

The Principle of Common but Differentiated Responsibility

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Abstract:

In the area of international environmental agreements, the field of climate change provides the best illustration of the application of the principle of common but differentiated responsibilities. However, it also reveals the difficulties raised by its application. Justice, equity and common but differentiated responsibilities can be claimed by all Parties, sometimes with diametrically-opposed goals. The aim of this article is to analyze the origins and evolution of common but differentiated responsibilities in global climate change regime. Part one retraces the Definition of the concept of common but differentiated responsibilities and its legal nature. Part two addresses Operationalization of the CBDR in climate change agreements.

Keywords Climate change, Differential treatment, Common but differentiated responsibilities (CBDRs).

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INTRODUCTION

Equity has been one of the central concerns in international environmental law over the past couple of decades. Debates have largely focused on the North–South dimension of a number of international environmental problems and on the need to adopt legal frameworks that foster substantive equality between developed and developing countries. In particular, attention has been given to the different contributions that states have made to the degradation of the environment and the different capacities that they have to address environmental degradation. In the case of global warming, for instance, one of the quintessential global environmental problems, there is a relatively clear link between the contribution to the build-up of greenhouse gases in the atmosphere and the capacity to introduce environmentally friendly technologies.

Many multilateral environmental agreements have adopted differentiated rules for different countries, based on the recognition of the ‘common but differentiated responsibilities’ (CBDRs) of states. By establishing two rigid groups of countries with and without emissions reduction obligations, the intergovernmental climate regime represents the most extreme case of such differentiation. The regime has struggled to overcome this rigidity and the resulting political deadlock between developing and developed countries.

Research Questions

How to incorporate justice and fairness on the one hand and effectiveness on the other into the obligations in global climate change regime? The principle of CBDR seeks to provide an answer to this dilemma. Global environmental problems require strong action from all members of the international community and, subsequently, the much needed multilateral treaty arrangements become increasingly demanding for all states. Under these circumstances, broad participation in the international regulatory arrangements is needed but, at the same time, claims for fairness considerations and differentiation in country commitments are increasingly being presented.

Considering the recent legal developments in the climate change regime, the purpose of this paper is to explore the principle of CBDR and thereby analyses its role in the climate change regime.

To fulfil the purpose, this paper intends to answer the following set of research questions: What does the principle of CBDR entail in global climate change regime?

How is the principle reflected in current agreements, in their design of burden-sharing? And what problems and challenges does the practical application of the CBDR principle present to the international community?

1. Common but Differentiated Responsibilities: Definition and juridical nature

Since the differences between developing and developed countries in the negotiations of Principle 7 of the Rio Declaration were resolved, more or less, to the satisfaction of the latter, they were therefore not an obstacle to the dissemination of the idea of equity in environmental agreements. Differential treatment, or the technique of modulation of obligations, has indeed been widely accepted in multilateral environmental agreements. However, the choice of the expression “common but differentiated responsibilities” invites us to look beyond the simple conventional technique, on the one hand, because the word “responsibility” gives rise to a certain number of binding associations and, therefore, on the other hand, because the expression as a whole could refer to a concept the legal nature of which deserves to be examined.

1.1 Definition of the Principle of Common but Differentiated Responsibilities

The principle of ‘common but differentiated responsibility’ evolved from the notion of the ‘common heritage of mankind’ and is a manifestation of general principles of equity in international law. The principle recognizes historical differences in the contributions of developed and developing States to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems. Principle 7 of the Rio Declaration states the principle thus:

- States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Similar language exists in the 1992 Climate Change Convention, which provides that the parties should act to protect the climate system ‘on the basis of equity and in

accordance with their common but differentiated responsibilities and respective capabilities’.

When talking about CBDR, one quite rarely actually pays attention to the word ‘responsibility’¹. Responsibility is a term that is often very freely used in a great variety of contexts without further thought with regard to its more precise meaning(s) and multiple dimensions. Basically, responsibility can be backward- or forward-looking: historical responsibility refers to conduct and events in the past whereas prospective responsibility looks to the future, emphasizing prevention of conflicts and facilitation of cooperation . These two main dimensions of responsibility are very much interlinked. Historic responsibility is a means to the various ends the law seeks to further by creating and imposing prospective responsibilities. The view conforms with the old truth according to which prevention is better than cure. This is however, a somewhat problematic approach to CBDR in international environmental treaties. The focus there has so far been quite backward-looking in the sense that countries with high historical emissions have been subjected to the strictest commitments (this, of course, also coincides with these countries’ higher capacity to take action). On the other hand, however, prospective responsibility has been realized as well by laying down legal obligations in the first place, and by usually prescribing commitments also to historically less-guilty parties, though the obligations may be, at least initially, smaller in scope and/or scale.

The principle of common but differentiated responsibility includes two elements. The first concerns the **common responsibility** of states for the protection of the environment, or parts of it, at the national, regional and global levels. The second concerns the need to take account of **differing circumstances**, particularly in relation to each state’s *contribution* to the creation of a particular environmental problem and its *ability* to prevent, reduce and control the threat. In practical terms, the application of the principle of commonbut differentiated responsibility has at least two

¹ State responsibility requires an internationally wrongful act, that is, the breach by an act (or omission) attributable to a State of an international obligation imposed on it. The use of the term "responsibilities" in Principle 7 is not made in reference to State responsibility. Rather, the liability provided for in Principle 7 is understood in the moral sense of the term and constitutes a type of sui generis liability specific to international environmental law. The mere recognition by developed countries of a "future responsibility" corresponding to the commitment to play the role of leader in the dual fight against environmental degradation and poverty also confirms that it cannot be avoided. act as a moral responsibility. First, legal liability can only be established after the breach of an obligation. In this sense, a "future responsibility" is unknown to the law, although it is conceived without too many moral problems. Then, by accepting their only "future responsibility", the developed countries refused to consent to any legal scope of their recognition, whereas they would have been free to undertake to repair - independently of state responsibility - for the damage caused. in the past by their development.

consequences. First, it entitles, or may require, all concerned states to participate in international response measures aimed at addressing environmental problems. Secondly, it leads to environmental standards which impose differing obligations on states.

CBDR has two main forms by which it is realized: allocation of rights and redistribution of resources.

1.2 Common but differentiated responsibilities: legal nature

Although the Rio Declaration was originally a mere declaration of a political nature and devoid of direct legal effects, some of the principles it enunciates have now acquired the status of customary legal principles. Examples include the prevention principle and the polluter pays principle.

So what about Principle 7 of the Rio Declaration? Doctors agree that this is not a customary principle². **Rajamani**, without exhausting this debate, further notes that it would be necessary, before looking at the constitutive elements of a custom, to ensure that the principle has the requisite character.

The technique of modulation of obligations is indeed a widespread practice. However, it is above all a conventional practice which, a priori, must be distinguished from a relevant practice in order to establish a custom. It seems more than doubtful that this technique of modulation of obligations can claim the quality of rule of law. Differential treatment can of course be received by a treaty with regard to certain obligations, or even as a structuring principle of the whole regime, like the climate change regime.

Conversely, Principle 7 could thus form the basis of a legal rule urging States to instill, in particular through recourse to differential treatment, greater equity in international relations in environmental matters.

Edith Brown Weiss suggests qualifying as an “emerging principle”, without specifying its normative scope. **Birnie, Boyle and Redgwell** propose the qualification of “framework principle”. **Kristin Bartenstein** argues that this is a structuring or guiding principle, that is, a principle that plays a central role in the structuring and systematization of the rule of law.

² Patricia Birnie, Alan Boyle et Catherine Redgwell:” *International Law and the Environment*”, 3^e éd, Oxford, Oxford University Press, 2009, p 135

We must ask ourselves whether the place of the debate on the legal nature of common but differentiated responsibilities is deserved. A look at conventional practice confirms that States very often resort to differential treatment in order to restore some degree of inequity, whether the motivation is legal or practical-moral. One of the reasons for the existence of the debate is probably the reflex of environmental legal doctrine to question the legal nature of the principles of the Rio Declaration, certainly because some principles belong to the category of customary norms and perhaps because the term "principle", which precedes each utterance, suggests this qualification. This debate also seems to suit developing countries which, in the absence of legal responsibility from developed States for past and current environmental degradation, seek to gain acceptance at least of the differential treatment technique as a conventional reference in the conception of the respective obligations of States. In fact, both the question of responsibility and the question of legal nature ultimately concern the binding nature of the recognition by developed countries of their ecological debt and the obligations that could result from it.

2. Operationalization of CBDR in Climate Change Agreements

Differentiation has a long and contested history in the climate change regime. One of the premises of the climate regime is that leadership from developed countries, and corollary differential treatment of developing countries, is the equitable and appropriate basis on which the international response to climate change must be structured. Elements of prescription (for developed countries), leadership (of developed countries), and differentiation (in favour of developing countries) are evident in the tone, intent, and design of the UNFCCC and the Kyoto Protocol. The nature and extent of differentiation in the climate regime has, however, continued to be disputed through the years.

2.1. CBDR in the UNFCCC

Formal international legal responses to climate change best date from the UNFCCC, which was introduced at the Rio Earth Summit in 1992. This Convention has been ratified by 195 countries, and it came into force on 21 March 1994. The Convention's 'ultimate objective' 'is to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous

anthropogenic interference with the climate system.’³ The UNFCCC has two central frameworks for addressing climate change. First, it frames climate change as an environmental pollution problem. Second, it links climate change to sustainable development, acknowledging that developing nations still need to deal with social and economic issues such as poverty.

2.1.1 Identifying CBDR in UNFCCC

CBDR is one of the UNFCCC’s central principles. The concept of **CBDR** is set out in Article 3.1 of the Convention. Which States that Parties “should protect the climate system for the benefit of present and future generations. On the basis of equity and in accordance with their common but differentiated responsibilities’ and calls on developed countries parties to ‘accordingly, take the lead in combating climate change and the adverse effects thereof’.

It is important to clarify that Article 3.1 does not refer to historic contributions to climate change as originally proposed by some developing countries but presents a more balanced approach emphasizing Parties’ responsibilities as well as their present-day capabilities. The historically larger contribution of developed countries to climate change and their higher per capita emissions are.

The most noticeable attribute of this manifestation is that it adds the mention of ‘respective capabilities’ to the concept of CBDR. In contrast to what was previously suggested when discussing the Polluter Payer Principle, this was an attempt by developed countries to evade themselves of responsibility for historical emissions and instead let the onus be associated with the positive factor of ‘capabilities’. The preamble also specifically acknowledges that: Climate change's global nature necessitates broad international cooperation, with all nations contributing to an effective response based on their common but differentiated responsibilities, capacities, and socio-economic contexts.

The reference to "social and economic conditions" underscores a close link to the sustainable development framework. This connection is further illustrated by acknowledging that per capita emissions in developing countries remain low, while their share of global emissions is expected to rise to fulfill their social and developmental needs..⁴ This suggests an implicit recognition of the need to permit developing countries a certain level of emissions to support their economic and social development.

³ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

⁴ UNFCCC preamble at 1.

2.1.2 Differentiated Obligations

Article 4 of the UNFCCC differentiates obligations between all parties and those specific to "developed country Parties and other Annex I Parties," illustrating concrete differentiation. While all parties must develop national emissions inventories, implement mitigation programs, and support adaptation measures, obligations vary based on classification.⁵ However, Annex I parties are uniquely obligated to adopt policies and measures to mitigate climate change by limiting GHG emissions. This places the primary burden of mitigation on these countries, although the targets are non-binding and the timelines are ambiguous.⁶

The universal commitments in Article 4.1 of the UNFCCC are contextual, requiring parties to fulfill them while considering "common but differentiated responsibilities" and specific national or regional development priorities, allowing for significant flexibility. Additionally, the needs of developing countries with vulnerable economies, particularly those reliant on fossil fuels, are given special consideration in implementing these commitments.⁷ It is certainly tempting to dismiss such deliberate ambiguity as anything *but* constructive differentiation, considering the objective of the UNFCCC. Furthermore, the UNFCCC grants 'a certain degree of flexibility' to Annex I-parties that are transitioning into a market economy, i.e. CEITs.⁸ This flexibility, however, did not fully operationalize until the Kyoto Protocol came into play.

Differential treatment is not only applied to mitigation commitments. Differentiation and, thus, CBDRs are also enshrined in the financial, technical, and capacity-building support provisions of the UNFCCC⁹, in the provisions about supporting adaptation in developing countries. The introduction of measures to facilitate the uptake of the Clean Development Mechanism (CDM) in least developed countries (LDCs), and later also in countries with fewer than ten registered projects, seeks to improve geographical balance and thus to address the equity concerns of those countries that have benefited less from this market mechanism.

As a result, the UNFCCC imposes primary obligations for reducing greenhouse gas emissions on industrialized countries (the so-called Annex I countries) to their 1990 levels by the year 2000, with financial responsibility falling on an overlapping list of Annex II developed nations.¹⁰ . Beyond this, the interpretation of the CBDR by the convention is vague,

2.2. CBDR in the Kyoto Protocol

⁵ UNFCCC article 4.1(a)-(b).

⁶ There is no compulsory obligation to return to specific previous levels of emissions within a specific time frame, only an *aim* to return to 1990-levels. Philippe Sands and Jacqueline Peel: "**Principles of International Environmental Law**", 4th ed, Cambridge University Press, 2012, p. 280.

⁷ UNFCCC article 4.10.

⁸ UNFCCC article 4.6

⁹ UNFCCC article 11.

¹⁰ UNFCCC art 4(2).

The first Conference of the Parties (COP) in 1995 adopted the Berlin Mandate, emphasizing that the process of creating a protocol should align with Article 3.1 of the UNFCCC on common but differentiated responsibilities (CBDR). In December 1997, approximately 160 countries negotiated the Kyoto Protocol, which became the Convention's main instrument for addressing global warming and climate change when it entered into force in 2005.

The Kyoto Protocol established a broad CBDR framework by imposing greenhouse gas reduction commitments exclusively on developed (Annex I) nations. In 2012, the Bali Action Plan reaffirmed the principle that efforts by parties should be based on equity and their common but differentiated responsibilities and respective capabilities.¹¹

2.2.1 Differentiated Obligations

The Kyoto Protocol negotiations, guided by the Berlin Mandate, heavily relied on the principle of CBDR, which became central to the treaty's spirit. Article 3 of the UNFCCC was explicitly referenced in the Protocol's preamble. The most evident expression of CBDR is the Protocol's structure, which imposes emission caps on Annex I countries while exempting developing nations from binding targets..¹²

In the Kyoto Protocol, only Annex I countries (developed nations and those with economies in transition) have quantified emissions reduction obligations. Developing countries are not subject to any new commitments under the Protocol.

The Kyoto Protocol does not significantly expand on the interpretation of the CBDR principle from the Convention. However, Article 10 of the Protocol asserts that "all Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances, shall act without introducing new commitments for Parties not included in Annex I."

2.2.2 Differentiated responsibilities: targets vary from country to country

Article 3(1) of the Framework Convention emphasizes that parties should protect the climate system based on equity and their common but differentiated responsibilities and respective capabilities. The Kyoto Protocol reflects this principle by setting an overall target to reduce greenhouse gas emissions to 5% below 1990 levels by 2012. While this target would demonstrate differentiated responsibilities if applied to all parties, the protocol goes further by establishing specific emissions targets for individual countries. These targets range from an 8% reduction for some nations to an 8% increase for others. For emerging economies like Ukraine and Russia, targets are based on 1995 emission levels. Notably, there are no emissions targets for developing countries.

The concept of differentiated responsibilities in international environmental agreements contradicts the notion that all parties involved in a shared activity should

¹¹ Conference of the Parties, United Nations Framework Convention on Climate Change, 'Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012: Addendum: Part Two: Action taken by the Conference of the Parties at its eighteenth session' (28 February 2013).

¹² Tuula Honkonen, "The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects", Kluwer Law International, 2009, p. 126. The countries included in Annex I to the UNFCCC are also listed in Annex B to the Kyoto Protocol.

follow the same rules. However, in the domestic context, differentiated responsibilities are more justifiable due to varying individual or group capacities and needs..

Differentiated responsibilities, shown through emission reduction targets and the exemption of developing countries, suggest that environmental responsibilities are not shared equally among all nations. Critics of the Kyoto Protocol argue that the exemption granted to developing countries is a key reason it should not be ratified..¹³

Despite the UNFCCC and its Kyoto Protocol extending the CBDR principle beyond the Annex I/non-Annex I distinction, and increasing recognition of shifting global emissions and capacities, the climate change regime has struggled to move past this binary division. It has faced a political impasse between developing countries, which sought leadership from industrialized nations, and the latter, which demanded meaningful participation from the former. This annex-based differentiation began to erode in 2009 with the non-binding Copenhagen Accord, which called for mitigation actions by non-Annex I countries. This idea was further advanced in the 2010 Cancun Agreements. In 2011, in Durban, negotiations were initiated for a post-2020 agreement, aimed at creating a protocol or legal instrument with binding force under the Convention, applicable to all parties.

2.3.CBDR in the Paris Agreement

On December 12, 2015, 195 countries unanimously adopted the Paris Agreement, an event celebrated worldwide as a historic achievement and a monumental breakthrough. The global community, fully aware of the destructive impacts and increasing risks of unchecked climate change, had struggled for years to create a comprehensive global treaty that would apply fairly to all countries while maintaining global ambition. The Paris Agreement represents the hard-won culmination of these efforts, clearly outlining the path for steady, collaborative progress in addressing climate change.

2.3.1 CBDR in the Paris Agreement

The Paris Agreement includes references to the CBDRRC (Common But Differentiated Responsibilities and Respective Capabilities) principle in its preamble.¹⁴ It also incorporates the CBDRRC principle in provisions related to the purpose of the Agreement,¹⁵ progression,¹⁶ and long- term low GHG emission development strategies.¹⁷ The Paris Agreement references the CBDRRC principle, noting "different national circumstances" and recognizing the specific needs of developing countries in implementing climate measures. The Paris Agreement focuses on "individual

¹³ For example, in 1997, the United States Congress passed the Byrd-Hagel resolution, which stated: "The United States should not be a signatory to any protocol...which would mandate new commitments to limit or reduce GHGs...unless [it] also mandates new specific scheduled commitments to limit or reduce GHGs for developing country parties within the same compliance period..." (S. Res 98. 105th Cong. (1997). In 2001, U.S. President George W. Bush opposed ratification of the Protocol on this basis: "I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance". White House Press Release, 13 March 2001, posted at <<http://www.whitehouse.gov/news/releases/2001/03/20010314.html>>.

¹⁴ Paris Agreement preambular recital 3.

¹⁵ *ibid* art 2.2.

¹⁶ *ibid* art 4.3.

¹⁷ *ibid* art 4.19.

nationally determined contributions" (INDCs), where each party sets its own emissions reduction and climate adaptation goals, which are expected to be in place by 2020, when the Paris Agreement takes effect. In some ways, the Paris Accord has softened the UNFCCC's clear dichotomy regarding CBDR.

2.3.2 Operationalizing CBDR in the Paris Agreement

The Paris Agreement operationalizes the CBDRRC- NC principle not by tailoring commitments to categories of parties, but by tailoring differentiation to the specificities of each of the Durban pillars— mitigation, adaptation, finance, technology, capacity-building, and transparency. In effect, this has resulted in different forms of differentiation in different areas.

(a) Mitigation

The Paris Agreement's mitigation provisions follow a self-differentiation model, allowing parties to define their own contributions based on their national circumstances, capacities, and constraints. This approach, known as "bounded self-differentiation," sets limits through normative expectations for all parties, even though they determine the scope and nature of their commitments.

The mitigation section of the Paris Agreement implements the CBDRRCNC principle through bounded self-differentiation. Self-differentiation is a practical approach for mitigation as it offers flexibility, respects sovereign autonomy, and encourages broader participation. However, while it acknowledges "national circumstances" and "respective capabilities," it allows limited scope for collectively adjusting commitments based on differentiated responsibilities for environmental damage. In this sense, it marks a departure from the UNFCCC and its Kyoto Protocol.

(b) Finance

The finance provisions of the Paris Agreement are among the most traditional in terms of differentiation. Developed countries are obligated to provide financial resources to developing countries, continuing their existing obligations under the Convention. They are also tasked with leading efforts to mobilize climate finance. Additionally, developed countries must report biennially on the provision and mobilization of finance, sharing both quantitative and qualitative data. This information will contribute to the global stocktake of collective progress.

The Paris Agreement expands financial responsibility beyond developed countries, encouraging developing nations to contribute voluntarily with fewer reporting requirements, while recognizing that greater support for them is essential for ambitious climate actions.

(c) Differentiation in compliance

The compliance provisions of the Paris Agreement reflect implicit differentiation, as the compliance committee must consider the national capabilities and circumstances of parties. This creates a form of "differentiation for all," potentially offering special consideration for developing countries, though not explicitly stated. While some parties proposed a compliance committee similar to the Kyoto Protocol, with both facilitative

and enforcement branches, these proposals did not gain support. The structure of the compliance committee will evolve in future negotiations, but due to the nature of differentiation and a focus on conduct rather than results, it is unlikely to resemble the compliance committee of the Kyoto Protocol.

The impact and widespread acceptance of the Paris Agreement is evident in the fact that it entered into force less than a year after its adoption. However, the Paris Agreement does not include an enforcement mechanism, nor does it impose penalties for non-compliance by countries, with the simplest example being the withdrawal of the United States in 2017. Additionally, countries have resorted to manipulation by transferring their polluting industries to developing nations that are not bound by commitments.

CONCLUSIONS

This study examined the principle of common but differentiated responsibilities (CBDR) of states, concluding that it is a fundamental principle in international environmental law, reflected in various environmental agreements. The principle of differentiation appeared in the global climate system, starting with the 1992 Framework Convention on Climate Change, which classified countries as developed, developing, or least developed. This differentiation was further emphasized in the 1997 Kyoto Protocol, which imposed obligations on developed countries but not on developing countries. The 2015 Paris Agreement moved away from classification-based disparity and introduced a subjective approach, where each country is committed based on its national capabilities and circumstances.

Through this study, a conclusion was reached that states have pursued distributive justice in the matter of protecting the environment in general and confronting climate changes in particular by transferring technology, transferring resources and providing financial aid to developing countries. And “developing countries” came in general without setting a specific definition for them, nor setting standards by which to distinguish between the two types.

Following this study, the following recommendation can be formulated:

- The necessity of the participation of all countries in bearing responsibility, but on a fair basis, as the developed countries and the first responsible historically for the deterioration of the environment bear the largest share of this responsibility without excluding developing countries from them, especially since some countries, such as India and China, are classified among the first polluting countries in the world, even if they fall under the category Developing countries.
- Establishing precise standards with regard to technology transfer as well as the issue of financing, and not only broad terms such as a call to provide technology and financial aid, but rather elaborating texts explaining how to do so.

Also, in the field of technology transfer, the technology pioneering countries should cooperate to enact a new international initiative to facilitate cooperation with developing countries in low-cost clean energy technologies, by working together through regional centers for innovation that enable researchers to adopt these technologies in their countries.