, supra note 20, at 3.

²⁴⁴ Id.

²⁴⁵ Id.

²⁴⁶ Rajamani, supra note 4, at 162.

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ Rajamani in YbIEL, supra note 24, at 108.

parties had implemented their commitments, in particular that Annex I parties had met their targets under the Kyoto Protocol, and the objective – to achieve ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’²⁵⁰ – was still not possible to achieve.

It is clear that the parties have not fully implemented their commitments.²⁵¹ Also, the refusal of the US, responsible for about 20-25 percent of the global GHG emission, to ratify the Protocol have greatly contributed to the inefficiency of the regime. The fact that there is no definition of what is to be considered ‘dangerous anthropogenic interference’ in the climate regime could also make this boundary difficult to assess. Although, a general view is that an upper limit is a global temperature rise above 2 degrees Celsius²⁵², which was confirmed in the Copenhagen Accord.²⁵³

However, there are still reasons to argue that the current differential treatment, where only Annex I countries have mitigation commitments, is insufficient to successfully meet the objective. There are many critical voices calling for a new approach in the literature. Mumma and Hodas are especially critical as they consider the lack of commitments on developing countries in the Kyoto Protocol as a ‘false articulation of the common but differentiated responsibilities’.²⁵⁴ In their view, the original meaning of the principle, “. . .*that all nations have a duty to protect common resources, but the nature and extent of a nation’s obligations will be equitably allocated, duty being the common denominator. . .*”, instead came to be understood that developing countries should have *no* responsibilities to undertake emission reductions under the Protocol.²⁵⁵ They argue that this is one reason why the Kyoto Protocol is flawed.²⁵⁶

Honkonen disagrees regarding their view of the CBDR principle, as she states that such a view is a quite strict interpretation of the principle.²⁵⁷ She underlines that “[t]he need for differentiation may sometimes be so strong that the ‘common’ element of the principle is forced to assume a very minor role. Still, that does not render the CBDR principle inapplicable in this case”.²⁵⁸ Yet, she also notes that the historical responsibility of developed countries with high GHG emissions has served as an important rationale for the current differential treatment, but that CBDR does not mean that developing nations should be enabled to follow the same ‘environmentally destructive path’.²⁵⁹ Rather, she says, the idea of

²⁵⁰UNFCCC, supra note 6, art. 2.

²⁵¹ Paul G. Harris: Collective Action on Climate Change: The Logic of Regime Failure, in 47 Nat. Resources J. 195, 2007, at 220.

²⁵² At the official UNFCCC website it is stated that IPCC has recognised a limit of 2-2.4 degrees Celsius temperature rise. See: http://unfccc.int/press/fact_sheets/items/4988.php

²⁵³ Decision 2/CP.15, para 1 (FCCC/CP/2009/11/Add.1). The Accord is however not (yet) signed by all parties to the UNFCCC or Kyoto Protocol, which means that there is still no clear consensus among the parties to the UNFCCC.

²⁵⁴ Albert Mumma and David Hodas, supra note 44, at 631.

²⁵⁵ Id.

²⁵⁶ Id.

²⁵⁷ Honkonen, supra note 20, at 131

²⁵⁸ Id.

²⁵⁹ Ibid., at 321.

CBDR is that developing countries gradually adopt stricter limitations on their environmentally harmful behaviour.²⁶⁰ Thereby, she also points out that the differential treatment might need adjustments in order to meet the objective. Gupta also notes that the current differential treatment allow the large developing countries to grow without restrictions, which potentially can make the whole process ineffective.²⁶¹

Described in a more explicit language, Murphy Et. al. stress that engaging developing countries will be critical to success in reaching the goal of the UNFCCC and point at the Stern Review, which notes that both leading developed and developing economies must act seriously in climate change in order to create a durable impact on atmospheric concentrations of GHGs.²⁶² Halvorsen also clearly states that if the major GHG-emitting developing countries are not given binding reduction commitments, the CBDR principle will have been taken beyond the limits, as the objective of the Convention would be defeated.²⁶³

However, more importantly, scientific research most certainly calls for an adjustment of the current differential treatment. An increasingly share of the global GHG emission is originating from developing countries,²⁶⁴ especially the large developing states that are experiencing powerful economic growth.²⁶⁵ Furthermore, IPCC states that in 2004, the developing countries were responsible for 53.6 percent of the global emission of GHGs,²⁶⁶ and that with the current climate change ‘mitigation policies and related sustainable development practices’, global GHG emission will continue to grow over the next few decades.²⁶⁷ In fact, already in the Second Assessment Rapport of the IPCC, concluded that: “[w]hatever the past and current responsibilities and priorities, it is not possible for the rich countries to control climate change through the next century by their own actions alone, however drastic. It is this fact that necessitates global participation in controlling climate change, and hence, the question of how equitably to distribute efforts to address climate change on a global basis”²⁶⁸

These statements clearly indicates that the current differential treatment, where only the Annex I countries have substantial mitigation obligations, is insufficient to meet the objective, and, thus has gone too far. As climate change will affect most, if not all, countries in adverse ways,

²⁶⁰ Id.

²⁶¹ Gupta, supra note 124, at 121.

²⁶² Murphy, Et. Al.,:Encouraging Developing Country Participation in a Future Climate Change Regime, International Institute for Sustainable Development, 2009, at 2.

²⁶³ Anita M. Halvorsen: Common, but Differentiated Commitments in the Future Climate Change Regime – Amending the Kyoto Protocol to include Annex C and the Annex C Mitigation Fund, in 18 COLO. J. INT’L ENVTL. L. POL’Y 247, 2007, at 258.

²⁶⁴ At the UNFCCC official website it is stated that: “the biggest contribution to the global emission increase over the next decades is projected to come from developing countries, though their average per capita CO2 emissions will remain substantially lower than those in developed country regions”, see http://unfccc.int/files/press/fact_sheets/application/pdf/fact_sheet_climate_deal.pdf.

²⁶⁵ Murphy, Et.al., supra note 262, at 2.

²⁶⁶ IPCC: Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, P.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp, 2007., at 37.

²⁶⁷ IPCC, supra note 10.

²⁶⁸ IPCC: supra note 95, at 97.

they have a common interest in reversing these effects by limiting the global GHG emissions, and consequently they should also have a common interest in taking on further action to ensure that the objective of the Convention is fulfilled. In order to ensure this, the current differential treatment, where developing countries are not committed to undertake mitigation action, therefore needs adjustments.

2. Does the current differential treatment recognize and respond to differences across pre-determined categories?

Rajamani points out that in order to be in harmony with the notion of justice requiring that those dissimilarly situated should be treated dissimilarly,²⁶⁹ “[j]ustice would demand that treaty commitments incorporate a proportionate reflection of relevant differences not just between industrial and developing countries but also between developing countries”.²⁷⁰ This should be done by recognising the relevant differences in the treaty, along with clear and flexible identifications and categorisations of parties based on the relevant differences.²⁷¹ Honkonen also supports this by stressing the importance of flexibility and dynamism in the criteria used for forming categories of countries for differential treatment.²⁷²

Although the differential treatment in the climate regime is seen as an outgrowth of the CBDR principle, and thus, contribution to the climate change and capacities were considered relevant differences when designing the Convention, no criteria are explicitly stated in the Convention nor the Kyoto Protocol. Even though Annex I countries listed in Annex B of the Protocol were differentiated through individual national targets,²⁷³ and the climate regime recognises the special needs of some countries,²⁷⁴ the differentiated commitments and favourable treatment are simply divided between those who are listed in Annex I,²⁷⁵ and those who are not – the ‘non-Annex I’ or ‘developing countries’.

This established categorisation of countries into developed and developing in international instruments has been said to imply an official recognition of the existence of inequalities between states.²⁷⁶ Furthermore, it has been claimed that as the obligations in the climate regime is generally based on the parties’ economic development, it respects the CBDR

²⁶⁹ As presented in part II.2.D.(i) of this paper.

²⁷⁰ Rajamani, supra note 4, at 109.

²⁷¹ Id.

²⁷² Honkonen, supra note 20, at 181.

²⁷³ Kyoto Protocol, supra note 7, art. 3. However, even these national targets were not ‘based on any comprehensive or standardized formula, but rather on complex negotiations and bargaining on manifold issues’, see Honkonen, at 129. However, it is interesting as it implies that differential treatment is not only applicable between developed and developing countries, see Honkonen, supra note 20, at 131.

²⁷⁴ In the preamble to the UNFCCC it is recognised that certain countries are particularly vulnerable to the adverse effects of climate change and also ‘the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of action taken on limiting greenhouse gas emissions’. Furthermore, UNFCCC, supra note 6, art. 4.8 identify specific groups of countries which needs and concerns should be given full consideration when the parties implementing the commitments in Article 4.

²⁷⁵ Which again can be listed in Annex II of the Convention or Annex B of the Kyoto Protocol

²⁷⁶ Honkonen, supra note 20, at 179.

principle.²⁷⁷ Yet, the differential treatment in the climate regime fails to address relevant differences among the developing countries.

The non-Annex I countries consists of 149²⁷⁸ countries including over 130 members²⁷⁹ of the Group 77 and China (G77/China), while the rest of the countries do not share a common negotiation history.²⁸⁰ Although most developing countries have similar historical experiences, weak institutions, economic and technological conditions, and most of them have low per capita emissions, insignificant total greenhouse gas emissions, and, for most, the impacts of climate change are likely to be relatively high, there are indeed important differences among them.²⁸¹ For instance, some of the developing countries have low potential for future GHG emissions, predominantly African countries, while other countries are large ‘newly industrializing countries’ with high potential for future GHG emissions, like China, India, Brazil, Mexico and South Africa.²⁸² Some of the non-Annex I countries are considered wealthy advanced developing countries, like Bahamas, Malta, Saudi Arabia and United Arab Emirates,²⁸³ while others, especially African countries, are poor and ‘under-industrialized’.²⁸⁴ Despite the fact that there are vast differences in these countries, the favourable treatment is granted them *all*. This could be linked to the lack of definition of ‘developing country’ in the climate regime, which has resulted in the fact that all countries not included in Annex I of the Convention automatically is considered a ‘developing country’. As stated by Myrphy Et. al: “*These countries represent a large, diverse group that have a variety of needs and required responses to climate change, and there are calls for differentiation or for different levels of actions.*”²⁸⁵

As presented in part III.1 above, the current differential treatment in favour of developing countries have lead to softer commitments as well as support to the developing countries. When this favourable treatment is given to them all, despite their differences, at least two problems arise: It could further inequality rather than restore equality, and, it would contribute to the inefficiency of the regime to meet the ultimate objective.²⁸⁶

First, as the equal treatment of all non-Annex I countries enable them all to receive assistance and benefits provided in the climate regime, this support could be misdirected to those developing countries which do not need it the most. If these resources are constantly

²⁷⁷ Gupta, supra note 124, at 127.

²⁷⁸ See UNFCCC’s official website: http://unfccc.int/parties_and_observers/parties/non_annex_i/items/2833.php

²⁷⁹ Facts from UNFCCC’s official website, see:

http://unfccc.int/parties_and_observers/parties/negotiating_groups/items/2714.php

²⁸⁰ Gupta, supra note 124, at 122.

²⁸¹ Ibid., at 123.

²⁸² Mumma and Hummas, supra note 44, at 640.

²⁸³ Murphy Et. Al., supra note 262, at 13.

²⁸⁴ Will Gerber: Defining “Developing Country” in the Second Commitment Period of the Kyoto Protocol, in 31 B.C Int’l & Comp. L. Rev. 327, 2008, at 334.

²⁸⁵ Murphy Et. Al., supra note 262, at 13.

²⁸⁶ Rajamani argue in a similar way when she points out that the ambiguity in the classification of developing can create a legitimacy deficit in the system in two ways, namely it can hamper efficient distribution of scarce resources, and it can prevent identification of those countries that bear greater responsibility for contributing to climate change, see Rajamani, supra note 4, at 171-172.

misdirected, this indeed further inequality, rather than restore equality among the parties.²⁸⁷ One example of this is the CDM projects. As I will explain below in part V.1., a tendency with this mechanism, although supposed to benefit developing countries by ensuring sustainable development, is that the projects are carried out in those countries where it is easiest and most cost-efficient, and consequently, not in the countries that would benefit the most from these projects. Honkonen argue likewise when she points at the lack of definition for a developing country could “. . .potentially lead to unjust outcome, since the states’ right and responsibilities rest on an obscure base”.²⁸⁸ It could therefore “. . .cause a legitimacy deficit in the system and hamper efficient distribution of scarce resources, leading to further inequality and questioning the legitimacy of the system”.²⁸⁹

Secondly, when all developing countries are subject to the same commitments, the regime does not reflect the actual capacity of the developing countries, nor their degree of contribution to the climate change. The equal treatment of the unequal developing countries therefore reduces the efficiency of the climate regime. Thus, one could argue that the degree and nature of their commitments should be differentiated, to better reflect that, at least some of, the developing countries could and therefore should be more actively involved to meet the objective of the treaty. Rajamani argues in the same direction as she points out that the lack of differentiation between developing countries “. . . can prevent identification of those countries that bear greater responsibility for contributing to climate change.”²⁹⁰

If the relevant differences among developing countries had been taken into consideration in the differential treatment it would be possible to adjust the commitments so that the developing countries could take on mitigation actions according to their individual capacity, and, furthermore, ensure a more balanced allocation of the support from developed countries.

Even though developing countries might not warmly welcome differentiation as it could lead to restraints on their economic development, differentiation between them through new categorisations could better reflect their diverse interests and therefore also be beneficial to the developing countries.²⁹¹ Yet, “. . . the realization of the idea will require major political will and courage.”²⁹²

To conclude, by treating all developing countries similarly, the climate regime fails to be fully in harmony with the vision of justice since those dissimilarly situated are actually treated similar. Since the climate regime fails to identify the relevant differences and criteria for which the differentiated treatment should be based on, it provides equal favourable treatment to a wider number of parties than necessary. Thus, the current differential treatment is too extensive.

²⁸⁷ See Rajamani in YbIEL, supra note 24, at 115.

²⁸⁸ Honkonen, supra note 20, at 184.

²⁸⁹ Ibid, with reference to Rajamani, 2006, at 165 and 171.

²⁹⁰ Rajamani, supra note 4, at 172.

²⁹¹ Honkonen, supra note 20, at 344.

²⁹² Id.

3. Have the relevant differences ceased to exist so the differential treatment should cease to exist?

Logically, since the differential treatment is based on relevant differences it should only be applied as long as the relevant differences exist. As Rajamani points out: “. . . [W]hen the relevant differences vanish, differentiation should cease, or at least the lack of differences should be taken into account in fashioning future obligations under the regime.”²⁹³ Otherwise, she argues, the differential treatment would further inequality, which is the opposite of the main purpose of differential treatment.²⁹⁴

In the lack of recognised relevant differences or defined criteria regarding which countries should be entitled to the favourable treatment in the climate regime, it is difficult to identify what differences between the countries should be assessed in relation to this boundary. However, as the differential treatment is seen as an outgrowth of the CBDR principle, and thus based on the differences regarding historic contribution and capacity, these differences must be seen as relevant.

Obviously, there are still important differences between most of the developed and developing countries. The historic responsibility still lays on the developed countries as the main contributors to the climate change problem. Furthermore, they generally have higher levels of wealth, better access to resources, and more stable institutions than developing countries. Based on this, one could say that the division between developed and developing countries’ commitments in the climate regime are legitimised.

However, some argue that these reasons for differentiation, based on fairness, do not improve the effectiveness of the treaties.²⁹⁵ Clearly, if the historic responsibility of the Annex I countries are exaggerated so that developing countries would still be without mitigation commitments – despite their increasingly contribution to the problem as well as capacity to tackle it – the differential treatment, as discussed above, would be insufficient to meet the common goal. Therefore, the countries’ current contribution to the climate change problem, rather than the historic, and the parties’ actual ability to take on mitigation action should be seen as relevant differences on which the future differential treatment should be based upon.

Since the ratification of the Kyoto Protocol, the political and economic situation in some developing countries has changed.²⁹⁶ As stated in Part II, the Annex I countries historically were responsible for two-thirds of the global GHG emissions, which was a major reason why only Annex I countries took on mitigation commitments. As the number of developing countries contributing to the climate change is now large and increasing,²⁹⁷ it could be claimed that they too should accept to undertake mitigation action. This is the view of Vandenbergh, Ackerly and Forster, for instance, as they state that “*Achieving any meaningful*

²⁹³ Rajamani, supra note 4, at 173.

²⁹⁴ Id.

²⁹⁵ Gupta, supra note 124, at 121.

²⁹⁶ Murphy et. al: supra note 262, at 13.

²⁹⁷ Paul G. Harris, supra note 251, at 210.

*climate goal will require a post-Kyoto agreement that all major emitting nations join in and comply with over time.*²⁹⁸

Yet, it can be argued that developing countries increasingly contribution to the problem should not alone lead to stringent commitments. Poor countries with high GHG emissions could still need favourable treatment due to lack of capacity to address the problem, or how they are affected by the climate change.²⁹⁹

Even so, since the increased GHG emissions from developing countries often are a result of economic development, their capacity to tackle climate changes in many cases will have improved as well. As pointed out by Gupta, “. . .some developing countries have become ‘quite developed and should be seen as such.’”³⁰⁰

Several of the developing countries that are members of the G-77, such as China, India, Brazil and Indonesia are among the top twenty-five nations with the highest gross domestic product (GDP) as well as total emissions.³⁰¹ In other words, some of the countries referred to as ‘developing’ actually have higher GDP than Annex I countries, as well as higher GHG emissions. For instance, countries like Bahamas, Cyprus, Israel, Qatar, and Singapore have higher GDP per capita than Portugal, which was the benchmark for inclusion in Annex II.³⁰²

That, at least, some of the developing countries should take on mitigation commitments under the regime based on these reasons, is therefore widely supported in the literature.³⁰³

For instance, Halvorssen notes that since some of the developing countries have grown much since the adoption of the Kyoto Protocol and now emit more GHGs than some developed countries, this should must be reflected in new commitments.³⁰⁴ In her view, the Annex I countries have now have taken the lead in the first commitment period of the Kyoto Protocol, in line with Article 4.2(a) of the Convention, it is time for the developing countries, at least the major GHG-emitters, to “follow” with commitments on their own.³⁰⁵

To sum up, the differences between developed and, at least, these fast growing developing countries are diminishing, or have even in some cases ceased to exist. According to this boundary identified by Rajamani, this would therefore require that the differential treatment should be adjusted in the commitments of a new agreement.

Having assessed the current differential treatment against the three ‘yardsticks’ or boundaries, the final conclusion must be that the Annex I countries should no longer be the only countries with mitigation commitments if the parties want to meet the objective of the

²⁹⁸ See generally Vandenberg, Ackerly and Forster: An Inconvenient View of the Climate Change Justice, in *The Harvard Environmental Law Review*, Volume 33, number 2 (2009), at 304.

²⁹⁹ Honkonen, *supra* note 20, at 3.

³⁰⁰ Gupta, *supra* note 124, at 121.

³⁰¹ Gerber, *supra* note 284, at 333.

³⁰² Muphy Et. Al., *supra* note 262, at 13.

³⁰³ *Id.*, at 2. See also, Gerber, *supra* note 284, at 333, Gupta, *supra* note 124, at 121 and Halvorssen, *supra* note 263, at 285, and Vandenberg, Ackerly and Foster, *supra* note 298, at 304.

³⁰⁴ Halvorssen, *supra* note 263, at 255.

³⁰⁵ *Ibid.*, at 258.

climate regime. The differential treatment in a new agreement should enable enhanced mitigation action in developing countries, as well as better reflect the actual differences between the parties. This means that the differentiation between developed and developing countries should be adjusted, and that developing countries should also be treated differently.

Therefore, as Vandenberg, Ackerly and Forster states, “[t]he principal challenge confronting climate change policymakers is to allocate the benefits and burdens in ways that will induce a sufficient number of the major emitters to participate and yet achieve the desired atmospheric GHG targets.”³⁰⁶

PART V: Future Options for Enhanced Mitigation Action in Developing Countries

As discussed in the previous part, a more active involvement of the developing countries regarding mitigation commitments, in addition to enhanced mitigation actions in developed countries, will be essential in order to meet the ultimate objective of the climate regime. In this part, the focus will therefore be on three options to enable enhanced mitigation action in developing countries, and the adjustments of the current differential treatment this will represent. I will present the already operational Clean Development Mechanism before presenting two proposed options for new regulations aimed at reducing emissions in developing countries, and look for signs of adjustments to the present differential treatment in the climate regime.

1. The Clean Development Mechanism

There are several reasons why the Clean Development Mechanism (CDM) is interesting as an option for enhanced mitigation action in developing countries, and therefore interesting in the context of this paper.

First, the CDM is so far the only mechanism in the climate regime aimed at reducing emissions of GHGs in developing countries, and could therefore continue to contribute to GHG emission reductions in these countries in the future. However, even though the CDM already has been operational for a long time, it has increasingly since then been subject for critical voices pointing at numerous problems or flaws with the mechanism. These flaws have hindered the CDM from reaching its full potential. Therefore, if the problems are solved, the mechanism can in fact contribute to enhanced mitigation action in developing countries and thereby be an important option in this relation in the future of the climate regime.

³⁰⁶ Vandenberg, Ackerly and Forster, supra note 298, at 312.

Secondly, even though it is not explicitly stated in Article 12, the CDM clearly reflects and builds on the CBDR principle.³⁰⁷ Honkonen describes the flexible mechanisms as ‘a form of realizing CBDR’.³⁰⁸ The parties’ common ‘responsibility’³⁰⁹ in this relation is to cooperate as both developing and developed countries are actively engaged in the CDM projects in order to meet their common goal of climate change mitigation.³¹⁰ While Annex I countries’ participation in the CDM will be in the context of their protocol commitments and their responsibility to meet their targets,³¹¹ the participation of developing countries as host states for the projects can be seen as a prolongation of their UNFCCC commitments and their sphere of responsibility herein.³¹² Sustainable development can be seen as a commitment that developing countries have undertaken in this relation, and, hence, their participation in the emission reducing CDM projects contributes to their compliance with this commitment as well as contributing to the ultimate objective of the Convention.³¹³ It has also been argued that developing countries through the CDM take on voluntary mitigation commitments since they enable low-cost mitigation options for developed countries that otherwise would not been possible, and that this could be seen as a first step towards formal targets in the future.³¹⁴

Thirdly, it is likely that the mechanism will be central also in the future development of the climate regime if the problems are properly addressed. Global carbon trading is likely to play a central role in any future architecture,³¹⁵ and because of its central role in the carbon market, the CDM remains an important option for the future development of the climate regime.³¹⁶ More importantly, the concepts embedded in the CDM – cooperation between developed and developing countries, sustainable development and mitigation action in developing countries supported by financial and technological resources – are crystallising as essential elements in a future agreement.³¹⁷

³⁰⁷ This is supported by the fact that the parties have also decided that in using the flexible mechanisms they should be guided by principles contained in Article 3 and 4.7 of the Convention. See: Decision 2/CMP.1, FCCC/KP/CMP/2005/8/Add.1, at 4. These principles include the CBDR principle as well as the linking-clause between the implementation of the developed and developing countries’ commitments, which is described in part III.1.

³⁰⁸ Honkonen, *supra* note 20, at 134 and 135.

³⁰⁹ As participation in CDM projects are voluntary to the parties according to Article 12.5 (a), the parties common responsibility only exists if they have willingly engaged themselves, either as host states (non-Annex I parties) or to carry out such projects (Annex I parties).

³¹⁰ Honkonen, *supra* note 20, at 135.

³¹¹ As stated in the Kyoto Protocol, *supra* note 7, Article 3.1, and listed in Annex B.

³¹² Rajanami in YbIEL, *supra* note 24, at 93.

³¹³ *Ibid.*, at 93.

³¹⁴ Honkonen, *supra* note 20, at 136-137.

³¹⁵ Michael Wara: Changing Climates: Adapting Law and Policy to a transforming world, *Measuring the Clean Development Mechanism’s Performance and Potential*, 55 UCLA L. Rev 1759, August, 2008, at 1797.

³¹⁶ Christina Voigt: Responsibility for the Environmental Integrity of the CDM: Judicial Review of Executive Board Decisions, in *Legal Aspects of Carbon Trading Kyoto, Copenhagen and Beyond*, 2009, [Hereinafter Voigt], at 273.

³¹⁷ These issues are highlighted in the Bali Action Plan and the negotiation texts under the AWG-LCA, as will be explained below.

Finally, the lessons learned from the revealed flaws and insufficiencies with this mechanism can serve as important experience when forming the new mitigation regulations in order to try to avoid the same problems in the future.³¹⁸

A full overview of all elements and how the flaws should be addressed is far outside the scope of this paper. Thus, in this section, I will give a presentation of the mechanism before explaining some of the most central flaws that need to be dealt with if the CDM should be considered as an effective and well-functioning option for mitigation action in developing countries in a future agreement.

A. The core regulations, institutions and procedures

The basic rules of the mechanism are set out in the Kyoto Protocol Article 12. At the first Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP.1), the parties adopted the rules on the modalities and procedures of the CDM³¹⁹ and since then further rules have been adopted by the Executive Board and through decisions by the CMP.

The purpose of the CDM is to assist non-Annex I Parties ‘in achieving *sustainable development* and in *contributing to the ultimate objective* of the Convention’, as well as *assisting Annex I countries to comply* with their quantified emission limitation and reduction commitments.³²⁰ The intention with the mechanism is that developing countries will benefit from the CDM projects while Annex I countries can use the emission reduction units, Certified Emission Reductions³²¹ (CERs), they receive from a CDM project to meet their emission reduction obligations,³²² as well as trade them in the emission trading market.³²³ Both public and private entities within an Annex I country with Kyoto targets may participate in a CDM project and thereby receive tradable CERs.³²⁴

Emission reductions shall be certified by operational entities based on real, measurable, long-term benefits, and be additional to any reductions that would have occurred in the absence of the certified project activities.³²⁵ These requirements are generally referred to as the ‘environmental integrity’ of the CDM.³²⁶

This market-based mechanism is built on the knowledge that all emissions of greenhouse gases end up in the atmosphere and therefore potentially will contribute to the global climate

³¹⁸ As pointed out by Stockwell, Hare and Macey: Designing a REDD mechanism: the TDERM Triptych, in *Climate Law and Developing countries: Legal and Policy Challenges for the World Economy*, 2009, at 160-163.

³¹⁹ Decision 3/CMP.1, para 1. (FCCC/KP/CMP/2005/8/Add1)

³²⁰ Kyoto Protocol, supra note 7, art. 12.2.

³²¹ The unit issued in relation to CDM project is a ‘certified emission reduction’ (CER), equal to ‘one metric tonne of carbon dioxide equivalent’, see Decision 3/CMP.1 Annex, para 1(b), (FCCC/KP/CMP/2005/8/Add.1).

³²² Kyoto Protocol, supra note 7, art. 12.3 (a) and (b).

³²³ Kyoto Protocol, supra note 7, art. 17 and Decision 11/CMP.1(FCCC/KP/CMP/2005/8/Add.2), Annex, para. 2.

³²⁴ Kyoto Protocol, supra note 7, art. 12.9.

³²⁵ Ibid, art. 12.5 (b) and (c).

³²⁶ Voigt, supra note 316, at 275.

change no matter where the gases originally were released, and thus, as long as GHG emission reductions actually occur, it does not matter where the reductions are made. The CDM serves as a cost-effective supplement to domestic mitigation action for Annex I countries to meet parts of their Kyoto-targets, because mitigation projects will generally be cheaper to carry out in developing countries.³²⁷

The Conference of the Parties serving as the Meeting for the Parties to the Kyoto Protocol (CMP) have the authority over, and provide guidance to the mechanism and the Executive Board (EB), and are primarily tasked to review the other CDM institutions and the distribution of the CDM projects and to make appropriate decisions in this relation.³²⁸ The EB has the overall mandate to supervise the mechanism³²⁹ and are tasked to, inter alia; approve new methodologies,³³⁰ be responsible for the accreditation of the operational entities and make recommendations to the CMP for the Designated Operational Entities (DOEs), and report to the CMP on regional and sub regional distribution of CDM project to identify barriers to their equitable distribution.³³¹ The DOEs have the mandate to validate proposed CDM projects, and to verify and certify reductions by sources of GHGs.³³² Each party shall designate a national authority for the CDM.³³³

The Annex I parties will receive CERs based on a two-step procedure before the CDM institutions. First, the project must pass the validation and registration process, which is the evaluation by the DOEs that a project activity is in line with the requirements of the CDM, followed by a formal acceptance by the EB, namely registration.³³⁴ Secondly, there is an 'exposed determination' by another DOE of the monitored GHG reductions that have occurred as a result of the registered CDM project activity, and that it would not have occurred in the absence of the CDM project, during the verification period.³³⁵ If the requirements are considered fulfilled, the DOEs formulate a certification report consisting of a request to the EB for issuance of CERs equal to the verified amount of GHG reductions.³³⁶ The issuance will then be final fifteen days later, unless a party involved or the EB requests a review of the proposed issuance of CERs, limited to issues of 'fraud, malfeasance or incompetence' of the

³²⁷ At the first CMP (CMP.1), through the adoption of the Marrakesh Accord, the parties decided that the use of the flexible mechanisms by the Annex I countries are to be supplemental to domestic action so that the domestic action constitute a significant element when meeting their binding emission reduction targets. See Decision 2/CMP.1, (FCCC/KP/CMP/2005/8/Add.1), at 4.

³²⁸ Decision 2/CMP.1(FCCC/KP/CMP/2005/8/Add.1), para. 2, 3 and 4.

³²⁹ Ibid., para 5.

³³⁰ Ibid., (d).

³³¹ Ibid., (f) and (h).

³³² Ibid., para. 27 (a) and (b).

³³³ Ibid., para. 29.

³³⁴ Ibid., para 35 and 36. In addition, since April 2007, the Secretariat assess the request for registration in order to make a summary note which is forwarded to the EB, see Christina Voigt: The Deadlock of the Clean Development Mechanism: Caught between Sustainability, Environmental Integrity and Economic Efficiency, in Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy, Richardsson et.al. (eds), 2009,[Hereinafter Voigt: The Deadlock of the Clean Development Mechanism] at 235.

³³⁵ Ibid., para 61 and 62 (f).

³³⁶ Ibid., para 64.

DOEs.³³⁷

B. The flaws

As the CDM is a market-based mechanism, the major interest of all CDM participants will generally be to achieve emission reductions in the cheapest way possible, and thereby receive a high number of CERs.³³⁸ Honkonen also stress that cost-effectiveness is a very significant factor, by some even viewed as the determinative one, and that efficiency ‘easily becomes the primary goal in a project’.³³⁹ As pointed out by Voigt, the problems with the mechanism are mainly related to structural flaws, which again can be linked to the conflicting interests embedded in the objectives and intentions of the mechanism.³⁴⁰ As she expresses it: “*The protection of the CDM’s contribution to sustainable development and its environmental integrity, on the one hand, are counterweighted by demands of procedural efficiency and economic feasibility on the other.*”³⁴¹ Some of the core problems in this relation will be now be explained.

(i) *The flaws in relation to sustainable development*

The original intent of the CDM was to encourage development of low-carbon energy infrastructure in the developing world through achieving sustainable development goals as well as substitution for early retirement of expensive, high-carbon energy infrastructure in the developed world.³⁴² Although it cannot be read directly out of Article 12, it is embedded in the purpose of CDM to achieve sustainable development and benefits for developing countries that the CDM projects should enable effective technology transfers,³⁴³ as well as other sustainable development benefits like improved energy efficiency, creation of jobs, local community support, and poverty alleviation.³⁴⁴

Other than stating that achieving sustainable development in developing countries is one of the purposes of the mechanism, there are no further definitions on this issue in Article 12 of the Protocol or in any subsequent COP decisions. Rather, it is left for the host countries’ Designated National Authority (DNA) to set the requirements and assess whether a project meets its standards of sustainability so that the project can be submitted for registration by the EB.³⁴⁵ Once the DNA has approved a CDM project, the sustainability of a project activity is no longer part of the review and assessment within the CDM institutions, and therefore not a requirement in order to receive CERs from these institutions. Since the primary goal of the CDM project participants generally are to achieve economic benefits, studies of the mitigation

³³⁷ Ibid., para 65.

³³⁸ Id.

³³⁹ Honkonen, supra note 20, at 135.

³⁴⁰ Voigt: The Deadlock of the Clean Development Mechanism, at 235.

³⁴¹ Id.

³⁴² Wara, supra note 315, at 1778.

³⁴³ Honkonen, supra note 20, at 136

³⁴⁴ Voigt: The Deadlock of the Clean Development Mechanism, supra note 334, at 240.

³⁴⁵ Wara, supra note 315, at 1773.

projects that have been carried out in developing countries show that the investors for these projects indeed tend to choose the projects that give a great reduction of emission but providing no or few development benefits.³⁴⁶ Thus, in order to be attractive host states, experience show the host countries have set low requirements for the sustainability of the projects, and thus approved projects that not at all, or to a small extent only, achieve sustainable development.³⁴⁷ This issue was highlighted by some parties already at the eleventh session of the COP, pointing out that the types of projects that were most likely to contribute to sustainable development in the host countries, such as renewable energy, energy efficiency, and transport projects, were not competitive in the CDM market and therefore not likely to be chosen.³⁴⁸

For instance, Wara points out that the CDM has proffered an exchange of CO₂ emission reductions in the developed world for reductions of various non-CO₂ gases in developing countries.³⁴⁹ A large amount of the subsidy provided through the CDM are based on large projects that capture and destroy high global warming potential (GWP) industrial gases from industrial production where these gases are unwanted by-products. Two relatively small such industries represented nearly 55 percent of the supply of issued CERs in 2008, while, unlike the original intent with the CDM, CO₂-based projects such as renewable energy and fuel switching from coal to gas, account for less than half of the CER supply to 2012.³⁵⁰ Accordingly, many of the CDM projects do not provide the sustainable development and social improvements that were the intentions of the CDM. This illustrates that the CDM project participants neglect the aim of achieving sustainable development in order to achieve economic benefits.

Even if the CDM projects had been able to achieve sustainable development in the host states, the CDM still would fail to be an eligible mechanism to ensure sustainability in the developing world, due to the uneven distribution of the projects among developing countries. Since Annex I participants are free to decide in which developing country they wish to practice their CDM projects,³⁵¹ they tend to choose locations that guarantee high emission reductions at, the least cost, and the least investments risks,³⁵² often countries that already successfully attract foreign direct investment.³⁵³ This has led to an uneven distribution of the

³⁴⁶ Rodi, et.al: Implementing the Kyoto Protocol in a Multidimensional Legal System: Lessons from a Comparative Assessment, in *Yearbook of International Environmental Law*, Volume 16, 2005, at 14, where they refer to Ellis, Corfee-Marlot and Winkler: Taking Stock of Progress under the Clean Development Mechanism (CDM), 2004, at 34.

³⁴⁷ Voigt: The Deadlock of the Clean Development Mechanism, *supra* note 334, at 240.

³⁴⁸ See generally Hermann E. Ott: Report on Global Climate in *Yearbook of International Environmental Law*, Volume 16, 2007, at 398.

³⁴⁹ Wara, *supra* note 315, at 1778.

³⁵⁰ *Id.* Wara also points out that the tendency to choose such large scale projects are also due to the fact that they are more likely to overcome the transactions costs associated with registration and production of CERs. This problem has also been discussed at the COPs as some parties have complained that the registration process and the issuance of CERs had become too complex and expensive, see Hermann E. Ott: Global Climate, in *Yearbook of International Environmental Law*, Volume 16, 2007, at 397.

³⁵¹ Damilola S. Olawuyi: Beatifying Africa for the Clean Development Mechanism: legal and institutional issues considered, in *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy*, 2009, at 262.

³⁵² *Ibid.*, at 263.

³⁵³ Gupta, *supra* note 124, at 131.

CDM projects because of the diverse economic, social and administrative conditions among developing countries.³⁵⁴ Currently, there are 2153 CDM projects registered by host parties, of which 37.44 percent are hosted by China, 23.8 percent in India, 7.94 percent in Brazil and 5.57 percent in Mexico.³⁵⁵ Summed up, 74.75 percent of the CDM-projects are situated in four countries. In regard of regions, 1636 CDM-projects are now registered in Asia and the Pacific, 463 in Latin America and the Caribbean, while only 41 projects are registered in Africa.³⁵⁶ These facts illustrate that the mechanism has not ensured sustainable development to all developing countries, ‘which was promised by the negotiators of the Protocol’.³⁵⁷ China, India, Brazil and Mexico are all fast-growing developing countries.³⁵⁸ Although their rising GHG emissions need to be addressed, their rising economic power should also enable them to reduce emissions without support (which also come in conflict of the additional criterion, see below). Many poor developing countries, most of which situated in Africa, have weak economies, insufficient governmental institutions, and will be affected the most by climate change, and, thus, one could argue that this is where sustainable development and the benefits from a CDM would be needed the most.³⁵⁹ This problem has been addressed at numerous COPs since Montreal in 2005.³⁶⁰ Yet, as the numbers clearly show, the CDM mechanism has failed to achieve sustainable development in most of the developing world.

The tendency by the investors to choose the most well proffered, least complicated, and cheapest projects to receive CERs has also translated into another problem. It has been argued that since developed countries ‘use up’ the easiest ways to reduce emission and often even fail to ensure sustainable development, the CDM projects could actually make it even more difficult for them to carry out mitigation actions, and potentially mitigation commitments, on their own initiative in the future.³⁶¹ This is quite different from the original purpose and intent of the CDM: achieving sustainable development and benefits in developing countries, which, in contrast to what have happened, should improve their capacity and thereby improve their ability to take on mitigation actions. Furthermore, as discussed in the previous part of this paper, enhanced mitigation action also in the developing countries are essential in order to achieve the ultimate objective of the UNFCCC. If the CDM projects make it harder for developing countries to take on the mitigation action, one could thus argue that this would be a threat to the efficiency of the climate regime to fulfil the objective, at least if this problem is not solved by enhanced support from the developed countries.

³⁵⁴ Id.

³⁵⁵ Facts available at

<http://cdm.unfccc.int/Statistics/Registration/NumOfRegisteredProjByHostPartiesPieChart.html>, last visited 20.04.2010.

³⁵⁶ Facts available at <http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByRegionPieChart.html>, last visited 20.04.2010.

³⁵⁷ Olawuyi, *supra* note 351, at 264.

³⁵⁸ Myrphy et.al., *supra* note 262, at 10.

³⁵⁹ This is also pointed out by Andrew Schatz: Discounting the Clean Development Mechanism, in *Geo. Int’l Evtl. L. Rev.* 703, Summer, 2008, at 724.

³⁶⁰ See generally Hermann E. Ott: Report on Global Climate in *Yearbook of International Environmental Law*, Volume 16, 2007, at 398 (regarding COP.11), and *ibid.*, in Volume 17, 2008, at 304 (regarding COP.12), and Volume 19, 2008, at 241 (regarding COP.14).

³⁶¹ Honkonen, *supra* note 20, at 135-136, see also Rodi et.al., *supra* note 346, at 14.

Thus, even though the parties are to be guided by the CBDR principle when participating in the projects, in which the philosophical notion of restoring equality is embedded, one could claim that the CDM, with the current flaws, rather furthers inequality among the parties. First, it increases the division between Annex I and non-Annex I countries when Annex I countries can benefit from a project although it fails to provide equal benefits and sustainable development in developing countries, and even make it harder for them to undertake mitigation actions. Secondly, it also furthers the division among developing countries since the projects are unevenly distributed.

(ii) *Flaws in relation to the 'additional' requirement*

The additional criterion refers to the requirement that the emission reductions from the CDM project activities must be other than those which had occurred in the absent of the project.³⁶² In other words, the CDM projects must lead to emission reduction below a 'business as usual' counterfactual baseline.³⁶³ This hypothetical baseline shall declare the amount of GHG emissions that would have been released in absent of the CDM project, which the reduction from a CDM project will be measured against.

Thus, the 'additional' GHG emissions “. . .*can never be proven with absolute certainty.*”³⁶⁴ and is therefore difficult to assess. The uncertainties related to the assessment have allowed developing countries to 'propose non-additional and 'free rider' projects that would in fact have taken place anyway'.³⁶⁵ The project proponents have a significant incentive to exaggerate their baseline in order to receive as many CERs as possible,³⁶⁶ because the more they can inflate their baseline, the more money they can earn.³⁶⁷ Wara states that this has resulted in a “. . .*substantial strategic behaviour . . . aimed at manipulating baselines...*”.³⁶⁸ Several studies and reports have also shown that the CDM approval process fails to screen out projects that in fact would have taken place without the CDM.³⁶⁹

If Annex I countries receive CERs, and thereby will not need to carry out this amount of emission reductions domestically, despite the fact that the emission reduction in the host states would have occurred in the absent of a CDM project, the CDM project have actually resulted in a lower total global GHG emission reduction than the targets called for.

Although the EB have endeavoured to improve the assessment by stringent requirements and standard calculation methodologies,³⁷⁰ by, for example, establishing an 'additional tool' and a 'combined tool for baseline selection and demonstration of additionality',³⁷¹ the climate

³⁶² Kyoto Protocol, supra note 7, art. 12.

³⁶³ Schatz, supra note 359, at 725.

³⁶⁴ Voigt: The Deadlock of the Clean Development Mechanism, supra note 334, at 237.

³⁶⁵ Olawuyi, supra note 351, at 264.

³⁶⁶ Schatz, supra note 359, at 725.

³⁶⁷ Wara, supra note 315, at 1802.

³⁶⁸ Ibid., at 1763.

³⁶⁹ Herman E. Ott: Global Climate, in Yearbook of International Environmental Law, Volume 19, 2009, at 241-242.

³⁷⁰ Schatz, supra note 359, at 725.

³⁷¹ Voigt: The Deadlock of the Clean Development Mechanism, supra note 334, at 237.

regime has not provided any standard method for assessing the additionality of a CDM project.³⁷² Therefore, the potential to abuse the mechanism remains.³⁷³

Especially because of the uneven distribution and the failure to achieve additional emission reduction, and other revealed flaws in general, the CDM needs to be improved in order for it to be an efficient mechanism to enhance the mitigation action in developing countries.

C. Recent developments

The CMP.5 in Copenhagen, could present hope for the future of the mechanism as it addressed some of the most central problems with the CDM.

For instance, the CMP requested the EB to further work on the ‘enhancement of objectivity and transparency in the approaches for demonstration and assessment of additionality and selection of baseline scenario’³⁷⁴, as well as requesting the Subsidiary Body for Scientific and Technological Advice to recommend ‘modalities and procedures for the development of standardized baselines that are broadly applicable, while providing for a high level of environmental integrity and taking into account specific national circumstances’.³⁷⁵ Hereby, the problems with the additional requirements are clearly acknowledged and addressed, and the work to make improvements are initiated.

Regarding the aim to achieve sustainable development, the CMP, encouraged the Designated National Authorities to publish the criteria they use when assessing the sustainability of proposed CDM project.³⁷⁶ By publishing the criteria of the sustainability assessment, this could promote the DNAs to be more conscious on the importance of assessing this requirement properly, and thereby be a step in the right direction to ensure that the criteria of the DNAs are not too soft.

Regarding regional and sub-regional distribution and capacity building, the CMP authorised the EB to prioritise the ‘consideration and development of baseline and monitoring methodologies that are applicable to under-represented project activity types and regions’;³⁷⁷ Furthermore, the CMP decided to defer the payment of the registration fee until after the first issuance for countries with fewer than 10 registered CDM projects. In addition, the EB was requested to develop top-down methodologies that are particularly suited for application in these countries³⁷⁸, and to allocate financial resources to provide loans to cover the costs of the development of project design documents, validation costs and the first verifications in relation to projects in countries with fewer than 10 registered CDM project activities.³⁷⁹

³⁷² Olawuyi, *supra* note 351, at 264.

³⁷³ Schatz, *supra* note 359, at 725.

³⁷⁴ Decision 2/CMP.5/ Section IV, para 24.

³⁷⁵ *Ibid.*, para 25.

³⁷⁶ Decision 2/CMP.5/Section VI, para 45.

³⁷⁷ Decision 2/CMP.5, Section IV, para. 23. (FCCC/KP/CMP/2009/21/Add.1)

³⁷⁸ *Ibid.*, para. 48 (a)

³⁷⁹ *Ibid.*, para. 49 (a) and (b).

Finally, the DOEs were encouraged to establish offices in developing countries in order to reduce the transaction costs for these countries and to contribute to a more equitable distribution of the projects.³⁸⁰ All parties are also encouraged to continue to cooperate bilaterally to develop and implement CDM project activities, and in particular to facilitate South-South cooperation and capacity transfer.³⁸¹

This indicates that also the problem with the uneven distribution is recognised and responded on. What is especially interesting here is the encouragement to *all* parties to contribute to facilitate South-South cooperation and capacity transfer. This could be a sign of a new approach in the climate regime, where all parties that are capable to support the implementation of the provisions should be more actively involved.

There could be argued that this CMP decision thereby included a new element of differential treatment *among* developing countries, of which many developing countries generally, at least before Bali,³⁸² have been reluctant to accept. Yet, this favourable treatment given to those countries with less than 10 registered projects cannot be seen as a direct respond to differences between these developing countries and others based on different degrees of responsibilities and different capacities, which the applied differential treatment in the climate regime is generally build on. Rather, this specific type of favourable treatment given in the context of CDM is obviously an adjustment of the mechanism necessary to ensure that all countries will have the opportunity to benefit from CDM projects, which in fact was the purpose of the mechanism in the first place.

Future will tell if the new regulations will manage to ensure a broader distribution and improve the mechanisms in general. It must be fair to say that as long as the CDM is a market-based mechanism, the economic value of a project will continue to be the leading force, unless, as Voigt underline, the goal to achieve sustainable development and environmental integrity is ensured trough the mechanism's 'regulatory framework and legal safeguards'.³⁸³ Although the CMP in Copenhagen must be seen as a step in the right direction, the complexity and amount of flaws within the mechanism will require further elaboration in order for the CDM to be an efficient mechanism to enhance the involvement of developing countries in the future of the climate regime.

2. New options for enhanced involvement by developing countries

In order to explain the new options in a new agreement an historic overview over the development of the negotiations should be presented in order to put the assessment below into context. The preparation for the post-2012 agreement began at COP.11, in conjunction with the first CMP, due to the provision in the Kyoto Protocol requesting the CMP to initiate considerations on the post-2012 commitments for Annex I parties at least seven years before

³⁸⁰ Ibid., para. 54.

³⁸¹ Ibid., para. 53

³⁸² This will be explained below.

³⁸³ Voigt: The Deadlock of the Clean Development Mechanism, *supra* note 334, at 235.

the end of the first commitment period.³⁸⁴ A two-track approach was initiated: an ‘ad hoc working group of Parties to the Kyoto Protocol’ (AWG-KP) to consider commitments for subsequent periods for Annex I countries under the Kyoto Protocol,³⁸⁵ and a ‘dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention’ to further develop the provisions under the UNFCCC. The latter, was engaged by the COP to “... *exchange experience and analyse strategic approaches for long-term cooperative action to address climate change*... ”³⁸⁶ Some parties were sceptic that this would lead to new commitments for non-Annex I countries and pointed at the fact that Kyoto Protocol Article 3(9), which opens for subsequent commitment periods, only are addressed to Annex I countries.³⁸⁷ Therefore, this dialogue should not open any negotiations leading to new commitments,³⁸⁸ but, inter alia, identify approaches and conditions for voluntary actions by developing countries that promote local sustainable development and mitigate climate change in a manner ‘appropriate to national circumstances’, especially actions in developing countries to adapt and manage climate change.³⁸⁹ The outcome of this COP indicated that a future agreement would follow the same path as the current regulations where developed countries have no binding commitments. Yet, it opened for enhanced involvement by developing countries concerning mitigation and adaption, and ensured that the parties started to explore future opportunities and approaches for a new agreement.

Two years later, a program for the negotiations towards a post-2012 agreement was adopted, referred to as the Bali Action Plan (BAP).³⁹⁰ The COP transformed the ‘dialogue’ into a negotiating body with clear mandate³⁹¹ as they established a subsidiary body under the Convention named the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) with the task to complete its work in 2009 and present the outcome of its work at COP-15 for adoption.³⁹² The Bali Action Plan addressed various issues central in a future agreement, and initiated the work towards: a shared vision for long-term cooperative action;³⁹³ enhanced national and international action on mitigation of climate change;³⁹⁴ enhanced action on adaption;³⁹⁵ enhanced action on technology development and transfer to support action on mitigation and adaptation;³⁹⁶ and, enhanced action on the provision of financial resources and investment to support action on mitigation and adaptation and technology cooperation.³⁹⁷

The enhanced national and international action on mitigation of climate change included, inter alia, considerations of ‘measurable, reportable and verifiable nationally appropriate

³⁸⁴ Kyoto Protocol, art. 3(9).

³⁸⁵ Decision 1/CMP.1 para.1, 2 and 3. (FCCC/KP/CMP/2005/8/Add.1),

³⁸⁶ Decision 1/CP.11, para. 1. (FCCC/CP/2005/5/Add.1.)

³⁸⁷ Herman E. Ott: Global Climate, in Yearbook of International Environmental Law, Volume 18, 2008, at 202.

³⁸⁸ Decision 1/CP.11, para. 2.

³⁸⁹ Id., para. 5.

³⁹⁰ Decision 1/COP.13 (FCCC/CP/2007/6/Add.1)

³⁹¹ Herman E. Ott: Global Climate, in Yearbook of International Environmental Law, Volume 18, 2008, at 202.

³⁹² Decision 1/COP.13 (FCCC/CP/2007/6/Add.1) para. 2.

³⁹³ Ibid., para. 1(a).

³⁹⁴ Ibid., para. 1(b).

³⁹⁵ Ibid., para. 1(c).

³⁹⁶ Ibid., para. 1(d).

³⁹⁷ Ibid., para. 1(e).

mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties'³⁹⁸ (NAMAs by developed countries, including QELROs)'; 'nationally appropriate mitigation action by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner'³⁹⁹ (NAMAs by developing countries); and 'policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries'⁴⁰⁰ (REDD).

The COP in Bali presented good hope for the further development of the climate regime, as it opened up new horizons for the negotiations.⁴⁰¹ As developing countries showed a willingness to take on further actions, the BAP seemed to wipe out a major reason for the inefficiency of the current climate regime as their previous reluctance to take on mitigation commitments have been the main excuse for the developed countries to refuse to take on further commitments.⁴⁰² Additionally, by using the terms 'developed' and 'developing countries' instead of the historic division of 'Annex I' and 'non-Annex I countries', the BAP opened for new combinations and grades of commitments for developing countries.⁴⁰³ This is especially interesting because, as discussed in the previous part of the paper, much of the criticism of the current climate regime have been related to the fact that it fails to reflect the differences between the various developing countries. The outcome of the COP in Bali indicated that the commitments in a new agreement would adjust the current differential treatment to reflect relevant differences between all countries. Yet, as Honkonen expresses it: ". . . [T]he grand division between developed and developing countries is likely to remain, but the door is open to more innovative and effective groupings".⁴⁰⁴

During the year 2008 there was a downturn in the climate policy process because the financial crisis displaced climate change issues from the main political concerns.⁴⁰⁵ Despite this, there were generally great expectations regarding the outcome of the fifteenth COP in Copenhagen, as this was when the new agreements was supposed to be adopted. Yet, even though both of the AWGs had drafted negotiation texts regarding new provisions, the parties did not reach an agreement. Instead, the COP took note of the Copenhagen Accord,⁴⁰⁶ which was drafted on the initiative from political leaders from only a few of the countries that are parties to the climate regime. In this accord, the scientific view that the global temperature should be below 2 degrees Celsius in order to prevent dangerous interference with the climate system, was

³⁹⁸ Ibid., para. 1(b)(i).

³⁹⁹ Ibid., para. 1(b)(ii).

⁴⁰⁰ Ibid., para 1(b)(iii).

⁴⁰¹ See generally Hermann E. Ott: Global Climate, in Yearbook of International Environmental Law, Volume 18, 2008, at 202 and 207, Brunnée, supra note 66, at 326, Honkonen, supra note 20, at 344, Richardson et. al.: Climate Law and Developing Countries: Legal and Policy Challenges for the World Economic, at 16 and Birnie, Boyle and Redgewell, supra note 47, at 376.

⁴⁰² Hermann E. Ott: Global Climate, in Yearbook of International Environmental Law, Volume 18, 2008, at 207.

⁴⁰³ Id.

⁴⁰⁴ Honkonen, supra note 20, at 344.

⁴⁰⁵ Hermann E. Ott: Global Climate, in Yearbook of International Environmental Law, Volume 19, at 234.

⁴⁰⁶ Decision 2/CP.15(FCCC/CP/2009/11/Add.1)

recognised.⁴⁰⁷ Furthermore, another interesting element was the expressed political will to enhance the long-term cooperative action to combat climate change through mitigation actions from both ‘Annex I Parties’ and ‘Non-Annex I Parties’,⁴⁰⁸ provided by ‘new and additional, predictable and adequate funding’ to developing countries with a collectively contribution from developed countries approaching USD 30 billion for the period 2010-2012, and a goal of mobilising jointly USD 100 billion dollars a year by 2020.⁴⁰⁹ In addition, the crucial role of reducing emissions from deforestation and forest degradation and the need to enhance removals of GHG emissions by forest was recognised.⁴¹⁰ Still, as the accord is written in a guiding and vague language, it cannot be considered legally binding. In addition, although the accord now has been signed by many parties to the climate regime,⁴¹¹ it is still controversial to some parties.

The COP decided to prolong the mandate of the ad hoc working groups, and their work shall be presented at the sixteenth session of the Conference of the Parties with the aim to be adopted.⁴¹² This work is what will be assessed below by studying some of the options for new regulations set out in BAP. All the addressed elements in BAP should be assessed to give a comprehensive analysis of the future adjustments of the differential treatment in a future agreement. However, to discuss all elements and details herein is far beyond the scope of this paper. Therefore, the focus will be on two of the elements under the issue ‘enhanced national and international action on mitigation on climate change’, namely the ‘nationally appropriate mitigation actions by developing countries’ (NAMAs), and ‘reducing emissions from deforestation and forest degradation in developing countries’ (REDD).

The purpose is not to give a full analysis and detailed presentation of all elements in these possible future regulations, but rather to look for signs of adjustments to the current differential treatment in the climate regime and assess whether such possible adjustments will be better in line with boundaries of differential treatment. Although it is left for the parties to decide on the definition and contents, and whether such regulations should be adopted at all, the language in the BAP itself gives some indication on what to expect. In addition, the negotiation texts of the AWG-LCA regarding the NAMAs by developing countries and REDD will be studied below, and primarily the latest preparation of a text to facilitate the negotiations among the parties at COP.16.⁴¹³

The Chair of the AWG-LCA were given the mandate to prepare this text, drawing upon the report of the AWG-LCA presented at COP.15, as well as the work undertaken by the COP on the basis of that report.⁴¹⁴ The Chair has selected elements from the source material, which she considers most conducive to facilitate the parties towards an outcome to be presented at

⁴⁰⁷ Ibid., para. 1.

⁴⁰⁸ Ibid., para. 4 and 5.

⁴⁰⁹ Ibid., para. 7.

⁴¹⁰ Ibid., para 6.

⁴¹¹ The parties that have agreed to the Accord are listed at UNFCCC's official webpage, see <http://unfccc.int/home/items/5262.php> (last visited May 27, 2010).

⁴¹² Decision 1/CP.15 (FCCC/CP/2009/11/Add.1), para. 1.

⁴¹³ FCCC/AWGLCA/2010/6 (17 May 2010)

⁴¹⁴ FCCC/AWGLCA/2010/6, at 3.

the next COP.⁴¹⁵ It is important to underline that new elements can be brought up during the further negotiations, and all the elements in the negotiation text will be subject to negotiations among the parties,⁴¹⁶ which could lead to an outcome that is completely different than what this negotiation text indicates. However, as the text, in general, maintains the outcome of the COP.15,⁴¹⁷ it serves as an updated ‘status rapport’ on what the parties might be willing to include in the new regulations. Therefore, in lack of any substantial agreements, it serves as a relevant source when studying future options for enhanced mitigation actions in developing countries and the adjustments to the differential treatment embedded herein. I will first present most relevant elements of differential treatment that seems to be embedded in the NAMAs and the REDD individually, before the signs of adjustments to the current differential treatment will be summarised in a conclusion.

A. Nationally appropriate mitigation actions of developing countries

The BAP initiated the negotiations towards ‘nationally appropriate mitigation action by developing countries in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner’⁴¹⁸ (NAMAs),⁴¹⁹ which has been referred to as a ‘make or break’ formulation.⁴²⁰

The BAP does not define what activities should be included under these regulations, nor has this been defined in the negotiation texts, with the exception that it reads that developing countries are to prepare ‘low-emission developing plans’.⁴²¹ However, by being ‘mitigation actions’ one must presume that they should have the primary aim to reduce GHG emissions, as ‘mitigation’ is defined as: “. . . human interventions to reduce the emissions of greenhouse gases by sources or enhance their removal from the atmosphere by “sinks,”⁴²² and “sink” refers to forests, vegetation or soils that can reabsorb CO₂”.⁴²³ Still, it is unclear whether only activities that directly lead to emission reductions are included, or whether also activities that indirectly enable reductions could be regarded as ‘mitigation actions’.⁴²⁴ In other words, a variety of different activities could be included in these regulations, but there are clear indications that the developing countries will be expected to undertake actions to reduce

⁴¹⁵ Id.

⁴¹⁶ Id.

⁴¹⁷ Id.

⁴¹⁸ Decision 1/COP.13 (FCCC/CP/2007/6/Add.1), para 1 (b) (ii)

⁴¹⁹ The term NAMAs will be used when describing the NAMAs by developing countries. Where the NAMAs by developed countries are mentioned this will be explicitly stated.

⁴²⁰ Herman E. Ott: *Global Climate*, in *Yearbook of International Environmental Law*, Volume 18, 2008, at 202.

⁴²¹ FCCC/AWGLCA/2010/6, Annex, Chapter I, para. 11.

⁴²² This is the definition used within the UNFCCC, See fact sheet available at http://unfccc.int/press/fact_sheets/items/4988.php

⁴²³ Id.

⁴²⁴ This is also a pointed out in the literature, see for instance, Murphy Et.al., *supra* note 262, at 15, where they state that NAMAs could be policies, legal requirements and measures that integrate climate change considerations with national sustainable development policies, including individual action or a set of actions that do not necessarily have GHG emissions as the primary goal.

emissions in a new agreement.⁴²⁵ Regarding the requirements for what the NAMAs must achieve, it is stated in one of two possible options for a new provision that the NAMAs are to be “. . . aimed at achieving a substantial deviation in emissions . . . relative to those emissions that would occur in the absence of enhanced mitigation. . . ”.⁴²⁶ This could be compared with the ‘additional’ requirement for CDM projects. However, the other option does not define any requirements regarding the degree of reduction of GHG emissions, but simply state that the parties ‘will implement mitigation actions in the context of sustainable development’.⁴²⁷

The phrase ‘nationally appropriate. . . by developing countries’ indicates that these activities are to be initiated by the developing countries themselves. This is also what the negotiation text points towards, as it is stated that developed countries ‘shall undertake’⁴²⁸ or ‘will implement’.⁴²⁹ More importantly, it indicates that it is up to each developing country to decide what kind of mitigation activities should be implemented on their territory. Consequently, it could be a variety of actions based on the individual developing country’s capacity as well as those actions best suited to limit or reduce GHG emissions in the individual country based on where their emissions originates from. As pointed out by Ott, the NAMAs thereby open up for differentiation between developing countries, and could better reflect ‘the different stages of economic development, emissions, and mitigation potential of different developing countries’.⁴³⁰

While the language in BAP called for nationally appropriate ‘commitments or actions’ by developing countries, including ‘quantified emission limitation and reduction objectives’,⁴³¹ it only called for ‘actions’ by developing countries. This suggests that the mitigation commitments for developed countries still are to be legally binding. The negotiation text prepared for the COP.15 in Copenhagen stated that the NAMAs should be voluntary for all developing countries.⁴³² However, in the newest negotiation text the legal status of the NAMAs is not quite as clear. In one of two options it is stated that all developing countries ‘shall’ undertake mitigation actions that are enabled and supported by developed countries, and in addition, they ‘may undertake autonomous mitigation actions’.⁴³³ The other options state that developing countries ‘will’ undertake mitigation actions, except least developing countries and small island developing countries, which ‘may undertake actions voluntarily and on the basis of support’.⁴³⁴ This indicates that the NAMAs could be formed as commitments also for the developing countries. Furthermore, it shows signs of differentiation

⁴²⁵ Birnie, Boyle and Redgewell have stated that the NAMAs by developing countries may be compared to the commitments in Article 10(b) of the Kyoto Protocol,⁴²⁵ which commit all parties to establish national programmes containing measures to mitigate climate change. However, they too see the language in BAP as an indication that developing countries are increasingly expected to be involved in mitigation efforts, and that it seems as concrete evidence of progress will be required of the NAMAs, see Bernie et.al., supra note 47, at 376.

⁴²⁶ FCCC/AWGLCA/2010/6, Annex I, Chapter I, para 10, Option 1.

⁴²⁷ Ibid., Option 2.

⁴²⁸ FCCC/AWGLA/2010/6, Annex I, Chapter I, para 10, Option 1

⁴²⁹ Ibid., para 10, Option 2.

⁴³⁰ Hermann E. Ott. ”Global Climate” in Yearbook of International Environmental Law, Volume 18, 2008, at 202.

⁴³¹ Decision 1/COP.13 (FCCC/CP/2007/6/Add.1), para. 1(b) (i).

⁴³² FCCC/AWL-GLA/2009/14, Section III, B, para. 5.

⁴³³ FCCC/AWGLA/2010/6, Annex I, Chapter I, para. 10, Option 1.

⁴³⁴ Ibid., Option 2.

among developing countries. Not only will the mitigation actions be ‘nationally appropriate’ and thereby be individual for each state, these proposals show signs of possible further differentiation as those who can undertake mitigation actions without support can do so (and thereby might be expected to do more by the international community), and that those countries with the least capacity will have softer requirements.

As the BAP included that the NAMAs should be ‘supported and enabled by technology, financing and capacity-building’, it is clear that the developing countries’ implementation of their commitments will continue to be dependent on support. The reference to support could refer to support provided within a country, support transferred from one developing country to another, and/or support from developed countries.⁴³⁵ In the newest negotiation text, one option contains both support from ‘domestic sources’ and support from ‘developing countries’,⁴³⁶ while another option refers to ‘international support’⁴³⁷. Also mentioned in the text are ‘bilateral, regional and other multilateral sources of funding’.⁴³⁸ Even though this shows that support from developed countries would still be central, in keeping with the current ‘linking-clause’ between developed and developing countries’ implementation,⁴³⁹ it opens for support provided by developing countries as well. Developing countries supporting other developing countries would be a new element in the climate regime. If this is included in a new agreement, the new regulations thus could better reflect the actual capacity of each country and acknowledge that also some of the developing countries have experienced economic growth and development, and thereby could contribute – not only by reducing their emissions – but also to give support to more disadvantaged countries.

In the BAP, the NAMAs by developed countries are expressed as ‘measurable, reportable and verifiable nationally appropriate mitigation commitments or actions’, while the NAMAs by developing countries should be ‘in a measurable, reportable and verifiable manner.’ This could be compared with the current requirements on Annex B countries under the Kyoto Protocol to establish a national system for estimating their emissions according to methodologies agreed on by the CMP,⁴⁴⁰ and to include this information in their national communication to the CMP in order for the expert review teams to assess their implementation.⁴⁴¹ Even though the concept needs to be clarified in relation to the NAMAs, the BAP indicated that there might be a distinction between developed and developing countries’ requirements to estimate and report on their emission reductions. In the negotiation text it seems to be a general agreement on the requirement that the NAMAs by developed countries should ‘be measured, reported and verified in accordance with existing and any further guidelines. . .’⁴⁴² In relation to the same requirement for the NAMAs by developing countries, the picture is more complex, and difficult to assess. However, it seems to be a distinction between

⁴³⁵ These different options are identified by Kim Et.al.: Linking Mitigation Actions in Developing Countries with Mitigation Support: A Conceptual Framework, 2009, at 3.

⁴³⁶ FCCC/AWLGLA/2010/6 Annex I, Chapter I, para. 12. Option 1.

⁴³⁷ Ibid., Option 2.

⁴³⁸ FCCC/AWLGA/2010/6, Annex V, Chapter V, para. 3.

⁴³⁹ UNFCCC, supra note 6, art. 4.7.

⁴⁴⁰ Kyoto Protocol, supra note 7, art. 5.

⁴⁴¹ Ibid., art. 8.

⁴⁴² FCCC/AWLGLCA/2010/6, Annex I, Chapter I, para. 9 (Both options).

the NAMAs undertaken without support, and those who are supported by ‘developed countries’ or ‘international support’.⁴⁴³ According to the negotiation text, the former should be subject to domestic measurement and verification, while the latter will be subject to international measurement, reporting and verification.⁴⁴⁴ How these requirements should be applied in the light of the CBDR principle has also been discussed at earlier stages in the negotiation process.⁴⁴⁵ As pointed out by Honkonen, such differences between developed and developing countries’ would represent a new type of differential treatment in the climate regime.⁴⁴⁶ Although developing countries were given differentiated requirements regarding the submission of national reports under the UNFCCC⁴⁴⁷, differential procedural standards for emission reductions and their reporting would represent a new feature.⁴⁴⁸ She further stress that although lightened procedures would probably promote new emission reductions, the quality of the projects might become a problem.⁴⁴⁹

B. Reducing emission from deforestation and forest deforestation in developing countries

The Bali Action initiated the negotiations towards ‘policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries’⁴⁵⁰ (REDD).⁴⁵¹

The concept of including reduction of emissions from deforestation in developing countries into the COP agenda was first proposed by Papa New Guinea and Costa Rica together with eight other countries from Latin America at the eleventh session of the COP in Montreal, 2005.⁴⁵² These parties highlighted here that emissions form deforestation in developing counties should be included in the climate regime in order to meet the ultimate objective of the UNFCCC.⁴⁵³ The issues have been discussed since,⁴⁵⁴ but the parties have yet to reach an agreement on how these regulations should be formed.

However, some decisions have been made regarding this issue. In order to understand the complexity of the problem and how it should be managed, the COP.13 in Bali requested the Subsidiary Body for Scientific and Technological Advice to undertake a programme of work on the methodological issues, including inviting Parties to submit their views on how to address outstanding methodological issues, and to report the outcome of the workshop to the

⁴⁴³ FCCC/AWGLCA/2010/6, Annex I, Chapter I, para. 12 (both options)

⁴⁴⁴ Id.

⁴⁴⁵ Honkonen, *supra* note 20, at 246, with references to FCCC/AWGLCA/2008/6 (2008), para. 21.

⁴⁴⁶ Id.

⁴⁴⁷ UNFCCC, *supra* note 6, art. 12.

⁴⁴⁸ Honkonen, *supra* note 20, at 246.

⁴⁴⁹ *Ibid.*, at 347.

⁴⁵⁰ Decision 1/COP.13 (FCCC/CP/2007/6/Add.1), para 1 (b) (iii).

⁴⁵¹ ‘REDD’ will be used in this paper as the reference to this phrase icluded in the BAP.

⁴⁵² Hermann E. Ott, in *Yearbook of International Environmental Law*, Volume 16, 2007, at 401.

⁴⁵³ Id.

⁴⁵⁴ See Hermann E. Ott, in *Yearbook of International Environmental Law*, Volume 17, 2008, at 307, *ibid.*, Volume 18, 2008, at 203-204 and *ibid.*, Volume 19, 2009, at 243.

COP.⁴⁵⁵ Furthermore, at the COP.15 in Copenhagen, the COP requested the developing countries to, inter alia, identify drivers of deforestation and forest degradation and the means to address these;⁴⁵⁶ to identify activities within the country that result in reduction of emissions and increased removals;⁴⁵⁷ and, to establish an national forest monitoring system.⁴⁵⁸ An interesting feature in the COP decision was that the COP encouraged ‘all parties in position to do so’ to support and strengthen the capacity of developing countries to develop estimates.⁴⁵⁹ The language herein is a sign that the actual capacity of the parties will be of increased importance in the future climate regime.

Deforestation accounts for approximately 17-20 percent⁴⁶⁰ of the annual global GHG emissions. According to the IPCC, “forest related mitigation activities can considerably reduce emissions from sources and increase Co₂ removals by sinks at low costs, and can be designed to create synergies with adaption and sustainable development.”⁴⁶¹ They also state that “reduced deforestation and degradation is the forest mitigation option with the largest and most immediate carbon stock impact [...] because large carbon stocks are not emitted when deforestation is prevented”.⁴⁶²

These facts clearly show that if regulations to reduce emissions from deforestation and forest degradation are included under the UNFCCC, this will not only be an important element to meet the ultimate objective, but it could also serve as a low-cost and effective mitigation alternative for developing countries. Reduced deforestation could be undertaken immediately using already known technologies,⁴⁶³ and therefore be suitable for enhanced mitigation action by developing countries since these countries generally lack resources to take on more complicated technical mitigation actions.

Compared to the first introduction of the issue at COP. 11, the BAP defined the term more broadly and included a collection of several actions.⁴⁶⁴ The phrase ‘policy approaches’, could include a variety of different policies and means. However, it is stated in the newest negotiation text, that developing countries should ‘contribute to mitigation actions in the forest sector’ by undertake ‘activities’ to reduce emissions from deforestation and forest

⁴⁵⁵ Decision 2/CP.13 (FCCC/CP/2007/6/Add.1), Para 7.

⁴⁵⁶ Decision 4/CP.15 (FCCC/CP/2009/11/Add.1), para 1(a).

⁴⁵⁷ Ibid., para 1(b).

⁴⁵⁸ Ibid.,para 1(c).

⁴⁵⁹ Ibid., para 5.

⁴⁶⁰ Some variety of the exact amount occurs in the literature. For instance, Meridian Institute has stated that deforestation accounts for 18 percent of the global GHG emission, see Angelsen et.al: Reducing Emissions from Deforestation and Forest Degradation (REDD): An Options Assessment Report, Meridian Institute,2009, at 1. Florence Daviet states 17-20 percent, see Florence Daviet: Beyond Carbon Financing: The Role of Sustainable Development Policies and Measures in REDD, in Climate and Forests Policy Series, at 1, and some also refer to ‘about 20 percent’, see Stockwell, Hare and Macey, supra note 318, at 152.

⁴⁶¹ IPCC, Summary for Policymakers. In: Climate Change 2007: Mitigation, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, (Metz et.al eds), at 14.

⁴⁶² IPCC, 2007: Forestry. In Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, at 550.

⁴⁶³ Vashist, supra note 40, at 8.

⁴⁶⁴ Florence Daviet: Beyond Carbon Financing: The Role of Sustainable Development Policies and Measures in REDD, at 1.

degradation, conservation of forest carbon stocks, sustainable management of forests, and enhancement of forest carbon stocks.⁴⁶⁵

The CMP has defined ‘deforestation’ as “. . .the direct human- induced conversion of forested land to non-forested land.”⁴⁶⁶, while ‘forest’ is defined as ‘a minimum area of land of 0.05-1 hectares with tree crown cover (or equivalent stocking level) of more than 10-30 percent with trees with the potential to reach a minimum height of 2-5 metres at maturity in situ’.⁴⁶⁷ Still, ‘forest degradation’ and other definitions regarding what the different activities refer to need to be agreed to by the parties.

The lack of clear language specifying the ‘activities’ must be seen in relation to the fact that causes of deforestation are ‘multiple, complex and are dissimilar from country to country’.⁴⁶⁸ Studies show that no universal policy for controlling deforestation can be conceived, and thus, the REDD mechanism must take into account the regional differences and interacting causes and enable ‘implementation of a variety of actions involving a number of actors at different levels’.⁴⁶⁹

The word ‘contribute’ does not provide clarity on what exactly is expected by the parties. Yet, in the negotiation text is stated that the activities are to be “. . .*implemented in phases, beginning with the development of national strategies or action plans, policies and measures and capacity-building, followed by the implementation of national policies and measures, and national strategies or actions plans and, as appropriate, subnational strategies, that could involve further capacity-building, technology development and transfer and result-based demonstration activities, and evolving into results-based actions...*”.⁴⁷⁰ Furthermore, it is stated that the implementation, ‘including the choice of starting phase’, depends on ‘the specific national circumstances, capacities and capabilities of each developing country Party and the level of support received’.⁴⁷¹ This indicates that the developing countries will have different commitments in relation to the REDD mechanism, which could ensure that their commitments are adjusted according to their actual capacities. The REDD mechanism could thereby ensure a more flexible type of differential treatment, which, as discussed in part IV above, will be an improvement of the current approach.

The developing countries have generally expressed “. . . that they want to be “paid” for their participation in the climate regime”.⁴⁷² The BAP stated that the negotiation also should be concentrated on ‘positive incentives’. Positive incentives is generally seen to mean benefits, more specifically ‘financial flows’⁴⁷³ or ‘benefits in form of financial incentives’⁴⁷⁴ to the developing countries that undertake REDD activities. ‘Positive incentives’ could also include

⁴⁶⁵ FCCC/AWGLCA/2010/6, Annex VI, Chapter VI, para. 3.

⁴⁶⁶ Decision 16/CMP.1, Annex, para 1(d). (FCCC/KP/CMP/2005/8/Add.3.)

⁴⁶⁷ Parker, Mitchell, Trivedi, Mardas and Sosis: *The Little REDD+ Book*, Third Edition, 2009, at 131.

⁴⁶⁸ *Ibid.*, at 13.

⁴⁶⁹ Stockwell, Hare and Macey, *supra* note 318, at 153.

⁴⁷⁰ *Ibid.*, para. 7.

⁴⁷¹ *Ibid.*, para 8.

⁴⁷² Harris, *supra* note 251, at 212.

⁴⁷³ Daviet, *supra* note 464, at 2.

⁴⁷⁴ Parker et. al, *supra* note 467, at 24.

transfer of technology.⁴⁷⁵ The REDD concept has been described to build on the idea that “. . . forests will contribute to climate change mitigation only if their value increased to a level that makes protecting forests consistent with viable development strategies”.⁴⁷⁶ It is stated in the negotiation text that the ‘promotion and implementation’ of all activities should be supported.⁴⁷⁷ How and on what grounds they should be supported is still unclear. Earlier in the negotiation process, the main options for financial incentives have been either a market approach or funding. The negotiation text mentions a combination of funds and market based sources of support, but this need to be discussed further by the parties in the negotiation.⁴⁷⁸

C. Conclusion: The signs of adjustments to the current differential treatment

The most obvious adjustment of the current differential treatment will be that Annex I parties are no longer the only countries expected to undertake mitigation action under the climate regime. This new approach would be better in line with the scientific research indicating that enhanced global mitigation actions are needed, and thus developed countries alone cannot prevent dangerous interference with the climate system. These new provisions, if adopted, could thereby present an improvement of the efficiency of the climate regime, and thereby also be better in line with the boundary of differential treatment required to fulfil the ultimate objective of the climate regime.

However, it is clear that favourable treatment to developing countries still will be a central part of the new agreement as well. First, it is likely that the differential commitments will continue as the BAP call for ‘commitments or actions, including quantified emission limitation and reduction objectives’ for developed countries, and simply ‘actions’ by developing countries. Even though the negotiation text indicates that the NAMAs by developing countries will be formed as commitments, it is unlikely that they will have as strong obligations as the developed countries. The negotiation text show no signs of individual quantified targets for developing countries, and thus, that these commitments should be legally binding and enforceable. Therefore, even if all parties would have mitigation commitments under a new agreement, the degree of the commitments on developed and developing countries would still be differentiated. Secondly, it clear that the NAMAs are to be ‘enabled and supported’ and the REDD includes ‘positive incentives’, the developing countries will still be granted assistance from the developed world. Finally, as the developing countries requirements regarding procedural standards and reporting regarding seems to be differentiated between the developed and developing countries, a possible new type of differential treatment in favour of the developed countries could be included in the future of the climate regime.

⁴⁷⁵ Harris, supra note 251, at 213.

⁴⁷⁶ Angelsen et. al, supra note 464, at 1.

⁴⁷⁷ FCCC/AWGLCA/2010/6, Annex VI, Chapter VI, para 12.

⁴⁷⁸ Id.

As the REDD mechanism and the NAMAs will require further cooperation between the parties regarding mitigation action and a more active involvement of all, one could say that the parties common responsibilities seems to be increased in a new agreement. On the other hand, the responsibilities of the developed countries would now be reflected and responded to by even more stringent mitigation obligations as well as enhanced assistance commitments to support the enhanced mitigation commitment of the developing countries. The differences between the parties will thus still be taken into account, but the differential treatment will be applied in a different way than before where the developing countries have been without mitigation commitments.

By being ‘nationally appropriate’, both the NAMAs by developing countries and the NAMAs by developed countries would require different types and degree of activities in the individual countries, which could ensure that the countries’ commitments would be based on what is an appropriate level of action for each country according to their contribution to the problem and their capacity to tackle it. Furthermore, in order to be ‘appropriate’ at all times, the commitments could therefore be adjusted in relation to the change of circumstances in the countries. A such flexible approach of differential treatment would therefore ensure that the differential treatment would ‘cease to exist when the differences cease to exist’, and thereby would be within this limit of differential treatment as well.

A new and important element of the NAMAs and the REDD mechanism is that the differential treatment will not only be distinguished between developed and developing countries, but also among the developing countries. First, as stated above, the NAMAs could ensure that the mitigation action in each country where based on the relevant national circumstances. The REDD mechanism would also require different activities in the different countries, and thereby the level of involvement in the developing countries would be differentiated. Furthermore, the negotiation text shows signs of differentiation among developing countries regarding the level of actions required. In relation to the NAMAs it is open for those countries with better capacity to undertake mitigation action without support, and, more importantly, the regulations could reflect the special situation of particularly vulnerable countries, like the least developed countries and the small island developing states, by giving them less stringent commitments. Based on the signs in the negotiation text, the developing countries would be clearly differentiated under the REDD mechanism since the parties’ implementation of the REDD activities will be divided based on different ‘phases’. If this would be included in a new agreement, the developing countries commitments would be differentiated according to the ‘specific national circumstances, capacities and capabilities in each developing country’. This would thereby be a clear shift of approach in relation to the current differential treatment where all developing countries are treated similarly despite their vast differences. This would therefore be in line with the notion of justice requiring that those dissimilarly situated should be treated dissimilarly.

Even though it is not explicitly stated in the BAP, nor in the negotiation text, from which countries the resources to ‘support and enable’ the NAMAs by developing countries, or provide the ‘positive incentives’ under the REDD mechanism, should come from, it is possible that the developing countries’ different level of wealth could be reflected by

requiring the richest developing countries to support the other developing countries in their implementation. This is also in harmony with the signals from the COP and CMP in Copenhagen. When the COP decision in relation to the REDD encouraged ‘all parties in position to do so to support and strengthen the capacity of developing countries’, it clearly indicated that the involvement by the parties to the climate change should be better adjusted to the actual capacity of each country, regardless if it is listed in an Annex or not. This is also supported by the fact that the CMP encouraged *all* parties to contribute to facilitate South-South cooperation and capacity transfer in relation to the CDM. This would be an additional adjustment to the current differential treatment that only requires the Annex II countries to support developing countries.

To sum up, in light of the signals in the BAP and the latest negotiation text by the AWG-LCA, the new options for enhanced mitigation actions in developing countries could possibly adjust the current differential treatment under the climate regime, and consequently be better in line with the three boundaries of differential treatment. Overall, the capacity and actual circumstances in each country would be taken into account, rather than the current approach which is based on a distinction of Annex I and non-Annex I countries. This gives hope for a more efficient and fair differential treatment in the climate regime in the future.

Future will tell if the NAMAs and REDD regulations will be voluntarily or formed as legally binding commitments for at least some of the developing countries. It will then be interesting to see whether non-Annex I countries also will be subject for enforcement consequences, or whether the differential treatment between developed and developing countries’ regarding non-compliance consequences will continue with the current approach.

Finally it should also be noted that if the NAMAs and REDD activities are to be financed through a market based approach, the lessons learned in relation to the flaws with the CDM should be taken into consideration. The purpose of the NAMAs would likely be, as with the CDM, to achieve emission reduction and at the same time ensure sustainable development. The REDD would also have multiple objectives, for instance to reduce emissions from deforestation as well as to respect the knowledge and rights of indigenous peoples and members of local communities.⁴⁷⁹ It should therefore be ensured under these regulations that all the objectives are respected, rather than neglected due to strong economic interests. This is also highlighted by Stockwell, Hare and Macey, concluding that: “[a] market mechanism will procedure only what which has economic value, unless the design of the mechanism clearly requires other deliverables in a measureable, reportable and verifiable manner.” It is therefore the task of the parties to agree on rules that protect the compliance with all of the several purposes that probably will be included in the NAMAs and REDD provisions. Furthermore, regulations should also be made to ensure an even distribution of the financial resources to all the developing countries if a market based approach is chosen.

⁴⁷⁹ This is included in the negotiation text regarding what safeguards should be promoted and supported when undertaking the REDD activities, see FCCC/AWGLCA/2010/6, Annex VI, Chapter VI, para. 2 (c).

FINAL REMARKS

I started this paper with the words “*There is now a worldwide consensus that climate change has become a global challenge that requires international action to be solved.*”

Although the climate regime has almost universal participation, the current differential treatment is not providing a sufficient level of international action in order to solve the climate change challenge. Thus, the differential treatment has gone too far. Enhanced global mitigation actions by developing countries are required in order to meet the objective of the treaty. Even though it is too early to conclude on what the contents of a new agreement will be, the Bali Action Plan and the later negotiations show signs of a new approach.

One could therefore say that we are moving towards a new era of differential treatment in the climate regime.

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LIST OF ABBREVIATIONS

AWG	Ad Hoc Working Group
AWG-LCA	Ad Hoc Working Group on Long-term Cooperative Action
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
BAP	The Bali Action Plan
CBDR	Common but differential responsibilities
CERs	Certified Emission Reductions
CDM	Clean Development Mechanism
COP	Conference of the Parties
CMP	Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol
DNA	Designated National Authority
EB	Executive Board
GHG	Greenhouse gas
GWP	Global warming potential
IPCC	Intergovernmental Panel on Climate Change
NAMAs	Nationally Appropriate Mitigation Actions
QUELROs	Quantified Emission Limitation or Reduction Obligations
REDD	Reducing Emissions from Deforestation and forest Degradation
UNFCCC	United Nations Framework Convention on Climate Change

