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PRINCIPLE OF CBDR-RC: ITS INTERPRETATION AND IMPLEMENTATION THROUGH NDCS IN THE CONTEXT OF SUSTAINABLE DEVELOPMENT

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ABSTRACT

For the international community, 2015 was a momentous year in terms of transformative legal developments. Climate change response culminated in the adoption of the Paris Agreement and Sustainable Development Goals (SDGs), which heralded a new era in the international community's pursuit of sustainability. Both of these developments are complementary; the climate change legal framework acknowledges sustainable development, and SDGs explicitly recognize the United Nations Framework Convention on Climate Change and the Paris Agreement. The Paris Agreement presented to the global community an objective to strengthen the global response to the threat of climate change, through sustainable development and efforts to eradicate poverty and a goal to restrict the global temperature increase to below 2 degrees Celsius above pre-industrial levels and a desirable goal of 1.5 degrees Celsius. The failure to achieve this target would seriously jeopardize States and individuals and challenge the success of sustainable development and SDGs. The Paris Agreement states not only that the achievement of the goal is essential, but the agreement must be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), in light of different national circumstances. This paper argues that the adoption of SDGs premised on the idea of leaving no one behind provides an impetus for the re-evaluation of the principle of CBDR-RC under the

Paris Agreement. The paper explores the possibility of a wider interpretation of CBDR-RC through the implementation of Nationally Determined Contributions (NDCs) to help the international community pursue SDGs.

Keywords: CBDR-RC, Equity, NDCs, Sustainable Development, Sustainable Development Goals.

INTRODUCTION

Sustainable Development Goals (SDGs) represent a comprehensive set of universal, human-oriented, integrated, and transformative goals and targets to achieve, with an overarching idea of sustainable development till 2030.¹ The idea of SDGs has been introduced in multiple conferences on the environment and development initiated by the United Nations. In the legal sense, the principle of sustainable development embedded in the concept of equity was enunciated as the leading concept of international environmental law with the Rio Declaration² and Agenda 21.³ However, the core foundation of sustainable development depends on the reformulation and integration of economic, social, and environmental systems, and their integration is difficult to measure.⁴ The adoption of the Millennium Development Goals saw the international community pursuing a targeted approach to development.⁵ In 2012, Rio+20 brought significant

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¹ See G.A. Res. 70A/1, Transforming Our World: The 2030 Agenda for Sustainable Development, pmb. (Sep. 2015) [hereinafter U.N. 2030 Agenda].

² U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug.12, 1992) [hereinafter Rio Declaration].

³ U.N. Conference on Environment and Development, *Agenda 21: Programme of Action for Sustainable Development*, U.N. Doc. A/CONF. 151/26 (Jun.14, 1992).

⁴ PHILLIPE SANDS ET AL., PRINCIPLES OF ENVIRONMENTAL INTERNATIONAL LAW 215-225 (4th ed., 2018); Ed Atkins, *Deflective Discourse and Sustainable Development*, in RETHINKING SUSTAINABLE DEVELOPMENT IN TERMS OF JUSTICE: ISSUES OF THEORY, LAW, AND GOVERNANCE 70-87 (B. F. Pérez et al. eds., 2018); CHRISTINA VOIGT, SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF INTERNATIONAL LAW 25 (2009).

⁵ See G.A. Res. 55/2, U.N. Millennium Declaration (Sep. 18, 2000).

changes in its approaches to sustainable development with the strengthening of environmental components. A long negotiation process resulted in the adoption of targeted sustainable development goals for the period from 2016 to 2030. The adoption of SDGs, which are aspirational political goals for States premised on “leaving no one behind,” represents a significant shift toward capturing the environmental, economic, and social dimensions of sustainable development and guiding policy decisions toward achieving objective, transparent and superior development results.⁶

Climate change, with its disproportionate impact on the poorest, most vulnerable and marginalized communities (such as people of color, women, children, elderly and indigenous peoples, etc.), is recognized as one of the biggest threats to sustainable development and the attainment of SDGs. In this scenario, it is important to appreciate the complementary nature of climate change and sustainable development; indeed, States cannot achieve sustainable development without addressing the disproportionate impacts of climate change. This is because climate change is fundamentally a social and political issue that challenges the global economic system founded on carbon-fueled growth. Climate change nullifies the efforts of nations to eradicate poverty, reversing decades of progress. It constitutes a threat to all three dimensions of sustainable development: economic, environmental, and social. Thus, any failure to address climate change mitigation seriously undermines the attainment of sustainable development.⁷ Considering the idea of “leaving no one behind” anchored in the SDGs Agenda 2030⁸ and addressing the disproportionate climate impacts in light of differing capacities of States, it becomes essential to invoke the principle of Common but Differentiated Responsibilities (CBDR). Against this background, this paper explores the role of CBDR in the attainment of SDGs. CBDR is a well-founded principle of the climate change regime and is also applied in the context of sustainable development. The first part of the paper explains the links between climate change, sustainable development and SDGs. The second part of the paper analyzes the links between sustainable development and CBDR and explores the position of CBDR under the climate change legal framework. The third part of the paper analyzes the possibility of expansive

⁶ NORICHIKA KANIE & FRANK BIERMANN, GOVERNANCE THROUGH GOALS: SUSTAINABLE DEVELOPMENT GOALS AS GOVERNANCE INNOVATION 5 (2017).

⁷ See Shinichiro Fujimori et al., *Measuring the Sustainable Development Implications of Climate Change Mitigation*, 15 ENV'T. RES. LETT. 1, 8-9 (2020); U.N. RSCH. INST. FOR SOC. DEV., SUSTAINABLE DEVELOPMENT IN TIMES OF CLIMATE CHANGE, 141-166 (2016), <https://www.unrisd.org/flagship2016-chapter5> (detailing that sustainable development will not be achievable unless climate change is addressed).

⁸ U.N. 2030 Agenda, *supra* note 1, ¶¶ 4, 26, 48, 72, pmbl. at 1.

interpretation and application of CBDR within the Paris Agreement implementation framework for the attainment of SDGs. The emphasis will be on the incorporation of CBDR in the implementation of Nationally Determined Contributions (NDCs). It is argued that the idea of “leaving no one behind” and CBDR as stipulated in the Sustainable Development Agenda creates a valid entry point for reinterpreting CBDR in the context of implementing NDCs in the Paris Agreement.

I. RELATION BETWEEN CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT AND SUSTAINABLE DEVELOPMENT GOALS

Human-induced climate change and the severe consequences it presents to the poor and vulnerable is a serious threat to sustainable development.⁹ Climate change disproportionately affects communities of low-income households, who are relatively more susceptible to the adverse impacts of climate change.¹⁰ This further exacerbates social inequality in terms of exposing these communities to the adverse impacts of climate change and at the same time reducing their ability to adapt to the damage caused by climate change.¹¹ Sustainable Development Goals can hardly be achieved without adequately addressing the concerns of marginalized communities and of the poorest countries. In this regard, prioritizing the needs of vulnerable communities holds special attention under the climate change regime’s integrated concept of equity.¹² The relationship between climate change and sustainable development was analyzed and reiterated in

⁹ Gary W. Yohe et al., *Perspectives on Climate Change and Sustainability*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 803 (M.L. Parry et al. eds., 2007) (reviewing projections of climate-change-related impacts on vulnerable communities).

¹⁰ CLAIRE MCGUIGAN ET AL., LSE CONSULTANCY PROJ., POVERTY AND CLIMATE CHANGE: ASSESSING IMPACTS IN DEVELOPING COUNTRIES AND THE INITIATIVES OF THE INTERNATIONAL COMMUNITY 4-14 (2002), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3449.pdf> (examining the disproportionate impact of climate change on developing nations); EMMANUEL SKOUFIAS ET AL., THE WORLD BANK, THE POVERTY IMPACTS OF CLIMATE CHANGE: A REVIEW OF THE EVIDENCE 1 (2011); Robin Leichenko & Julie Silva, *Climate Change and Poverty: Vulnerability, Impacts, and Alleviation Strategies*, 5 WIREs. CLIM. CHANGE 1, 2-8 (2014) (discussing the impact of climate change on poverty citing evidence from jurisdictions).

¹¹ S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality* 2-3 (U.N. DEP’T OF ECON. & SOC. AFFAIRS, Working Paper No. 152 ST/ESA/2017/DWP/152) (offering conceptual understanding of the relationship between climate change and inequality).

¹² See generally Beverly Wright & Earthea Nance, *Toward Equity: Prioritizing Vulnerable Communities in Climate Change* 4 DUKE F. L. & SOC. CHANGE 1-23 (2012).

the Intergovernmental Panel on Climate Change (IPCC) third assessment report.¹³ The relationship operates in a circular fashion with climate change threatening development, and sustainable development providing the foundation for actions in mitigation and adaptation.¹⁴ For example, water is a primary indicator of the impacts of climate change; climate change threatens water quality and access. Hence, sustainable development strategy and sustainable management of water resources can help prevent exacerbating these adverse impacts and provide a foundation for climate adaptation and mitigation. The relationship is further cemented by the fact that an effective shift to climate adaptation needs to be inclusive, which again points to the broader agendas of sustainable development. The interrelation provides synergies for integrating climate actions into the overall development agenda. This has been underscored as part of the idea, objective, and mandate of the Sustainable Development Goals, particularly SDG-13.¹⁵

SDG-13 focuses on strengthening the resilience and capacity of nations to respond to climate change.¹⁶ Goal-13 adopts not only a country-specific approach, by emphasizing the special needs of least developed countries and small island developing States (SIDS), but also an individual approach with special focus on women, youth and local and marginalized communities.¹⁷ The interconnected nature of climate change and sustainable development is not only reflected under SDG-13 but is integrated within the broader fabric of SDGs.¹⁸ Though the Paris Agreement does not mention SDGs explicitly, their content can be found in

¹³ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2001: SYNTHESIS REPORT, *in* CONTRIBUTION OF WORKING GROUP I, II, AND III TO THE THIRD ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 276-280, 306-308, 351, 354 (R.T. Watson & C.R. Team ed. 2001).

¹⁴ Christoph V. Stechow et al., *Integrating Global Climate Change Mitigations Goals with Other Sustainability Objectives: A Synthesis*, 40 (1) ANN. REV. OF ENV'T. & RES. 363, 363 (2015); Prajal Pradhan et al., *A Systematic Study of Sustainable Development Goal (SDG) Interactions*, 5(11) EARTH'S FUTURE 1169, 1169–1179 (2017) (identifying the synergies and trade-offs based on SDG indicators for climate actions).

¹⁵ U.N. 2030 Agenda, *supra* note 1, SDG-13.2. (emphasizing the need to integrate climate change measures into national policies, strategies and planning).

¹⁶ *Id.* SDG-13.1.

¹⁷ *Id.* SDG-13.b.

¹⁸ SUMMARY FOR POLICYMAKERS, *in* GLOBAL WARMING OF 1.5°C. – an IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY 1-32, 9–13, 26 (Valérie Masson-Delmotte et al. eds., 2018).

the Agreement's preamble and operative sections.¹⁹ For instance, SDG topics such as forestry, adaptation, loss-and-damage, and education are mentioned in the Paris Agreement's articles 5, 7, 8, and 11(1) and 12, respectively.²⁰ In addition to the operative part of the Paris Agreement, the Agreement's preamble also references the subjects of several SDGs. These references include food security²¹ (SDG-2), jobs²² (SDG-8.3 and 8.9), health²³ (SDG-3), rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, etc.²⁴ Although the SDG-related issues mentioned in the preamble of the Paris Agreement do not entail any binding obligation, they are relevant for interpretive purposes.²⁵ The clear references of sustainable development and SDG content in the preamble and operative part of the Paris Agreement indicate the intention of the international community to adopt an integrated approach to the implementation of the Agreement and SDGs. An empirical investigation into the substantive content of NDCs also reveals the broader inclusion of SDGs.²⁶

The advancement of integrated and interrelated goals requires transformative changes in the way societies, economies, and legal systems operate and respond at varying levels. SDGs do not operate in isolation or in a vacuum. They are grounded in international law which provides them with a normative environment. SDGs are made consistent with existing commitments expressed in various international legal instruments. In this context, the mutually supportive relationship of international law is paramount, which has been acknowledged by the SDGs.²⁷ For example, the

¹⁹ See Francesco Sindico, *Paris, Climate Change, and Sustainable Development*, 6 CLIM. LAW 130, 140 (2016) (assessing the extent to which the Paris Outcome incorporates the SDGs or sustainable development concerns).

²⁰ U.N. Framework Convention on Climate Change (UNFCCC), Dec. 1/CP.21: *Adoption of the Paris Agreement*, FCCC/CP/2015/10/Add.1, 21, annex (Jan. 29, 2016), [hereinafter 'Paris Agreement'].

²¹ *Id.* at 2; SDG target 2.4 provides a link between sustainable food production, resilient agricultural practices, and climate change: “[b]y 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality.” U.N. 2030 Agenda, *supra* note 1, ¶ 2.4.

²² Paris Agreement, *supra* note 20 at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ Max H. Hulme, *Preambles in Treaty Interpretation*, 164(5) U. PA. L. REV. 1281, 1305-1329 (2016).

²⁶ ADIS DZEBO ET AL., STOCKHOLM ENV'T. INST., THE SUSTAINABLE DEVELOPMENT GOALS VIEWED THROUGH A CLIMATE LENS 1-4 (2018) (examining 7000 climate activities from 164 Nationally Determined Contributions and showing the inclusion of SDG goals).

²⁷ U.N. 2030 Agenda, *supra* note 1, ¶ 18.

contents of SDG-13 were comprehensively drawn from the concrete terms of the United Nations Framework Convention on Climate Change (UNFCCC).²⁸ The significance of international law as a normative backbone for SDGs also stems from the fact that implementation of SDGs rests on legal forums and institutions.²⁹

In addition, the complementary nature of international law in the context of SDGs also stems from “equity” as a normative framework for both climate change and SDGs.³⁰ By adopting the 2030 agenda, States commit to “leave no one behind” and wish to see goals and targets met for all nations and peoples and for all segments of society.³¹ Leaving no one behind as it relates to equity means that the specific needs of countries, communities, and individuals are addressed so that everyone benefits from sustained growth and progress.³² In the context of climate change, it is the poorest and most marginalized who suffer first and worst from its effects.³³ Leaving no one behind would require prioritizing and assisting the mitigation and adaptation efforts of the poorest countries and fighting for the inclusion of marginalized peoples’ voices everywhere. In this case, it is important to see that NDCs, which form the backbone of the Paris Agreement, address and pursue the goal of leaving no one behind through climate actions. However, given the disproportionate impact of climate change and differing capabilities of nations to respond to climate change, there is a strong case for allowing differing responsibilities for climate actions at the international level. The attainment of inclusive participation and benefits for everyone requires serious evaluation of the role of CBDR in the sustainable development framework and climate change legal

²⁸ *Id.* SDG-13.

²⁹ Rakhyun E. Kim, *The Nexus Between International Law and the Sustainable Development Goals*, 25(1) REV. OF EUR., COMMUNITY & INT’L ENV’T. L. 15, 16 (2016).

³⁰ See generally Stellina Jolly & Abhishek Trivedi, *Implementing the SDG-13 Through the Adoption of Hybrid Law: Addressing Climate-Induced Displacement*, 2 BRILL OPEN L. 69 (2019).

³¹ U.N. 2030 Agenda, *supra* note 1, at 1, 3 ¶ 4.

³² See generally J. ROY ET AL., SUSTAINABLE DEVELOPMENT, POVERTY ERADICATION AND REDUCING INEQUALITIES, *in* GLOBAL WARMING OF 1.5°C. – an IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY 445, 469 (Valérie Masson-Delmotte et al. eds., 2018) (considering the broad and multifaceted bi-directional interplay between sustainable development, including its focus on eradicating poverty and reducing inequality in their multidimensional aspects, and climate actions in a 1.5°C warmer world); Otto Spijkers, *Intergenerational Equity and the Sustainable Development Goals*, 10(11) SUSTAINABILITY 1, 1-12 (2018).

³³ Leichenko & Silva, *supra* note 10.

regime. In this context, the concept of leaving no one behind anchored in the SDGs Agenda 2030 provides a strong justification for a wider interpretation of CBDR.

II. COMMON BUT DIFFERENTIATED RESPONSIBILITY, SUSTAINABLE DEVELOPMENT, AND SUSTAINABLE DEVELOPMENT GOALS

The historically disproportionate contribution of countries to climate change³⁴ and existing disparities amongst countries in their ability to respond to climate change has forced the international community to deviate from the classic notion of the sovereign equality of States by adopting a differentiation principle in terms of climate obligation.³⁵

Even though CBDR is most discussed in the context of climate change, it is important to mention that the concept of CBDR evolved as a legal principle in the context of sustainable development as part of the Rio Declaration which stated: “[I]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”³⁶

Principle 7 of the Rio Declaration explicitly integrated CBDR within the context of sustainable development. However, the relationship was expressed only in the context of historical contributions of developed countries to environmental degradation and their capacity to respond to environmental degradation. This point is a serious bone of contention between developed and developing nations where the latter insist on an expansive interpretation of CBDR to be applicable to all facets of sustainable development.³⁷ It should be noted, however, that at the Rio conference, sustainable development was understood to encompass only

³⁴ STELLINA JOLLY & AMIT JAIN, CLIMATE CHANGE: CHANGING DIMENSIONS OF LAW AND POLICY 48 (2009) (highlighting the disproportionate impact of climate change).

³⁵ See Philippe Cullet, *Common but Differentiated Responsibilities*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 161-180 (M. Fitzmaurice et al. eds., 2014) (explaining the evolution and development of common but differentiated responsibilities).

³⁶ Rio Declaration, *supra* note 2, principle 7; see also Philippe Cullet, *Principle 7: Common but Differentiated Responsibilities*, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 229-44 (Jorge E. Vinuales eds., 2015) (tracing the history of CBDR in the context of sustainable development).

³⁷ Lavanya Rajamani, *The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law*, 88 INT’L AFFAIRS 605, 613-614 (2012).

economic and environmental dimensions.³⁸ Subsequent legal developments strengthened and broadened CBDR.³⁹ The 2002 Johannesburg Declaration also broadened the gamut of sustainable development by explicitly adding social components to sustainable development.⁴⁰ The Johannesburg Plan of Implementation (JPOI) indicates that the principle of CBDR should be taken into account in implementing Agenda 21 and the internationally-agreed upon development goals.⁴¹

The Outcome Document of the United Nations Conference on Sustainable Development, 2012, reaffirmed the principles of the Rio Declaration, including the principle of CBDR.⁴² It stated, “[w]e reaffirm all the principles of the Rio Declaration on Environment and Development, including, *inter alia*, the principle of common but differentiated responsibilities, as set out in principle 7 thereof.”⁴³

Negotiations over the principles were contentious. While reaffirming the Rio Principles, the co-chair of the negotiation proposed the following: “[W]e also reaffirm that all the Principles contained in the Rio Declaration on Environment and Development will continue to guide the international community in the achievement of sustainable development and the future we want and will serve as the basis for cooperation, coherence and implementation of agreed commitments, including in this outcome.”⁴⁴ The Group of 77 (G-77) introduced an alternative text to reaffirm the Rio Declaration on Environment and Development and all its principles, in

³⁸ Clara Nobbe, *Universality, Common but Differentiated Responsibilities and the Sustainable Development Goals* 1, 3 (Stiftung Wissenschaft Und Politik, Working Paper FG 8, 2015/01, 2015), https://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Nobbe_2015_SWP-WorkingPaper.pdf.

³⁹ Marie Claire C. Segger et al., *Prospects for Principles of International Sustainable Development Law after WSSD: Common but Differentiated Responsibilities, Precaution and Participation*, 12(1) REV. OF EUR. COMMUNITY & INT’L ENV’T. L. 54, 58 (2013).

⁴⁰ U.N. Rep. of the World Summit on Sustainable Development, Resolution 1: Johannesburg Declaration on Sustainable Development, ¶¶ 5, 8, 11, U.N. Doc. A/CONF.199/20 (2002); see also Ina Von Frantzius, *World Summit on Sustainable Development Johannesburg 2002: A Critical Analysis and Assessment of the Outcomes*, 13(2) ENV’T. POL. 467, 471 (2004).

⁴¹ U.N. Rep. of the World Summit on Sustainable Development, Resolution 2: Plan of Implementation of the World Summit on Sustainable Development, ¶¶ 14, 20, 38, 39, 81, U.N. Doc. A/CONF.199/20 (2002); see also Kevin R. Gray, *World Summit on Sustainable Development: Accomplishments and New Directions?*, 52(1) INT’L COMP. L. Q. 256, 265-66 (2003).

⁴² G.A. Res. A/RES/66/288, The Future We Want (July 27, 2012) [hereinafter Rio+20 Outcome Document].

⁴³ *Id.* at ¶ 15.

⁴⁴ Chee Yoke Ling, “Common but Differentiated Responsibilities” Under Threat, Third World Network Update on Sustainable Development Conference 2012 (June 8, 2012), <https://www.twn.my/title2/sdc2012/sdc2012.120606.htm>.

particular the Principle of CBDR and equity.⁴⁵ The United States and the developed nations were against singling out any of the Rio Principles.⁴⁶ They elucidated their position, stating that CBDR only applied in the context of the environment and could not be protracted into the broader context of development.⁴⁷ However, for G-77 and China, the position was non-negotiable since the developing countries believed that the principle of CBDR is not just about the environment alone, but rather the international pursuit of sustainable development.⁴⁸ It should also be noted that in spite of the acceptance of the CBDR principle in the environmental context, the principle was never incorporated into the global development agenda, including the Millennium Development Goals.⁴⁹ However, this was mainly due to the absence of emphasis on the responsibility of northern countries and the general focus of north-south cooperation.⁵⁰

The notion held by developed nations that CBDR is only applicable in the context of global environmental goals and not for the global development agenda resulted in its exclusion from the initial agenda for negotiations leading to the adoption of SDGs.⁵¹ In addition, the concern was on how to reconcile the development of goals that were “global and universal in nature to all countries while taking into account different national realities, capacities and levels of development and respecting national policies and priorities” prescribed by the Rio+20.⁵² Given the universality of SDGs and the different capabilities of countries, linking CBDR to the whole components of sustainable development becomes critical. CBDR is invoked not merely to address the historical contribution to environmental degradation, but also due to countries’ differing

⁴⁵ *Id.*

⁴⁶ Raymond Clemencon, *Welcome to the Anthropocene: Rio+20 and the Meaning of Sustainable Development*, 21(3) J. ENV’T. DEV. 311, 316-317 (2012); Ye Jiang, *Common but Differentiated Responsibilities and Its Effect on the Post-2015 Development Agenda*, 54 CHINA INT’L STUD. 22, 30-31 (2015) (articulating the general position of developed nations that common but differentiated responsibilities is not an organic part of the Post-2015 Development Agenda).

⁴⁷ Achala C. Abeyasinghe & Gilberto Arias, *CBDR as a Principle of Inspiring Actions Rather Than Justifying Inaction in the Global Climate Change Regime*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE 235-257 (Oliver C. Ruppel et al. eds., 2013) (articulating the operationalization of CBDR in the environmental dimensions of sustainable development); Ye Jiang, *The CBDR Principle in the UN 2030 Agenda for Sustainable Development*, 2(2) CHINA Q. OF INT’L STRATEGIC STUDIES 169, 170 (2016).

⁴⁸ *Summary of the United Nations Conference on Sustainable Development 13-22 JUNE 2012*, 27 (51) EARTH NEGOT. BULL. 8, 16-18, 21 (2012).

⁴⁹ Ye Jiang, *supra* note 47, at 173 (exploring the negotiation history on the inclusion of CBDR in the U.N. 2030 Agenda).

⁵⁰ *Id.* at 178.

⁵¹ *Id.* at 172-74.

⁵² Rio+20 Outcome Document, *supra* note 42, ¶¶ 246-47.

capacities.⁵³ The historical contribution and capacity argument can be invoked to support the whole components of sustainable development. Most developing nations were colonized,⁵⁴ which resulted in their economies being drained and undermining their prospects and ability to develop. Development and underdevelopment as historical processes of imperialist exploitation needs to occupy a larger place in the global negotiation agendas and require clear acknowledgment and articulate explanation. Even if the social components of sustainable development are added to the notion of CBDR, developed countries must account for their historical contribution to underdevelopment. Thus, equity demands that CBDR should be given a broad interpretation to achieve the substantive equality essential for the implementation of international laws regarding climate change.⁵⁵

During the negotiation on developing global SDGs under the mandate of Opening Working Group (OWG),⁵⁶ the G-77 and China were of the opinion that the principle of CBDR applies equally to all dimensions of sustainable development and to the entire set of SDGs.⁵⁷ The developed countries, however, contended that the relevance of the CBDR principle in its application is limited to the global environmental aspect of sustainable development.⁵⁸ Finally, the presence of the differentiation principle in the context of sustainable development and its application to the implementation of SDGs was reaffirmed and reiterated in the OWG Report on sustainable development submitted to the General Assembly on August 14, 2014.⁵⁹ Paragraph 191 of the outcome document specifically mentions

⁵³ *Id.*

⁵⁴ Gbedoah Richard, *On Colonialism and Development – Why the Underdevelopment of the South Cannot Be Delinked from the Experience of the Past*, 7(1) AFRICAN J. GOV. & DEV. 6-16 (2018).

⁵⁵ See generally Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations*, 10(3) EUR. J. OF INT'L L. 549 (1999); Philippe Cullet, *Equity and Flexibility Mechanisms in the Climate Change Regime: Conceptual and Practical Issues*, 8(2) REV. OF EUR., COMMUNITY & INT'L ENV'T. L. 168 (1999) (explaining equity in the context of climate change through the interpretation of CBDR).

⁵⁶ Rio+20 Outcome Document, *supra* note 42, ¶ 248.

⁵⁷ *Statement on behalf of the Group of 77 and China by H.E. Ambassador Sacha Llorenty, Permanent Representative of the Plurinational State of Bolivia to the United Nations and Chair of the Group of 77, at the Ninth Session of the Open Working Group on Sustainable Development Goals* (New York, Mar. 3, 2014), <https://www.g77.org/statement/getstatement.php?id=140303c>; see also *China's Position Paper on the Development Agenda Beyond 2015*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLES' REPUBLIC OF CHINA (Sept. 22, 2013), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1078984.shtml.

⁵⁸ Pamela S. Chasek et al., *Getting to 2030: Negotiating the Post-2015 Sustainable Development Agenda*, 25(1) REV. OF EUR., COMMUNITY & INT'L ENVTL. L. 5, 9 (2016).

⁵⁹ See G.A. Res. A/68/970, Rep. of the Open Working Group of the General Assembly on Sustainable Development Goals, ¶¶ 5, 8, 12, 13, 18 (Aug. 12, 2014).

CBDR in the context of climate change.⁶⁰ In addition, paragraph 247 of the outcome document espouses that the SDGs, which are global and universal in nature, should be applicable to all countries while taking into account different national realities, capacities and levels of development and respecting national policies and priorities.⁶¹ Though the term CBDR is not explicitly stated in the outcome document, which refers instead to national realities and capabilities, the outcome document has adopted a dynamic principle of differentiation applicable in all contexts of sustainable development.⁶²

The inclusion of differentiation constituted a decisive step towards the completion of the U.N. 2030 Agenda. CBDR is crucial for strengthening the means of implementation of SDGs and also for promoting the revitalization of global cooperation for sustainable development. The indivisible and integrated nature of SDGs has opened the possibility of interpreting and implementing the CBDR principle as applying equally to all dimensions of sustainable development and to the broader framework of SDGs. In this context, the next part of the article explores the contours of CBDR under the climate change legal framework and its contextualization within sustainable development.

III. PRINCIPLE OF ‘COMMON BUT DIFFERENTIATED RESPONSIBILITY’ UNDER THE CLIMATE LAW FRAMEWORK

The principle of CBDR has been a contentious issue in the climate change regime, with developed countries arguing that CBDR should be based on “capabilities”, while developing countries emphasize the term “responsibility.”⁶³ Ultimately, the debate resulted in a compromise in the form of “common but differentiated responsibilities and respective capabilities” (CBDR-RC) as bases for differentiation.

The CBDR-RC is mentioned under the preamble⁶⁴ and article 3 of the UNFCCC⁶⁵ as one of its guiding principles. The Kyoto Protocol, which supplemented the Convention, applied an Annex-based model of

⁶⁰ Rio+20 Outcome Document, *supra* note 42, ¶ 191.

⁶¹ *Id.* ¶ 247.

⁶² Nobbe, *supra* note 38, at 1-12; Pieter Pauw et al., *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations* 1-76, 48-50 (GERMAN DEVELOPMENT INSTITUTE DISCUSSION PAPER 6/2014, 2014), https://www.die-gdi.de/uploads/media/DP_6.2014.pdf.

⁶³ DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 27 (2017).

⁶⁴ UNFCCC, 1771 U.N.T.S. 107, pmb1. ¶ 6 (May 9, 1992).

⁶⁵ *Id.*, art. 3.1.

differentiation.⁶⁶ The idea of CBDR was problematic from the very beginning as many of the developed nations, especially the U.S., opposed the idea of non-binding obligations on some of the developing nations, like China and India.⁶⁷ The opposition took a concrete turn especially from the Bali Conference of Parties (CoP), which started working on the post-Kyoto commitments.⁶⁸ The idea that differentiation requires flexibility and dynamism was moot.⁶⁹ Following the climate negotiations, State Parties in the Durban platform embraced the notion of “intended nationally determined contributions” (INDCs), which continued in Warsaw (COP-19) where it was decided to put INDCs at the heart of the future climate agreement.⁷⁰

Finally, the Paris Agreement, while diluting the traditional binary understanding of CBDR-RC,⁷¹ approached what many experts call dynamic differentiation, which considers different national circumstances, capacities, and vulnerabilities and tailors differentiation to the specificities of mitigation, adaptation, finance, technology, capacity building and

⁶⁶ Kyoto Protocol to the UNFCCC, 2303 U.N.T.S. 162, arts. 2, 3 (Dec. 11, 1997) [hereinafter Kyoto Protocol].

⁶⁷ Rowena Maguire, *The Role of Common but Differentiated Responsibility in the 2020 Climate Regime: Evolving a New Understanding of Differential Commitments*, 7(4) CAR. & CL. L. REV. 260, 263, 266 (2013); Paul. G. Harris, *Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 2 NYU ENV'T. L. J. 27, 28 (1999).

⁶⁸ Lavanya Rajamani, *From Berlin to Bali and Beyond: Killing Kyoto Softly?*, 57(4) INT'L & COMP. L. Q. 909, 911, 923 (2008) (explaining the controversial negotiating positions of countries for the post Kyoto commitments).

⁶⁹ Jorge Vinuales, *Balancing Effectiveness and Fairness in the Redesign of the Climate Change Regime*, 24(1) LEIDEN J. INT'L L. 225, 245 (2011) (exploring the differing position of nations concerning fairness and the developed nations perspectives of flexibility for all nations).

⁷⁰ UNFCCC, Decision 1/CP.19: Further Advancing the Durban Platform, UN Doc. FCCC/CP/2013/10/Add.1 (Jan. 31. 2014).

⁷¹ The principle of CBDR-RC is arguably diluted under the Paris Agreement in a sense that it adopted a self-differentiation approach, in contrast to an annex-based approach of differentiation tailored by the Kyoto Protocol. The weakening of the differentiation principle under the Paris Agreement has been seen by a few commentators as a positive sign of evolution of CBDR-RC principle towards a flexible and dynamic framework. *See generally*, S. Maljean-Dubois, *The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?*, 25(2) REV. OF EUR., COMMUNITY & INT'L ENV'T. L. 151 (2016); *see also* Philippe Cullet, *Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps*, 5 TRANSNAT'L ENV'T. L. 305 (2016) (taking a different approach to the CBDR-RC principle, arguing that, in a world where inequalities remain, the differentiation principle should be developed around new environmental and social bases and must be applied in all aspects of sustainable development).

transparency.⁷² All of these areas are directly related to the various dimensions of sustainable development and sustainable development goals. It would be legally implausible to argue that the “differentiation” under the Paris Agreement goes without touching upon the aspects of sustainable development. In other words, even though the Paris Agreement has diluted the traditional approach of CBDR-RC, the present dynamic of differentiation is closely related to multiple dimensions of sustainable development.

A. *Paris Agreement, Sustainable Development, and SDGs*

The preamble of the Paris Agreement emphasizes the relationship of climate change actions and responses to equitable access to sustainable development and the eradication of poverty.⁷³ Sustainable development and poverty eradication are the overarching goals of the UN Agenda 2030.⁷⁴ Article 2 of the Agreement goes further by setting an ambitious goal of limiting global temperature increase to 2 degrees Celsius in the context of sustainable development.⁷⁵ The Parties under article 4 have agreed to achieve and implement the goals of the Paris Agreement including NDCs on the basis of equity and in the context of sustainable development.⁷⁶ In this way, sustainable development provides a context for the State Parties to achieve and implement the goals of the Agreement.⁷⁷

⁷² Christina Voigt & Felipe Ferreira, ‘Dynamic Differentiation’: *The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement*, 5(2) TRANSNAT’L ENV’T. L. 285, 303 (2016) (analyzing the ‘dynamic differentiation’ as built into the architecture of the Paris Agreement); Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, 28(2) J. OF INT’L ENV’T. L. 337, 358 (2016); Lavanya Rajamani, *Ambitions and Differentiation in the 2015 Paris Agreement: Interpretative possibilities and Underlying Politics*, 65(2) INT’L & COMP. L. Q. 493 (2016) (exploring ambition and differentiation as articulated in the text of the Agreement and its interpretative possibilities and underlying politics).

⁷³ Paris Agreement, *supra* note 20, pmb. ¶ 8.

⁷⁴ Lynda M. Collins, *Sustainable Development Goals and Human Rights: Challenges and Opportunities*, in SUSTAINABLE DEVELOPMENT GOALS: LAW, THEORY AND IMPLEMENTATION 72-78 (Duncan French ed., 2018).

⁷⁵ Paris Agreement, *supra* note 20, art. 2.1.

⁷⁶ *Id.*, art. 4.1.

⁷⁷ Since sustainable development and the contents of SDGs form part of the preamble and operative part of the Paris Agreement and provide a context for the implementation of the Agreement, they could be used in several ways including in the interpretation of the relevant provisions of the Agreement. *See generally* Vienna Convention on the Law of the Treaties, 1155 U.N.T.S. 331, art. 31(1) (May 23, 1969) (saying that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); *see* Hulme, *supra* note 25, at 1296-1329 (discussing the relevance of preamble text in the interpretation of the main text of a

Parties are further allowed to seek international cooperation in the implementation of their NDCs,⁷⁸ and thus, while engaging in such cooperative mechanisms, they are required to promote sustainable development, *inter alia*.⁷⁹ The Agreement further establishes a link between global goals on adaptation with those of sustainable development in the sense that the domestic adaptation measures adopted by the States should be in tune with a view to contributing to sustainable development.⁸⁰ Moreover, Parties under the Paris Agreement have explicitly recognized the role of sustainable development in reducing the risk of loss-and-damage.⁸¹ Interestingly, SDG-13, on the other hand, also requires States to adopt domestic measures in their implementation of mitigation and adaptation goals.⁸² Thus, it is incumbent upon States to ensure that their domestic implementation policies regarding the Paris Agreement and SDGs are mutually supportive and do not result in a fragmented approach.⁸³

treaty and in the reconciliation of the text-and-context and object-and-purpose approaches); *see e.g.*, Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, 12, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) (in this case, the Appellate Body looked at the preamble text of the WTO Agreement while giving an interpretation of article XX of the GATT. It noted that “An environmental purpose is fundamental to the application of article XX, and such a purpose cannot be ignored, especially since the preamble to the [WTO Agreement] ... acknowledge that the rules of trade should be in accordance with the objective of the sustainable development.”); J. KLABBERS, *Treaties and their Preambles, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 172-200* (M. Bowman & D. Kritsiotis eds., 2018).

⁷⁸ Paris Agreement, *supra* note 20, art. 6.1.

⁷⁹ *Id.*, art. 6.2.

⁸⁰ *Id.*, art. 7.1.

⁸¹ *Id.*, art. 8.1.

⁸² U.N. 2030 Agenda, *supra* note 1, SDG 13.2.

⁸³ Mutually supportive role of SDGs and the Paris Agreement help influence the countries to adopt an integrated approach and avoid fragmentation in their policy design regarding climate change. As for the relevance of an integrated and coherent approach in relation to the Paris Agreement and the SDGs. *See generally* David Griggs et al., *An Integrated Framework for Sustainable Development Goals*, 19(40) *ECOL. SOC.* 49 (2014); William Boyd, *Climate Change, Fragmentation, and The Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32(2) *U. OF PA. J. OF INT’L L.* 457, 513 (2010) (analyzing global environmental law in the context of a plural, fragmented international legal order); CLARA BRANDI ET AL., *GERMAN DEV. INST., THE CASE FOR CONNECTING THE IMPLEMENTATION OF THE PARIS CLIMATE AGREEMENT AND THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT 1-4* (2017) (exploring the enormous potential for co-benefits to arise from the mutually supportive implementation processes of the 17 Sustainable Development Goals (SDGs) elaborated in the 2030 Agenda and the Nationally Determined Contributions (NDCs) underpinning the legally binding Paris Agreement); TARA SHINE, *SWEDISH INT’L DEV. COOPERATION AGENCY, INTEGRATING CLIMATE ACTION INTO NATIONAL DEVELOPMENT PLANNING: COHERENT IMPLEMENTATION OF THE PARIS AGREEMENT AND AGENDA 2030, A GUIDE TO SUPPORT IMPLEMENTATION OF THE PARIS AGREEMENT PART THREE 1-15* (2017); UNDP, *GUIDELINES TO SUPPORT COUNTRIES REPORTING ON THE*

The explicit references to sustainable development and SDG content in the preamble and operative part of the Paris Agreement indicate the seriousness attached by the climate change regime to the operationalization of the Agreement in the context of sustainable development.⁸⁴ The references to sustainable development and SDG content also points to the need to adopt an integrated approach to the implementation of the Agreement and SDGs, with a strong mandate in the field of adaptation, loss-and-damage, and support mobilization.

In this scenario, the question is whether the Paris Agreement, with its diluted form of the CBDR-RC principle, is capable of attaining the climate goal of 2-degrees Celsius and the ambitious goal of 1.5-degrees Celsius in the context of sustainable development. This article reiterates the position of the Paris Agreement that the implementation of the Agreement is to be in the context of sustainable development and equity. With this in mind, the next section illustrates the significance attached to SDGs in the NDCs submitted by State Parties.

IV. INCORPORATING SUSTAINABLE DEVELOPMENT GOALS IN THE NATIONALLY DETERMINED CONTRIBUTIONS

Implementation of NDCs and building climate resilience capacity are not exclusive to the achievement of the Paris Agreement goals but are strongly connected to the broader concept of sustainable development and contribute substantially to the achievement of SDGs. The mutually supportive nature of the two agendas is clear—i.e., delivering on NDCs will help countries achieve their SDGs, and achieving the SDGs will facilitate countries' efforts to mitigate and adapt to climate change. Further, since the NDCs process is cyclical and will be assessed collectively

SUSTAINABLE DEVELOPMENT GOALS 22 (2017); Norchika Kanie et al., *Introduction: Global Governance through Goal Setting*, ' in GOVERNANCE THROUGH GOALS: SUSTAINABLE DEVELOPMENT GOALS AS GOVERNANCE INNOVATION 1-28 (Norchika Kanie & Frank Biermann eds., 2017).

⁸⁴ It needs to be emphasized that although the U.N. Agenda 2030 is a soft law instrument and that the SDGs are not legally binding, they are nevertheless of great importance in many ways including informing the interpretation of the Paris Agreement, influencing the general international law-making process and the content of international law, and most importantly helping to define the standards of good behavior of the states in a given context. See generally Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12(2) MICH. J. OF INT'L L. 420, 431-35 (1990); Tadenz Grnchalla-Wesierski, *A Framework for Understanding "Soft Law"*, 30 MCGILL L. J. 38, 52-60, 70-79 (1984); Alan E. Boyle, *Some Reflection on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L. Q. 901, 904-914 (1999) (discussing the legal status of treaty provisions and soft laws, this understanding is important to appreciate inclusion of terminologies in different parts of the treaty or agreement).

through global stocktaking “in light of equity,”⁸⁵ the SDG lens can help countries develop more comprehensive and ambitious targets while taking into account how NDC implementation can contribute to achieving multiple goals of the U.N. 2030 Agenda.⁸⁶ As with the SDGs, the achievement by a Party of its NDCs is not a legally binding obligation, but governments are expected to take ownership and establish national frameworks for their targets.⁸⁷ The Stockholm Institute studies show that NDCs include a large number of climate activities that are also relevant to achieving multiple SDGs.⁸⁸ As of now, 186 State Parties have submitted their first NDCs and many States mention in their NDCs, directly or indirectly, concerns about sustainable development and SDGs.

For instance, India’s NDC refers to sustainable development and sustainable development goals of poverty eradication, food security, and nutrition, universal access to education and health, gender equality and women empowerment, water and sanitation, energy, employment, sustainable urbanization and new human settlements, and the means of implementation for enhanced actions.⁸⁹ India’s broad policy framework on environment and climate change as highlighted in its NDC and laid down by the National Environmental Policy (NEP, 2006) and National Action Plan on Climate Change (NAPCC, 2008) along with several other national strategies and policies, such as Energy Conservation Act (2001), focus on achieving sustainable development with the imperatives of economic and social justice.⁹⁰

⁸⁵ Paris Agreement, *supra* note 20, art. 14.1.

⁸⁶ See Eliza Northrop et al., *Examining the Alignment Between the Intended Nationally Determined Contributions And Sustainable Development Goals*, WORLD RESOURCE INST. 1, 2, 13 (2016), <https://www.wri.org/publication/examining-alignment-between-intended-nationally-determined-contributions-and-sustainable> (demonstrating that climate actions communicated in the Intended Nationally Determined Contributions under the Paris Agreement have the potential to generate mutual benefits with at least 154 of the 169 SDG targets); Jennifer Huang, *What Can the Paris Agreement’s Global Stocktake Learn from the Sustainable Development Goals?*, 12(3) CAR. & CL. L. REV. 218- 228 (2018) (undertaking a review of the potential similarities and differences in the review, reporting cycles, and outcomes, measuring progress, managing technical expert input, sharing knowledge, information and experience, of SDGs and climate change and suggesting that SDGs could provide some relevant lessons for international climate negotiations).

⁸⁷ Paris Agreement, *supra* note 20, art. 4(2); see generally Christina Voigt, *The Paris Agreement: What is the Standard of Conduct for Parties?*, 26 QUESTIONS OF INT’L L. 17, 19-20 (2016).

⁸⁸ See generally, Dzebo, *supra* note 26.

⁸⁹ *India’s Intended Nationally Determined Contribution: Working towards Climate Justice*, UNFCCC 4 (Oct. 2, 2016), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “India First NDC” English language hyperlink).

⁹⁰ *Id.* at 7.

Similarly, Afghanistan, Nepal, Pakistan, and Sri Lanka, while adopting a low carbon pathway, have mainstreamed climate and environmental considerations with a sustainable development agenda.⁹¹ The Maldives has even made the explicit reference of sustainable development as a context for its conditional target of a 24% reduction in Green House Gases (GHGs) below business as usual (BAU) for the year 2030.⁹² Thus, the Maldives believes that its domestic budgetary spending on addressing climate change would remain an additional burden towards the achievement of sustainable development.⁹³ The group of Brazil, Russia, India, China and South Africa (BRICS) countries have also mentioned sustainable development as a context and basis in the formulation and implementation of their NDCs based on equity and equitable access to sustainable development. For instance, South Africa believes that the principles of equity and sustainable development are the basis of its NDCs, and equity applies to adaptation, mitigation and all forms of investment and support.⁹⁴ In this context, South Africa further mentions that equity, economic and social development, and poverty eradication are the first and overriding priorities for the effective implementation of its NDCs.⁹⁵ Brazil is also committed to enhancing its contribution towards global efforts to hold the increase in global average temperature below 2°C above pre-industrial levels in the context of sustainable development and access to financial and technological means.⁹⁶

Concerns about sustainable development are not specific to the NDCs of developing and least developed nations. Many member countries to the Alliance of Small Island States (AOSIS) have increasingly aligned their climate change policy with sustainable development objectives. For instance, Trinidad and Tobago, while adopting a low carbon development plan through the National Climate Change Policy, is willing to achieve an

⁹¹ *Afghanistan's Intended Nationally Determined Contribution*, UNFCCC 3-4 (Sept. 21, 2015); *Sri Lanka's Nationally Determined Contribution*, UNFCCC 1 (Sept., 2016); *Nepal's Nationally Determined Contributions*, UNFCCC 5, 9 (Oct. 2016); *Pakistan's Intended Nationally Determined Contribution*, UNFCCC 1 (Nov. 10, 2016). NDC submissions for each country can be accessed at <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>.

⁹² *Maldives' Intended Nationally Determined Contribution*, UNFCCC 3 (Sept. 2015), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow "Maldives First NDC" hyperlink).

⁹³ *Id.* at 10.

⁹⁴ *South Africa's Intended Nationally Determined Contribution*, UNFCCC 10 (Nov. 1, 2016), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow "South Africa First NDC" hyperlink).

⁹⁵ *Id.* at 7.

⁹⁶ *Brazil's Intended Nationally Determined Contribution towards Achieving the Objectives of the UNFCCC, Additional Information on the INDC for Clarification Purposes Only*, UNFCCC 1 (Sep. 21, 2016), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow "Brazil's First NDC" hyperlink).

optimal energy mix with the lowest GHGs emissions in order to ensure a sustainable development path with significant co-benefits in terms of enhancing its ability to cope with and adapt to the adverse impacts of climate change.⁹⁷ In contrast, Tuvalu believes that climate change is a cross-cutting development issue, which seriously undermines its efforts towards sustainable development and climate change resilience, and threatens the survival and sovereignty of the nation.⁹⁸

The assessed NDCs broadly reveal not only climate action goals but also the strong alignment and *de jure* sustainable development plans deeply rooted in the U.N. 2030 Agenda.⁹⁹ Two things are important to note here. First, these countries viewed sustainable development as an objective to be achieved in all three areas of environmental, economic and social development. Second, these countries provided sustainable development as a context and basis for NDCs implementation in the areas of not only mitigation but also adaptation, and support. SDGs rooted in the principle of leaving no one behind have been given a place of prominence in a majority of NDCs reiterating the complementarity of the goals specified in the two regimes. The strong emphasis on sustainable development in the NDCs reflects the intention of countries to advance the implementation of the Paris Agreement in the context of sustainable development. It should also be emphasized that case law jurisprudence has highlighted the commitments of governments to meet climate change targets set up by the Paris Agreement with the objective of contributing to the achievement of sustainable development.¹⁰⁰ These cases vividly highlight the significance

⁹⁷ *Trinidad and Tobago's Intended Nationally Determined Contribution*, UNFCCC 2, 3 (Feb. 22, 2018), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow "Trinidad and Tobago First NDC" hyperlink).

⁹⁸ *Tuvalu's Intended Nationally Determined Contributions*, UNFCCC 9, 10 (Nov. 27, 2015), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow "Tuvalu First NDC" hyperlink).

⁹⁹ Dzebo, *supra* note 26, at 1-2.

¹⁰⁰ *See generally* Gloucester Resources Ltd. v. Minister for Planning, NSWLEC 7, 491, 525-49, 556, 664, 695 (2019). In this case, the Court rejected the approval of a proposed open-cut coal mine – Gloucester Resources Ltd – based on the grounds of social, environmental and climate change considerations. The court noted that the exploitation of the coal resources in the Gloucester Valley would not be a sustainable use and would cause substantial environmental and social harm, and that the project's GHGs emissions would contribute to global climate change degradation. Therefore, the Planning Department under the Environmental Planning and Assessment Act of 1979 should consider the climate change impacts, including the cumulative upstream and downstream GHGs emissions, of the project because the Act together with its regulations require the considerations of the principles of ecologically sustainable development which can encompass climate change impacts. Finally the court held that the Gloucester Valley coal mine project is not a sustainable use as it would cause adverse impacts on climate change and incur high environmental and social costs. *See* Lesley Hughes, *The Rocky Hill Decision: A Watershed*

attached by legal systems in responding to the Paris Agreement targets connecting some SDGs to the concept of sustainable development.

Since international law forms the backbone of SDG implementation, the achievement of climate goals and SDGs for everyone requires a stronger focus on equity and in the climate context, the expansive interpretation of CBDR in NDCs. The following sections enumerate how an expansionist interpretation of CBDR can be applicable to the implementation of NDCs under the Paris Agreement, as NDCs constitute the primary mechanism of implementation strategy under the Paris Agreement.

V. INCORPORATING CBDR IN THE IMPLEMENTATION OF NDCs

The concept of NDCs under the Agreement lies at the heart of the climate change regime, where State Parties are given extensive discretion to decide their GHG reduction target domestically and report them internationally. Article 4 of the Agreement deals in detail with the issue of mitigation, i.e. NDCs, where each State is required to “prepare, communicate and maintain successive” NDCs that it intends to achieve.¹⁰¹ The methods of implementation of these NDCs are chosen by concerned State Parties by adopting any domestic measures including legislation, rules, regulations, or any other policy measures. The overarching issues of the Paris Agreement: fairness, transparency framework, global stock-take, ambitious cycle, and means of implementation form the entry points for incorporating CBDR differentiation in NDCs. This article, while arguing for the expansive interpretation of CBDR, does not advocate for the retention of the binary divide between Annex countries. This article promotes the concretization of the developed, developing and vulnerable categories of countries specified under the Paris Agreement. The call for an expansionist interpretation of CBDR in NDCs should not be understood in the limited context of simply achieving the climate temperature goal of 2 degrees Celsius. Instead, it is more about the process and methods of

for Climate Change Action, 37(3) J. OF ENV'T. & NAT. RES. L. 341 (2019); *Plan B Earth v. Secretary of State for Transport*, EWCA Civ. 214 (2020) (UK). In this case the UK appellate court declined the decision of the government approving an expansion of Heathrow International Airport without considering its commitment to meeting the Paris Agreement goals. The court held that since the Paris Agreement goals form part of the “Government Policy,” the Secretary must consider and address the Paris Agreement goals during the preparation of the Airport National Policy Statement. And since the government failed to consider the Paris Agreement goals, it acted in violation of the Planning Act of 2008 and the requirement to undertake a strategic environmental assessment. *See also* JACQUELINE PEEL & HARI OSOFSKY, *CLIMATE CHANGE LITIGATION: LESSONS AND PATHWAYS* (2017).

¹⁰¹ Paris Agreement, *supra* note 20, art. 4.2.

achieving that goal based on equity and in light of sustainable development and efforts to eradicate poverty. Given the complementary relationship and significance of SDGs and climate change, fair and equitable preparation of NDCs is crucial in the attainment of SDG targets, as the implementation and operationalization of the Paris Agreement is mainly envisaged through NDCs, which outline countries' contributions to reduce or limit GHG emissions. Without an adequate reference to and incorporation of equity in NDCs, the goal of the Paris Agreement and the hope of attaining the SDGs would be impossible to achieve. With this in mind, the following subsections will explore the ways and methods of incorporating CBDR and promoting equity in the implementation of NDCs.

A. *Promoting Equity through Fairness Requirement of NDCs*

The effective implementation of the Paris Agreement is envisaged in the context of sustainable development and equity.¹⁰² Hence, it is imperative that the process leading to the preparation, accounting, implementation and compliance procedures relating to NDCs includes considerations promoting equity and fairness. An assessment of the Paris Agreement and the agreed Paris Rulebook for implementation shows an entry point for incorporating equity and fairness. Despite the interdisciplinary and philosophical nature associated with the idea of equity, most scholars have considered the incorporation of equity essential for the dynamic operation of climate governance.¹⁰³ It is to be noted that equity under the climate change regime is operationalized through the application of the principle of CBDR-RC.¹⁰⁴ Though the UNFCCC has never formally adopted any criteria to measure equity, considerations implicit in the UNFCCC can be used to infuse the virtues of CBDR-RC in the implementation of NDCs.

The Paris Agreement especially mentions that each State is required to explain the factors and parameters regarding the fairness and ambitious consideration, and how the NDCs will contribute to the collective goals of

¹⁰² *Id.*, arts. 2.1, 2.2.

¹⁰³ See Rebecca J. Howard et al., *Which "Fairness", for Whom, and Why? An Empirical Analysis of Plural Notions of Fairness in Fairtrade Carbon Projects, using Q methodology*, 56 ENV'T. SCI. & POL'Y. 100-109 (2016); Mark Fleurbaey et al., *Sustainable Development and Equity, in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* 283, 317-321 (O. Edenhofer et al. eds., 2014); Bodansky et al., *supra* note 63, at 26-30, 51-53; BENOIT MAYER, *THE INTERNATIONAL LAW ON CLIMATE CHANGE* 27-31 (2018).

¹⁰⁴ UNFCCC, *supra* note 64, art. 3.1.

the Agreement and the Convention.¹⁰⁵ However, it is built upon the flexibility granted to each country to interpret the extent of their proposed commitments and the parameters they consider equitable. This provision can form an entry point for assessing the incorporation of equity in the implementation of NDCs. In the absence of any common parameters applicable to assessing the adequacy of evaluation by each State Party, it is imperative that common parameters be developed. CBDR could be one of the guiding principles for promoting fairness because equity and fairness under the climate change regime are channeled through application of the principle of CBDR-RC.¹⁰⁶ Any method or benchmark for the evaluation of NDCs mitigation efforts should be fairly balanced between equity and stringent requirements for achieving the temperature goal of 2 degree Celsius. This is not to argue for sacrificing the Paris Agreement goal of 2 degrees Celsius on the altar of equity. This paper argues that the process of achieving the 2 degrees Celsius goal is equally as important an achievement as the goal itself. The Paris Agreement also clearly reflects this point when it states that implementation should reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.¹⁰⁷ Studies have focused on providing a comprehensive overview of equity criteria ranging from allocation-based, objective-based, and process-based criteria, applicable in the context of climate change implementation.¹⁰⁸ In this regard, it should be pointed out that though most of the controversy surrounding fairness is centered around responsibility and capacity, the decisive point of fairness conceptions in climate negotiations centered around whether a country is listed as an ‘Annex’ country under the Kyoto

¹⁰⁵ UNFCCC, ‘Decision 4/CMA.1: Further Guidance in relation to the mitigation section of decision 1/CP.21, FCCC/PA/CMA/2018/3/Add.1 annex I, sect. 6 (Mar.19, 2019).

¹⁰⁶ See Friedrich Soltau, FAIRNESS IN INTERNATIONAL CLIMATE CHANGE LAW AND POLICY 187 (2009) (mentioning that the principle of CBDR ‘gives effect to conceptions of equity and fairness in international environmental law’ generally and climate change law particularly); see also Daria Shapovalova, *In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities*, in DEBATING CLIMATE LAW 2-4 (Benoit Mayer and Alexander Zahar eds., 2021, forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3652184 (advancing the argument that the principle of CBDR-RC is indispensable for the achievement of equity under climate change regime).

¹⁰⁷ Paris Agreement, *supra* note 20, art. 2.2.

¹⁰⁸ Yann Robiou du Pont et al., *Equitable Mitigation to Achieve the Paris Agreement Goals*, 7(1) NATURE CLIM. CHANGE 38-43 (2017) (study identifying global cost-optimal mitigation scenarios consistent with the Paris Agreement goals and allocating their emissions dynamically to countries according to equity approaches); Joeri Rogelj et al., *Paris Agreement Climate Proposals Need a Boost to Keep Warming Well below 2 °C*, 534 NATURE 631-639 (2016).

Protocol.¹⁰⁹ This is because the differentiation under the Kyoto protocol was characterized by a firewall with legally binding and country-specific, quantitative mitigation targets for Annex I Parties only.¹¹⁰ The shift in structure towards self-differentiation in the Paris Agreement through NDCs mainly resulted from a lack of consensus on fundamental burden-sharing principles.¹¹¹ Under the Paris Agreement, Parties are obliged to submit NDCs every five years and are requested to justify their contribution as “fair and ambitious” through self-differentiation.¹¹² Article 2 of the Paris Agreement specifically directs that implementation. Commitments should “reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”¹¹³

Rajamani and Bodansky write that as for the long-standing contentious issue of equity, although the Paris Rulebook does not prescribe parameters for assessing how States’ NDCs are to be fair and ambitious, the mere requirement that countries have to provide explanations and justifications about how their NDCs are fair and ambitious might enable and open the door to more focused criticism by others.¹¹⁴ It gives an opportunity for public scrutiny of NDCs. Thus, the question of fairness in effort-sharing will continue to be relevant in the future cycle established by the Agreement. Therefore, it is crucial that climate negotiations approach the issue with a dynamic prism since the Annex division is not applicable. One of the plausible approaches in this direction could be to fix an emission allowance on the basis of specific equity principles discussed in the IPCC AR5,¹¹⁵ without necessarily compromising the equity considerations and

¹⁰⁹ See generally, Benito Muller, EQUITY IN CLIMATE CHANGE: THE GREAT DIVIDE (Oxford Inst. for Energy Studies, 2002) 1-2, 13-15 (explaining the north-south perception with regard to equity in climate change and highlighting the perspective of Annex and non-Annex countries). An assumption can be made that more than the philosophical underpinnings of equity, the concerns of the countries were on the division between Annex and non-Annex countries since the non-Annex countries were exempted from quantified emission. The exemption granted to countries like China and India became the primary reason for the United States’ non-ratification of the Kyoto Protocol.

¹¹⁰ See Kyoto Protocol, *supra* note 66, arts. 2.1 and 3.1; see also, Bodansky, *supra* note 63, at 165-69 (detailing the nuances of differentiation under the Kyoto Protocol).

¹¹¹ Hugh Breakey, *COP20’s Ethical Fallout: The Perils of Principles Without Dialogue*, 18 (2) ETHICS, POL’Y & ENV’T. 155-168 (2015).

¹¹² See Draft decision to the Paris Agreement, *supra* note 20, ¶ 27.

¹¹³ Paris Agreement, *supra* note 20, art. 2.

¹¹⁴ Lavanya Rajamani & Daniel Bodansky, *The Paris Rulebook: Balancing the International Prescriptiveness with National Discretion*, 68 INT’L COMP. L. Q. 1023, 1031 (2019).

¹¹⁵ Leon Clarke et al., *Assessing Transformation Pathways*, in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE – CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 413, 457, 478 (O. Edenhofer et al. eds, 2014); see also Glen P. Peters et al., *Measuring a Fair and*

efficacy requirements of NDCs. These equity principles are reflective of several equitable considerations including historical responsibility, equal individual rights, economic capability, cost-effectiveness, legitimate right to development, responsibility, capacity and need, equal cumulative per capita emissions, and staged approaches.¹¹⁶ In this regard, it may be pointed out that the reference to historical responsibility need not merely refer to emissions from the beginning of the industrial revolution and the automatic exclusion of recent years' emissions. Historical responsibility can be looked at from a dynamic perspective as current emissions represent future historical responsibility. Thus, the equity criteria would need to be viewed from a progressive perspective, requiring regular evaluation. Scholars have empirically analyzed selected NDCs based on a host of parameters including the criteria proposed above. These studies have revealed that the NDCs of the U.S. and the European Union lack ambition with respect to responsibility and that China's NDC projection falls short of satisfying any approach in 2030.¹¹⁷ Further, the study conducted by Xunzhang Pan, et al. comparing the NDCs of the top six emitters, jointly accounting for about 70% of the world's CO₂ emissions, revealed that the NDCs of four developed countries, including the United States, lack ambition with respect to most allocations under 2°C and all under 1.5°C, indicating the need to increase the targets under all the components of NDCs substantially.¹¹⁸ These empirical evaluations of NDCs and revelations about their lack of ambition further indicate the need to evolve a mechanism of common parameters against which nations' efforts can be measured.

The above-mentioned equity considerations to assess the fairness requirements of NDCs are significant for many reasons. Currently, NDCs reflect a national view on what a single country's contribution should be, both in terms of capability and fairness.¹¹⁹ The combined perspective of

Ambitious Climate Agreement using Cumulative Emissions, 10 ENV'T. RES. LETT. 1, 3 (2015) (allocating global emissions to keep global warming below 2 °C by 2100, two approaches are followed: an "equity" approach based on population, and an "inertia" approach based on current shares of global emissions).

¹¹⁶ Niklas Höhne et al., *Regional GHG Reduction Targets Based on Effort Sharing: A Comparison of Studies*, 14(1) CLIM. POL'Y, 122-147 (2014); M. Davide et al., *Fairness in NDCs: Comparing Mitigation Efforts from an Equity Perspective*, UNFCCC 1-16 (Oct. 2017), https://unfccc.int/sites/default/files/resource/312_Fairness%20in%20NDCs.%20Comparing%20mitigation%20efforts%20from%20an%20equity%20perspective.pdf; X. Pan et al., *Exploring Fair and Ambitious Mitigation Contributions under the Paris Agreement Goals*, 74 ENV'T. SCI. & POL'Y 49-56 (2017).

¹¹⁷ Davide et al., *supra* note 116, at 9-12.

¹¹⁸ Xunzhang Pan et al., *Comparing and Evaluating the Nationally Determined Contributions of the Top Six Emitters Under the Paris Agreement Goals*, 16 CHINESE J. OF POP. RES. & ENV'T. 211, 211-19 (2018).

¹¹⁹ Davide, *supra* note 116, at 12.

each nation must advance the Paris Agreement's core objective in a manner reflective of equity and the principle of CBDR-RC, in the light of different national circumstances.¹²⁰ Reference to commonly defined equity criteria can objectively advance different national circumstances. Further, these considerations and approaches can be used to compare emissions targets in NDCs reflecting differential equity; such an assessment could be the foundation for reviewing NDCs by 2030 and dividing the emissions gap amongst countries equitably. The current pattern of self-certification based on self-selected benchmarks can hardly be considered to advance the ambitious nature of the Paris Agreement.¹²¹ Commonly identified equity parameters would help account for the nuanced categorization involved in fairness considerations and the ambitious nature of the Paris Agreement.

B. Promoting Equity through International Support and Conditional NDCs

Equity enacted through CBDR-RC is widely argued as one of the justifications for providing international support¹²² for two broad reasons. First, “solidarity” between higher-capacity countries and countries with less capacity to deal with climate change.¹²³ Second, those who have contributed the most to global GHG emissions have the highest responsibility and should support those who have contributed the least and who are generally likely to face worse impacts.¹²⁴ Providing international

¹²⁰ Paris Agreement, *supra* note 20, arts. 2, 4.1, 4.3.

¹²¹ Harald Winkler et al., *Countries Start to Explain How Their Climate Contributions Are Fair: More Rigour Needed*, 18(1) INT'L ENV'T. AGREEMENTS: POL. L. & ECON. 99, 99-115 (2018) (studying 163 INDCs and analyzing how countries have applied different self-selected equity parameters (such as countries' small share in global emissions, per capita emissions, and vulnerability argument) to explain the equity of mitigation and adaptation in their respective INDCs. They find that aggregate effect of INDCs will not be sufficient to keep global temperature increase well below 2 degrees Celsius).

¹²² In this paper, international support is interchangeably used as “means of implementation” or “support.” International support under the U.N. climate change regime for the purpose of this paper is understood in terms of providing financial assistance and facilitating technology transfer to, and strengthening and investing in capacity-building measures of, developing countries.

¹²³ Rob Dellink et al., *Sharing the Burden of Financing Adaptation to Climate Change*, 19(4) GLOBAL ENV'T. CHANGE 411, 411-21 (2009) (mentioning that richer countries should pay more based on a principle of solidarity, irrespective of whether there is evidence that they have directly or indirectly caused harm. The authors use the paradigms of “historical responsibility” and “capacity to pay” in order to propose burden-sharing arrangements assigning individual countries a share of the financial burden regarding climate adaptation costs).

¹²⁴ Carola Klöck et al., *Responsibility, Capacity, Greenness or Vulnerability? What Explains the Levels of Climate Aid Provided by Bilateral Donors?*, 27(5) ENV'T. POL. 892 (2018)

support would also enhance distributive equity internationally. The challenge, however, is to distribute the support equitably and to prioritize the area of climate change between mitigation and adaptation.

Under the enhanced transparency framework, the Paris Agreement requires developed countries to report on international support provided,¹²⁵ whereas developing countries should report on the support needed and received.¹²⁶ The requirement of international support can be explicitly pronounced as part of NDCs. There is no provision in the Paris Agreement which prohibits, directly or indirectly, developed countries from mentioning their reporting obligation as part of their respective NDCs. In this way, the inclusion by developed countries in their NDCs of reporting obligations on support would be an addition and does not require an overhauling of the Agreement. Explicit mention of international support can also assist countries in fulfilling the criteria and passing the fairness requirement of NDCs discussed above. The U.S. and the EU and its member States mention, without any reference to sustainable development, equity, or information regarding support provided to developing or least developed countries, that their economy-wide target of reducing GHGs emissions are “fair and ambitious.”¹²⁷ However, it is strange and not legally in tune with the long-term goals¹²⁸ of the Paris Agreement for developed countries not to give due consideration in their NDCs to providing relevant information on support delivered to developing countries.

The need to explicitly provide for international support in NDCs is further supported by the fact that India, Sri Lanka, Bangladesh, Afghanistan, and the Maldives, among other nations, have explicitly made the implementation of their NDCs conditional upon international support in the form of financing, technology transfers and/or capacity building.¹²⁹ Afghanistan’s NDC, for instance, says that it would have a “conditional”

(explaining that countries with more “capacity to pay” are more willing to provide for climate aid).

¹²⁵ Paris Agreement, *supra* note 20, art. 13.9.

¹²⁶ *Id.*, art. 13.10.

¹²⁷ *The USA’s First Intended Nationally Determined Contribution*, UNFCCC 1 (2015), <https://www4.unfccc.int/sites/NDCStaging/pages/Party.aspx> (follow “USA First NDC (Archived)” hyperlink); *Intended Nationally Determined Contribution of the EU and its Member States*, UNFCCC 1, 3 (Mar. 6, 2015), <https://www4.unfccc.int/sites/NDCStaging/pages/Party.aspx?party=EUU> (follow “European Union First NDC (Archived) hyperlink”).

¹²⁸ Paris Agreement, *supra* note 20, arts. 4.1, 4.19, 7.2, 10.5, 14.1.

¹²⁹ *NDC of Sri Lanka*, *supra* note 91, at 5-7, 23-24; *NDC of Afghanistan*, *supra* note 91, at 1, 6-7; *NDC of Maldives*, *supra* note 92, at 2-3; *Bangladesh’s Intended Nationally Determined Contributions (INDC)*, UNFCCC 1, 2-4 (Sept. 2015), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “Bangladesh First NDC (Archived)” hyperlink) [hereinafter *NDC of Bangladesh*].

13.6% reduction in GHG emissions by 2030 compared to a BAU 2030 scenario.¹³⁰ Similarly, they have consistently argued in their NDCs that because of their historically minimal contribution to climate degradation and the least capacity for climate resilience, they must be supplied with, as a matter of fairness and equity, international support in the form of financial assistance, technology transfers and investment in areas of capacity building, such as agriculture, food security, irrigation, and its power sector, among other things.¹³¹ In this way, countries have incorporated in their NDCs the principle of CBDR which emphasizes that the success of the implementation of their NDCs depends on the support they receive from developed countries.

According to one analysis, around 136 out of 168 NDCs are conditional upon at least one type of support: around 113 NDCs request capacity building support, with 110 NDCs for mitigation finance, 109 NDCs for technology transfers, and 79 NDCs for adaptation finance.¹³² Furthermore, out of the 110 NDCs requesting mitigation support, 17 are fully conditional and 93 are partly conditional. Notably, a higher proportion of LDCs and SIDS have conditional NDCs on mitigation than do other countries.¹³³ Overall, around 64 (or 58%) of the countries with conditional NDCs on mitigation finance are either LDCs or SIDS (or both).¹³⁴ This shows that the “solidarity” justification for allocating international support to countries with the least capacity is more pronounced.¹³⁵ As with mitigation finance, the proportion of LDCs and SIDS proposing conditional adaptation actions is much higher than other countries: more than 60% of the countries putting forward adaptation finance as a condition are SIDS and LDCs, and most of them are lower-income countries.¹³⁶ Thus, providing international support to these countries seems to be consistent with the equity-based justifications of “solidarity” and “responsibility.”¹³⁷

Though providing for flexibility, conditional NDCs bring uncertainty and may seriously affect the feasibility of their implementation.¹³⁸

¹³⁰ *NDC of Afghanistan*, *supra* note 91, at 1.

¹³¹ *Id.* at 2; *see also NDC of Bangladesh*, *supra* note 129, at 9, 12; *NDC of Maldives*, *supra* note 92, at 5-11; *INDC of India*, *supra* note 89, at 2-3.

¹³² W. P. Pauw et al., *Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?*, 20(4) CLIM. POL’Y 468, 468-70, 473 (2020).

¹³³ *Id.* at 475.

¹³⁴ *Id.* at 478.

¹³⁵ *See generally* Angela Williams, *Solidarity, Justice and Climate Change Law*, 10(2) MELBOURNE J. INT’L L. 493, 509 (2009).

¹³⁶ Pauw et al., *supra* note 132, at 477.

¹³⁷ Klöck et al., *supra* note 124, at 893, 898.

¹³⁸ Pauw et al., *supra* note 132, at 481-82.

Therefore, countries are expected to provide more clarity on their conditional NDCs with detailed information regarding calculated and credible cost estimates.¹³⁹ This uncertainty can be further ameliorated by operationalizing the CBDR-RC principle of support to developing countries for the implementation of NDCs,¹⁴⁰ as an explicit requirement of NDCs. This will provide a factual calculation as to the cost of implementation of all conditional NDCs and the assistance offered as international support. In the absence of information regarding support, developed countries' claims regarding their NDCs being fair and ambitious are not faithful to the central features and spirit of the Paris Agreement. In this context, the next subsection discusses how information regarding support is an essential part of equity requirements, transparency frameworks, and global stock-taking.

C. Promoting Equity through Global Stock-take and Transparency Framework

The Paris Agreement's "ambition cycle" includes the binding obligation of each State to communicate an NDC every five years,¹⁴¹ the normative expectation of "progression" and the "highest possible ambition" in each successive NDC,¹⁴² and a global stock-take to assess collective progress towards long-term goals and to inform the Parties in updating and enhancing their successive NDCs and support.¹⁴³ Notably, the provision on global stock-take explicitly covers the areas of "mitigation, adaptation, and the means of implementation."¹⁴⁴ In addition, the Paris Rulebook further expands the scope of global stock-take that may take into account efforts related to its work addressing the socio-economic consequences of response measures and the loss-and-damage associated with the adverse effects of climate change.¹⁴⁵ In this regard, the SDGs' approach towards

¹³⁹ *Id.*

¹⁴⁰ Paris Agreement, *supra* note 20, art. 4.5.

¹⁴¹ *Id.*, art. 4.2 read with art 4.9.

¹⁴² *Id.*, art. 4.3 (also placing expectations that NDCs will reflect Parties' "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances").

¹⁴³ *Id.*, art. 14.

¹⁴⁴ *Id.*, art. 14.1.

¹⁴⁵ UNFCCC, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of its First Session, Held in Katowice from 2 to 15 December 2018*, dec. 19/CMA.1 para. 6(b)(i)-(iii), FCCC/PA/CMA/2018/3/Add.2 (Mar. 19, 2019) [hereinafter UNFCCC Katowice Decisions].

adaptation can be useful in global stock-take to address the concerns regarding climate change adaptation.¹⁴⁶

The issue of equity in the context of global stock-take was a contentious matter during the Rulebook negotiations. For instance, the Africa Group argued that the application of objective indicators, such as historical responsibility, cumulative per capita emissions, different responding capacity due to different development levels, and sustainable development, would offer greater precision and rigor in assessing the extent to which Parties' contributions address equity concerns.¹⁴⁷ On the other hand, many developed countries objected to the application of such indicators arguing that the indicators could lead to selectivism, thus rendering the stock-take a contentious exercise.¹⁴⁸ As a result of this, the Paris Rulebook does not identify and provide for the use of objective indicators of equity in the stock-take. However, the rules do provide that equity should form part of the input to the global stock-take, in a balanced, holistic and comprehensive manner while taking into account equity considerations and best available science.¹⁴⁹

In addition to the issue of equity, the Paris Rulebook further requires the State Parties to provide, as inputs to the stock-take, the information regarding the state of adaptation efforts, finance flows, and efforts relating to loss and damage.¹⁵⁰ This can be an entry point for State Parties, particularly developed country Parties, to include information regarding support in their NDCs, thus promoting equity and making their NDCs fair in a realistic sense.

Though the Paris Rulebook provides entry points for countries to infuse equity considerations through the global stock-take process, how the assessment of the adequacy of individual contributions would be carried out is beyond the scope of the Paris Agreement as the stock-take allows only assessment of collective progress of countries.¹⁵¹ Nevertheless, using a transparency framework, where all countries are to provide information explaining how their NDCs are fair and ambitious, would help inject equity

¹⁴⁶ Huang, *supra* note 86, at 224-26, 228 (also arguing that since the processes of climate change regime and SDGs are complementary in several ways, they should evolve hand-in-hand with systematic integration of the several relevant aspects of the two regimes with a view to enhance coherence and reduce redundancies).

¹⁴⁷ UNFCCC, *Submission by the Republic of Mali on Behalf of the African Group of Negotiators on Views on Issues Discussed Under Agenda Item 6 1, 1-3* (Apr. 2017), https://unfccc.int/files/meetings/bonn_nov_2017/application/pdf/compilation_26072017.pdf.

¹⁴⁸ Rajamani & Bodansky, *supra* note 114, at 1031.

¹⁴⁹ Decision 19/CMA.1, *supra* note 145, ¶¶ 2, 13, 27, 36(h).

¹⁵⁰ *Id.* ¶ 35.

¹⁵¹ Rajamani & Bodansky, *supra* note 114, at 1037.

into global stock-take.¹⁵² Consequently, since equity forms part of the input and outcome of all components of stock-take, it would inform countries of the need for successive NDCs to be ambitious. However, it is essential to reiterate the fact that since all countries are not to be placed in the same category for the purpose of discharging their part of commitments, including those undertaken as part of the transparency framework of the Paris Agreement, there should be some criteria that can be used to classify the world's countries into different categories corresponding to States' obligations based on equity. With this in mind, the next part seeks to explore the criteria that can be employed to categorize and define world countries for the purpose of climate change.

D. Promoting Equity by Adopting Nuanced Categorization of World Countries

Most of the opposition to the Convention and Protocol stems from their stringent version of differentiation with almost all the burden placed on developed nations and almost no binding obligations on non-annexed countries.¹⁵³ However, as pointed out by Rajamani, though the Paris Agreement has done away with the binary classification, it still retains the differentiation through reference to an undefined group of developed, developing, and vulnerable nations.¹⁵⁴ The Paris Agreement makes a differentiation between developed and developing countries an integral feature, with developed countries taking the lead and developing countries needing the means of implementation as well as needing to ensure sustainable development, poverty eradication and innovation.¹⁵⁵ For instance, developed countries are expected to undertake economy-wide absolute emission reduction targets, while developing countries are only “encouraged to move over time towards economy-wide emission reduction or limitation targets” as it suits their national circumstances.¹⁵⁶ This differentiation points to the fact that the Paris Agreement desired to treat developed and developing nations differently, and this provides a valid entry point for bringing differentiation into the NDCs implementation. This reference to the undefined category also points to the future, and challenges

¹⁵² Harald Winkler, *Putting Equity into Practice in the Global Stocktake under the Paris Agreement*, 20 CLIM. POL'Y 124, 124-132 (2020).

¹⁵³ Philippe Cullet, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 28 (1st ed. 2003); Cullet, *supra* note 71, at 327-28; Harris, *supra* note 67, at 41-42; Rajamani, *supra* note 37, at 615.

¹⁵⁴ See generally Rajamani, *supra* note 72.

¹⁵⁵ Paris Agreement, *supra* note 20, pmb., arts 4.1, 4.4, 4.5, 9.1, 9.3, 9.5, 9.7, 10.5, 11.3, 13.9, and 14.1.

¹⁵⁶ *Id.*, art. 4.4.

climate negotiations to identify and resolve the categorization of differentiation between “developed” and “developing” countries.

1. Attempting to categorize and define the world countries

The Paris Agreement has not defined developed and developing nations or other vulnerable categories. The existing classifications based on the Annex system of the UNFCCC do not give a clear reference point to define developed and developing countries.¹⁵⁷ This leaves the question of how to define or classify the world countries into different categories or groups for the purpose of climate change regime unanswered. Outside the climate change regime, different methodologies have been adopted to classify world countries into different categories based on either economic criteria¹⁵⁸ or a self-selection method.¹⁵⁹ Whether the climate change regime should follow the method of “self-selection,” or some other objective criteria based on multiple factors and subject to expert review would be more justifiable to the overall context of climate change. The examples of

¹⁵⁷ Izzet Ari & Ramazan Sari, *Differentiation of Developed and Developing Countries for the Paris Agreement*, 18 ENERGY STRATEGY REV. 175, 175, 179-180 (2017).

¹⁵⁸ For instance, the World Economic Situation and Prospects (WESP) classifies world countries into one of three broad categories: developed economies, economies in transition and developing economies. The criteria followed by WESP is purely based on economic indicators including their level of development as measured by per capita gross national income (GNI). Accordingly, countries have been grouped as high-income, upper-middle-income, lower-middle-income and low-income. WESP further includes the list of least developed countries as decided upon by the United Nations Economic and Social Council, and the criteria followed there include a certain level of threshold with regard to per capita GNI, a human assets index, and an economic vulnerability index. See U.N. DEP’T OF INT’L ECON. & SOC. AFFAIRS, COMM. FOR DEV. POLICY, HANDBOOK ON THE LEAST DEVELOPED COUNTRY CATEGORY: INCLUSION, GRADUATION AND SPECIAL SUPPORT MEASURES, at 1-14, U.N. Sales No. E.07.II.A.9 (2008). While WESP follows exchange-rate based method (aggregation methodology), the IMF and the World Bank follow and estimate world and regional economic growth based on purchasing power parity (PPP) weights and GNA per capita (Atlas Model), respectively. See U.N. DEP’T OF INT’L ECON. & SOC. AFFAIRS, WORLD ECON. SITUATION & PROSPECTS, 163-65 (U.N., New York 2020), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf; *How Does the World Bank Classify Countries?*, THE WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries>.

¹⁵⁹ The World Trade Organization (WTO) follows a self-selection method. It recognizes preferential treatment given to the developing and least-developed countries. The WTO system, however, does not provide any definition of developing and developed countries, but the State members announce for themselves on the basis of the self-selection method whether they are “developed” or “developing” countries. See *Who Are the Developing Countries in the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm.

“self-selection” are to be found in several NDCs submitted by States so far. For instance, while Qatar, India, and Pakistan, among others, identify themselves in their NDCs as developing countries,¹⁶⁰ Bangladesh¹⁶¹, Bhutan, Tuvalu and Nepal, among others, distinguish themselves as least-developed countries.¹⁶² Similarly, Dominica, Marshall Islands, Singapore, and Trinidad and Tobago, among others, call themselves SIDS.¹⁶³ There are few countries, for instance, Kiribati and Tuvalu, who are identified both as SIDS and LDC.¹⁶⁴

The Paris Agreement does envisage differentiation, and it does not merely differentiate between developed and developing nations but in many places provides special provisions which are envisaged for vulnerable categories, such as LDCs, SIDS, etc.¹⁶⁵ The need is to evolve some concrete mechanism of categorization between Parties which could be applicable in the implementation of NDCs. However, the idea of differentiation has been a matter of great conflict in the negotiation. G-77 and other developing countries have been insisting on a clear differentiation between developed and developing countries specifically relating to NDCs.¹⁶⁶ However, at the negotiation leading to the Paris Rulebook at Katowice, developed countries, such as the U.S. and the Umbrella group have demanded that the differentiation be diluted further and in many cases parity be set between emerging economies and

¹⁶⁰ *NDC of Pakistan*, *supra* note 91, at 5; *NDC of India*, *supra* note 89, at 4-5; *State of Qatar's Intended Nationally Determined Contributions*, UNFCCC 1, 2 (Nov. 2015), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “Qatar First NDC (Archived)” English language hyperlink).

¹⁶¹ *NDC of Bangladesh*, *supra* note 129, at 9.

¹⁶² *NDC of Nepal*, *supra* note 91, at 1; *Kingdom of Bhutan Intended Nationally Determined Contributions*, UNFCCC 1, (Sep. 30, 2015) <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “Bhutan First NDC (Archived)” hyperlink).

¹⁶³ *Intended Nationally Determined Contribution (INDC) of the Commonwealth of Dominica*, UNFCCC 1 (Sept. 2015) <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “Dominica First NDC (Archived)” hyperlink); *The Republic of the Marshall Islands Nationally Determined Contribution*, UNFCCC 1, 7 (Nov. 22, 2018), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “Marshall Islands Second NDC (Archived)” hyperlink); *Singapore's Intended Nationally Determined Contribution (INDC) And Accompanying Information*, UNFCCC 1 (Sep. 21, 2016), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “Singapore First NDC (Archived)” hyperlink); *NDC of Trinidad and Tobago*, *supra* note 97, at 7.

¹⁶⁴ *Republic of Kiribati Intended Nationally Determined Contribution*, UNFCCC 1, 3, 11 (Sep. 21, 2016), <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> (follow “Kiribati First NDC” hyperlink); *NDC of Tuvalu*, *supra* note 98, at 5.

¹⁶⁵ Paris Agreement, *supra* note 20, arts. 4.6, 9.4, 9.9, 11.1, 13.3.

¹⁶⁶ *Id.*; Christina Voigt, Felipe Ferreira, *Differentiation in the Paris Agreement*, 6 CLIM. L. 58, 62-64 (2016).

developed nations. They have often claimed that the Paris Agreement does not provide for bifurcation.¹⁶⁷ But this is unethical and not based on sound legal principles as the Paris Agreement clearly incorporates the idea of differentiation between developed and developing countries.¹⁶⁸ The requirement is to flush out the criteria and parameters for such a distinction. In the end, the NDCs Guidance refers back to the exceptions carved out under the Paris Agreement, such as flexibility for LDCs and SIDS under article 4.6 and flexibility for developing countries under article 4.4.¹⁶⁹ No new categories of States with specific exceptions were created in the Rulebook. Instead, language, such as “as appropriate,” “as applicable,” and “in the light of national circumstances,” was inserted to signal the need for flexibility, but without differentiating among State Parties.¹⁷⁰

Economic development is one of the potential ways to categorize States for the purpose of differentiation. However, to look at the entire framework of differentiation from the lens of economic development would seriously undermine the importance of other relevant considerations such as social and cultural adaptation capabilities, and special vulnerability of countries including small island States and LDCs due to a number of factors such as sea-level rise and their peculiar geographical location, etc. Sands and Peel recognize the need for a further level of differentiation in the international climate change regime considering the current socio-economic and political realities of States particularly while differentiating between developed countries and major developing countries including China, India, Brazil and South Africa.¹⁷¹ In other words, the advanced version of the CBDR principle under the climate change regime inevitably requires its further improvement by analyzing the nuances of economics, socio-cultural and legal-political dimensions while focusing on women, youth, and local and marginalized communities particularly vulnerable to the adverse effect of climate change.

In this scenario, differentiation based on multiple parameters can be developed. Parameters can include total emissions, relative emissions, cumulative emissions, emissions per GDP, projected emissions, luxury/survival emissions, total GDP, GDP per capita, human development index (HDI), climate vulnerability, and mitigation potential, etc. Based on

¹⁶⁷ Meena Raman, *Key Challenges at COP 24*, KATOWICE NEWS UPDATES AND CLIMATE BRIEFINGS, THIRD WORLD NETWORK 1, 2 (Dec. 2018), <https://www.twn.my/title2/climate/fullpdf/katowice01.pdf>.

¹⁶⁸ Paris Agreement, *supra* note 20, arts. 3, 4.1, 4.4-5, 4.15, 5.2, 6.6, 7.2-3, 7.6-7, 7.13-14, 9.1, 9.3, 9.5-9, 10.5-6, 11.1-4, 13.2-3, 13.9-15.

¹⁶⁹ Decision 4/CMA.1, *supra* note 105, ¶ 4, annex I, ¶¶ 1(c) and 6, annex II, ¶ 1(b).

¹⁷⁰ Rajamani & Bodansky, *supra* note 114, at 1030, 1034.

¹⁷¹ Sands & Peel et al., *supra* note 4, at 247-8.

these indexes and parameters, countries can be divided into types I, II and III, thus reflecting the true essence of CBDR-RC. Countries could be categorized as developed, developing and least developed according to their HDI ranking and vulnerability status. This could be re-evaluated and revised every 10 years or at a time decided by the State Parties. The above classification of countries into type I, II, and III categories would provide the much-needed clarification to the developed and developing categories of countries and their varied obligations as provided under the Paris Agreement. It would also help adjudicate the adequacy and ambitious nature of NDCs. This classification system would help streamline the scope and subject matters of NDCs discussed in the next section. It would also ease the task of evaluation by pertinent technical and scientific bodies (such as Subsidiary Body for Scientific and Technological Advice), manage expectations of the international community, and assist the task of the implementation and compliance branch of the Paris Agreement to examine, evaluate, and follow-up on the collective progress under global stocktake. Finally, categorizing countries on identifiable, objective criteria is essential as placing countries individually would defeat the purpose of equity, which is the cornerstone of the climate change legal framework.

E. Promoting Equity through Expanding the Scope of NDCs

Though the Paris Agreement requires countries to submit their NDCs, what constitutes the content of the NDCs has been a matter of contention. Developing nations insist on the principle of equity¹⁷² and CBDR-RC along with emphasis on the full scope of NDCs, including mitigation, adaptation, and means of implementation. Developed countries, however, view NDCs as being mitigation-oriented only.¹⁷³ The Rulebook provides that as far as the contents and the information to be provided for the NDCs are concerned, the information is without prejudice to the inclusion of components other than mitigation.¹⁷⁴ This is viewed by developing countries as a major win on the scope of NDCs, which not only relates to mitigation contributions but may include an adaptation component, along

¹⁷² *Summary of the Lima Climate Change Conference: 1–14 December 2014*, 12 EARTH NEGOT. BULL. 1, 28, 29 (2014).

¹⁷³ See Pieter Pauw et al., *Subtle Differentiation of Countries' Responsibilities Under the Paris Agreement*, 5 (86) PALGRAVE COMMUN. 1, 5-6 (2019); W. Pieter Pauw et al., *Beyond Headline Mitigation Numbers: We Need More Transparent and Comparable NDCs to Achieve the Paris Agreement on Climate Change*, 147 CLIMACTIC CHANGE 23, 26–27 (2018); EARTH NEGOT. BULL., *supra* note 172, at 27-28; *Summary of the Katowice Climate Change Conference: 2–15 December 2018*, 12 EARTH NEGOT. BULL. 1, 13 (2018).

¹⁷⁴ Decision 4/CMA.1, *supra* note 105, ¶ 8; Rajamani & Bodansky, *supra* note 114, at 1029-31.

with the necessary means of implementation.¹⁷⁵ This needs to be made mandatory for consistency and certainty, otherwise, it may have the effect of overlooking the holistic response needed to address multidimensional aspects of climate change and diminishing the importance attached to adaptation and other aspects of climate change. It is also necessary to measure the progress of countries under the global stock-take process. It is interesting to note that the Paris Agreement provides an opportunity for States where they are allowed to submit their adaptation-related information as part of their NDCs: States are free to submit their adaptation communication as a component of or in conjunction with their national adaptation plan or NDC or national communication.¹⁷⁶ This provision can be a valid justification for most of the countries that have made their domestic adaptation plans part of their NDCs. More than that, this provision can also form a valid entry point for developed nations providing information related to adaptation actions taken domestically and support provided internationally, thus promoting equity and fairness through the implementation of their NDCs.

Furthermore, the language of article 3 of the Agreement also emphasizes the fact that States' NDCs are not limited to the issue of mitigation only but cover other issues related to adaptation, finance, technology, and transparency framework. Article 3 says that: "As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in articles 4, 7, 9, 10, 11 and 13." This article implies two meanings. First, "nationally determined contributions" (i.e., NDCs) are meant to be applied against the "global response [which is not limited to only mitigation response] to climate change."¹⁷⁷ Because of the wider scope of the term "global response to climate change," the concept of NDC can be construed in such manner so as to include in its content the issues of adaptation and means of implementation. Second, as a result of this, States are required under their NDCs to "undertake and communicate ambitious efforts" regarding adaptation and international support. In sum, article 3 is a valid legal justification for the countries and a requirement to include in their NDCs the efforts which they have taken regarding adaptation and

¹⁷⁵ Rajamani & Bodansky, *supra* note 114, at 1037-38.

¹⁷⁶ Paris Agreement, *supra* note 20, art. 7.11.

¹⁷⁷ The term "global response" to climate change is an inclusive term which includes the issues of mitigation, adaptation, human rights, vulnerability, gender, sustainable development, and means of implementation including financial assistance, technology transfer and investment in capacity building areas which result in maximization of co-benefit approach. Example of this has already been given under the various provisions (preamble as well as the operative part) of the Paris Agreement. *See id.* pmb., arts. 2.1, 3, 4.1, 7.1, 7.2, 9.3, and 10.5.

support pursuant to their obligations under the relevant provisions of the Agreement.

It is also important to point out that expanding the scope of NDCs would not require major overhauling of the Paris Agreement, but is in consonance with the spirit and objective of the Paris Agreement as the Agreement makes explicit references to human rights, sustainable development, and contents of SDGs. The implementation of these goals would require providing for information and taking into consideration economic and social development, gender issues, indigenous and local communities, and international cooperation, among other things. This aspect can only be taken care of when we expand the scope of NDCs beyond mitigation to cover adaptation, loss-and-damage, and international support, etc.¹⁷⁸ This point would also be in consonance with the fact that climate change is not only an environmental challenge, but also one of the biggest developmental threats in terms of varied economic consequences of climate change,¹⁷⁹ and thus requires a holistic response.¹⁸⁰

In addition to mitigation, the expansion of NDCs' contents to include other aspects is ingrained in the equity and the north-south difference. Developing nations who have not contributed historically to climate change are the biggest victims of climate change and therefore, they need to adapt to climate change immediately. Therefore, adaptation has emerged for developing nations as a major concern required to be addressed at all levels, from the local to national to regional. Effective adaptation would require a comprehensive strategy taking into account economic and social considerations. This would also be in consonance with, and can be used to enhance, the Paris Agreement's adaptation goal of "establishing the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development."¹⁸¹

¹⁷⁸ Sébastien Duyck et al., *Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach*, 12(3) CARBON & CLIM. L. REV. 191-202 (2018).

¹⁷⁹ Richard S. J Tol, *The Economic Impacts of Climate Change*, 12(1) REV. OF ENV'T. ECON. & POL'Y 4, 8-12 (2018); *see also* OECD, *THE ECONOMIC CONSEQUENCES OF CLIMATE CHANGE* 11-13 (OECD Pub., 2015) (providing a detailed global quantitative assessment of the direct and indirect economic consequences of climate change in a selected economic sectors).

¹⁸⁰ Graeme Taylor, *A Realistic (Holistic) Approach to Climate Mitigation*, 8(3) WORLD FUTURES REV. 141, 141-161 (2016); *see also* Jolly & Trivedi, *supra* note 30 (discussing the role of Hybrid law as a holistic response to solve the problems of climate-induced displacement).

¹⁸¹ *See* Paris Agreement, *supra* note 20, art. 7.1.

Further expanding the scope of NDCs to adaptation with a provision for financial assistance, technology transfer and other areas would require considerable attention to economic and social development components and would ultimately help the wider interpretation of CBDR-RC to non-environmental contexts. When the CBDR principle is applied to the environmental context and environmental-related global goals (such as climate change mitigation), the underlying idea for differentiation lies in the heart of historic responsibility; in case of non-environmental related global goals (such as social and economic development), the core idea for differentiation thrives at the center of different national “capacities and priorities” which each State carries. The application of the CBDR principle to non-environmental related global goals, however, is dependent upon the varying degree of national “capacity” of each State, such capacity, especially in terms of financial accumulation and technology advancement, has been built up (in the case of developed countries) and adversely affected (in the case of developing countries) as a result of historical reasons. In this way, the CBDR principle should be applied even to those cases where historical responsibility has not been mentioned as one of the reasons for differentiation (especially in matters of economic and social development) since the different degrees of each State’s capacity is [may necessarily be] an inevitable result of those historical actions.

The differentiation in NDCs could be further extended to the case of compliance mechanisms whereby countries could be asked to provide information about implementation status.¹⁸² Article 15 of the Paris Agreement envisages the establishment of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.¹⁸³ The committee shall pay particular attention to the respective national capabilities and circumstances of Parties. Modalities and procedures developed for the Compliance Committee specifically state that its work has to “be guided by the provisions of the Paris Agreement, including . . . article 2,” which refers to

¹⁸² Christina Voigt, *The Compliance and Implementation Mechanism of the Paris Agreement*, 25(2) REV. OF EUR., COMMUNITY & INT’L ENV’T. L. 161, 166-68 (2016).

¹⁸³ Paris Agreement, *supra* note 20, art. 15; *see generally*, Sebastian Oberthur & Eliza Northrop, *The Mechanism to Facilitate Implementation and Promote Compliance with the Paris Agreement 1-24* (Project for Advancing Climate Action Transparency Working Paper 2018), <https://www.wri.org/publication/pact-compliance-mechanism>; Lavanya Rajamani, *Elaborating the Paris Agreement: Implementation and Compliance*, 2017 CTR. FOR CLIM. AND ENERGY SOLUTIONS; Achala Abeysinghe & Subhi Barakat, *The Paris Agreement: Options for an Effective Compliance and Implementation Mechanism*, INT’L INST. FOR ENV’T AND DEV.; Alexander Zahar, *A Bottom-Up Compliance Mechanism for the Paris Agreement*, 1 CJEL. 69, 70-71 (2017); Wang Ruibin, *Implementing the Paris Agreement: Achievements and Constraints*, 63 CHINA INT’L STUDIES 83 (2017).

sustainable development and equity as operational principles.¹⁸⁴ In addition, “[t]he Committee shall pay particular attention to the respective national capabilities and circumstances of Parties, recognizing the special circumstances of the [LDCs] and [SIDS], at all stages of the process, in accordance with the provisions of the Paris Agreement, including in determining how to consult with the Party concerned, what assistance can be provided to the Party concerned to support its engagement with the Committee, and what measures are appropriate to facilitate implementation and promote compliance in each situation.”¹⁸⁵ Further it is provided that the financial “assistance should be provided, upon request, to developing country Parties . . . to enable their necessary participation in the relevant meetings of the Committee.”¹⁸⁶ This explicit reference to, and treatment of, differentiation provides a scope for bringing differentiation to compliance mechanisms and also points to the need to identify and resolve the categorization of differentiation between “developed” and “developing” countries. Based on the above analysis, it is suggested that developed countries are expected to integrate into their NDCs obligations of providing transparent and consistent information on support, and to expand the scope of their NDCs incorporating adaptation plans and providing information and explanation on how their NDCs are fair and ambitious in the context of sustainable development. This paper has argued for the division of NDCs by building on the differentiation provided under the Paris Agreement. This would provide nuanced categorization and offer clarity on who is to provide support and who should be the beneficiaries. Such clarity at normative level becomes important where article 4.5 of the Agreement is silent on it. For UNFCCC Parties to practically avail the benefits of equity and provisions of the Paris Agreement on support, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) needs to adopt a decision providing more clarity about the categorization of countries into different categories based on the indicators broadly highlighted above. The basis for such categorization and differentiation is already provided for under several provisions of the Agreement. The problem would nevertheless be regarding how to further develop those indicators to be adaptive to the national circumstances of each country.

CONCLUSION

The adoption of SDGs, with their complementary nature and integrated relationship of environment and development, contributes to achieving the

¹⁸⁴ UNFCCC Katowice Decisions, *supra* note 145, dec. 20/CMA.1 annex I, ¶ 3.

¹⁸⁵ *Id.*, annex, ¶ 19(c).

¹⁸⁶ *Id.*, annex, ¶ 27.

climate goals of adaptation and mitigation. The climate change regime, on the other hand, provides a legal basis and normative tools for States' efforts towards realizing the fruits of sustainability. In this complementary process, equity plays an important role as a driving force to implementing States' NDCs in light of their national circumstances. Equity under the climate change regime is channeled through the application of the principle of CBDR-RC, which is a living principle and still evolving.¹⁸⁷ States' submission of NDCs suggest that the NDCs can provide opportunity for achieving not only the Paris Agreement temperature goal of 2 degrees Celsius, but overall long-term goals of building a resilient society with the idea of "leaving no one behind" focusing on youth, women, and vulnerable sections of society. Thus, the evolutionary principle of CBDR-RC, needs to be reframed and widely interpreted in the overall context of sustainable development. While the adoption of SDGs with the idea of "leaving no one behind" provides a solid foundation with political legitimacy, the incorporation of CBDR in the SDG outcome document opens up the possibility of incorporating and applying CBDR to all dimensions of sustainable development. The wider interpretation of the CBDR-RC principle, therefore, must be extended and applied in the implementation of NDCs. This would also be in consonance with many NDCs revealing the significance attached to sustainable development and SDGs.

The Paris Agreement encompasses several legal provisions, and thus provides a way for this wider interpretation to become applicable to all aspects of sustainable development and efforts to eradicate poverty. Following the Paris Agreement, equity could be promoted under the climate change regime through implementation of NDCs, while expanding the scope of NDCs explicitly covering mitigation and adaptation targets with detailed information. Equity could also be promoted through fairness requirements of NDCs. This aspect of equity would, however, face legal challenges in defining the parameters of fairness. Further, there is an urgent need for classification of countries into different categories based on multiple factors including climate vulnerability, gender considerations, and differing levels of economic and human development and corresponding capacity of States. This explicit reference and treatment for differentiation provides the scope for bringing differentiations to compliance mechanisms and also points to the need to identify and resolve the categorization of differentiation between "developed" and "developing" countries and their varied obligations as provided under the Paris Agreement. Differentiation will help to adjudicate the adequacy and ambitious nature of the NDCs.

¹⁸⁷ See Daniel Bodansky & Lavanya Rajamani, *The Issues that Never Die*, 12(3) CARBON & CLIM. L. REV. 184, 188-190 (2018).

Conditional NDCs if provided international support could further enhance equity at the next level. However, it is important to balance the equity considerations with those of efficacy requirements: too much emphasis on conditional NDCs could affect the efficiency of NDC implementation. Thus, conditional NDCs remain both an opportunity and a potential vulnerability for ambition and equity. To this end, to promote equity and justify fairness through the transparency framework provided under the Paris Agreement, developed countries are, nevertheless, expected to come out with NDCs incorporating detailed quantified information regarding international support provided to developing countries, LDCs, and SIDS. They are also expected to provide detailed explanations of how their NDCs are “fair and ambitious,” and to ensure that their NDCs will be implemented in the context of sustainable development. The lack of information regarding international support in the NDCs of developed countries may raise the question of how successive NDCs of developing countries with higher ambitions will be financed. In this regard, developing countries are also expected to come out with detailed NDCs, adding substance to their international support needs with information regarding calculated and credible cost estimates. Thus, developing and developed countries are expected to provide all this information regarding international support received and delivered, respectively, in terms of providing financial assistance and technology transfer and investing in capacity-building measures of developing countries. Because climate change negotiations and issues of equity are an ongoing process, CMA should start giving deference to new equity considerations and adopt guidance on how NDCs can be implemented with focus on a holistic interpretation of, and an integrated approach to, the principle of CBDR-RC.