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COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN THE CLIMATE CHANGE REGIME

- Historic Evaluation and Future Outlooks

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Abstract

An aspect that has always been present in the climate change regime is the question of equity between developed and developing countries. The principle of common but differentiated responsibilities (CBDR) acknowledges that climate change is a universal problem that all countries have an obligation to address, but also that the individual capabilities of each country should guide the extent of such efforts and thus simultaneously address inequalities. Since the beginning of the climate change negotiations, the notion of CBDR has been imperative to how the regime operates. Therefore, researching how the concept of CBDR relates to the Paris Agreement, which recently came into force, is essential to understanding the dynamics of the regime and what could be done to foster further improvements.

This thesis explores the CBDR-principle throughout the history of climate change regulation, with the purpose of analysing the current and future role of CBDR in this regime. The study mainly adopts a legal dogmatic method with comparative elements to approach this task. However, due to the closely intersecting nature of law and politics in international law, a basic theoretical paradigm of legal realism constitutes the premises of the analysis.

The study finds that while climate change regulation has changed its approach from a top-down structure into a bottom-up structure, the function of the CBDR-principle has correspondingly transformed towards a more contextualized operationalization. Rather than promoting concrete differentiation in emission reduction commitments between developed and developing countries, the operationalization of CBDR is now more procedurally weighted. In fact, CBDR has probably been the key driver in this system change. This paper argues, along the lines of other authors, that the climate change regime under the Paris Agreement applies a system of self-differentiation. Such contextualized self-differentiation may have an empowering effect on state behaviour and hopefully facilitates the involvement of more non-state actors in the regulatory scheme and lead to more ambitious efforts to combat anthropogenic climate change. Arguably, the new paradigm of CBDR resolves the tension between national sovereignty and the need for states to accept binding commitments, and promotes a ‘race to the top’.

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Abbreviations

AAU	Assigned Amount Unit
AOSIS	Alliance of Small Island States
BASIC	Brazil, South Africa, India and China
CBDR	Common but Differentiated Responsibilities
CDM	Clean Development Mechanism
CEIT	Country with Economy in Transition
CER	Certified Emission Reduction
COP	Conference of the Parties
ERU	Emission Reduction Unit
GHG	Greenhouse Gas
ICJ	International Court of Justice
INC	Intergovernmental Negotiating Committee
IPCC	Intergovernmental Panel on Climate Change
LDC	Least Developed Country
MEA	Multilateral Environmental Agreement
NDC	Nationally Determined Contribution
NIEO	New International Economic Order
OECD	The Organization for Economic Co-operation and Development
SIDS	Small Island Developing States
PPP	Polluter Pays Principle
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
WMO	World Meteorological Organization

1. Introduction

1.1. Background

There is no longer much debate about whether anthropogenic climate change is occurring. The world's scientific community is more or less unanimous on the matter.[1] Due to increasing concentrations of greenhouse gases (GHGs) in the atmosphere, the oceans and atmosphere are getting warmer by the day, which in turn leads to melting ice caps and rising sea levels. Whole nations risk disappearing into the sea and extreme weather patterns such as heat-waves, cyclones, floods, droughts and wildfires are increasingly commonplace.[2]

To address this problem, the world community has sought to reduce GHG emissions through various regulatory instruments. This framework of regulation, which is commonly referred to as the 'climate change regime', is thus the basis for universal action. And it is true that climate change unarguably is an issue that concerns every nation on the planet. Hence, this governance falls within the realm of international law, which in turn is characterized by its interplay with national sovereignty.[3] Closely connected to the principle of full sovereignty is the accompanying principle of legal equality among states.[4] However, these premises for interstate regulation are to be balanced against the need for states to surrender to commitments in order to remedy global warming. Whereas the wealthier countries of the world have had a bigger role in causing climate change, some of the poorest countries are expected to suffer the worst consequences. As such, it seems only fair that this economic inequality be accounted for and treaty obligations be more cumbersome for the more well-off nations.

[1] John Cook and others, 'Consensus on consensus: a synthesis of consensus estimates on human-caused global warming' [2016] vol 11 (048002) Environmental Research Letters <http://dx.doi.org/10.1088/1748-9326/11/4/048002> accessed 14 May 2017 at 6.

[2] IPCC, 'Climate Change 2014: Synthesis Report: Summary for Policymakers. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' [2014] [Core Writing Team, RK Pachauri and LA Meyer (eds)] IPCC Geneva Switzerland 151 pp at 4 and 7-8.

[3] Ove Bring, Said Mahmoudi and Pål Wrange, *Sverige och folkrätten* (5th edn, Norstedts Juridik 2014) at 22.

[4] Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate 2003) at 1.

A response to this inequity is the principle of common but differentiated responsibilities (CBDR).[5] Simply put, the principal idea of CBDR is to call attention to every nation's stake in addressing this problem and while doing so, also distinguishing between each country's respective capabilities. The principle can be said to tilt the scales in favour of poorer nations by differentiating between commitments when allocating the action that needs be taken.

The concept of climate justice is perhaps not so difficult to comprehend, and legal doctrine has discussed the purpose, structure, importance and legal character of CBDR over several decades. The issue of climate change, however, is ongoing, and every country's ability to act is continually changing. Hence, the principle has constantly evolved and we have yet to see the full function of the Paris Agreement which recently came into force. The question of whether differentiation among countries in global efforts to combat climate change really is desirable needs constant revision, especially when a new multilateral environmental agreement (MEA) like the Paris Agreement has changed the legal landscape.

1.2. Purpose and Research Questions

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

To fulfil the purpose, this paper intends to answer the following set of research questions:

- *How has the CBDR-principle emerged in the international climate change regime and what was its original purpose?*
- *How is the principle of CBDR operationalized in regulatory climate change instruments and how has it affected the climate change negotiation process in general?*
- *Why, if at all, is the principle of CBDR needed and what role does it have in the current and future climate change regime?*

[5] Jutta Brunnée, 'Climate change, global environmental justice and international environmental law' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009) at 316-17.

1.3. Delimitations and Terminology

This paper is focusing on the CBDR-principle exclusively within the climate change regime. Differential treatment has been present in international law for almost a century.[6] CBDR within climate law could be regarded as just one (albeit rather substantial) part of differential treatment in environmental law. For example, other areas where the notion of CBDR is prevalent includes the law of the sea and the ozone layer regime.[7] Even though some aspects of differential treatment in these other areas can serve as interesting objects of comparison, they are out of the scope of this paper.

However, 'sustainable development' is a concept that is intrinsically connected to the CBDR-principle and deserves more attention. This essay only briefly touches upon this concept and its connection to the principle, but it is worth noting that this area constitutes a major part of the development of CBDR. The United Nations' (UN) 'Sustainable Development Goals' are regularly referred to in climate talks, but attempting to incorporate their influence on CBDR within the climate change regime would bring a huge additional dimension to this study, such that a comprehensive analysis would be unmanageable within the given limits of this thesis.

Climate change response is usually divided into mitigation, adaptation and finance. Adaptation means taking action that is aimed at increasing the ability of a country to cope with the adverse effects of climate change. These include land-elevation or coastal protection, water efficiency schemes, or developing techniques that make buildings and urban environments more resilient against extreme weather conditions. Mitigation is about trying to prevent these problems by reducing the human impact on the climate. In other words, mitigation primarily means trying to reduce GHG emissions, but it can also involve trying to 'remove' GHGs from the atmosphere through so-called geo-engineering. However, this highly controversial tool against climate

[6] Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' [2004] 98(2) American Journal of International Law 276-301 at 278. Differential treatment is found as far back as in the Versailles Peace Treaty (adopted at 28 June 1919, entered into force 10 January 1920) 13 AJIL Supp. 151 (Treaty of Versailles), where the labor movement recognized the need for demands based on different premises of the parties.

[7] Regulatory instruments that mention CBDR in these areas are the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) and the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September, entered into force 1 January 1989) 1522 UNTS 3 (Montreal Protocol).

change is not yet part of international regulation. Finally, the financial aspect of climate change aims at, quite obviously, how mitigation and adaptation should be financed.

These three fields of climate change are thus constantly present in the attempts made to address the problem internationally. In the context of this paper, however, the focus is primarily on the CBDR principle in relation to mitigation aspects. The reason for this is simply that this is the area where differentiation is most prominent. As it deals with reducing the threat of climate change rather than managing it, mitigation is also the most fundamental aspect of addressing the climate threat. Therefore, CBDR in relation to adaptation measures is not being discussed to a great extent. Funding, however, is an important tool in differential treatment and is therefore a relevant feature to consider, but mainly in relation to mitigation.

Regarding the terminology used in this essay, it should be noted that the terms 'differential treatment' and/or 'differentiation' are not completely synonymous with the term CBDR. Differentiation in treaties can be an effect of how the principle is expressed, but of course, there are many possible reasons for this, not only confined to CBDR. In a sense, differentiation is thus broader than CBDR and has its own inherent meaning. On the other hand, differentiation is also one of the components of CBDR, meaning it could also be considered a narrower concept.[8] Notwithstanding this, the terms will be used interchangeably throughout this essay.

1.4. Method, Material and Theoretical Premises

The basic methodological paradigm in which this essay operates is legal dogmatic, but also comparative elements constitute the basis on which the formulated research questions are being answered. To answer the research questions, a historical exposé of the climate change regime from a perspective of CBDR constitutes the main body of this study. Also, the analysis that runs throughout the paper commits to a certain characterization of the CBDR-principle. However, a further development of what this categorization means is specifically described in a separate section further below.[9] Anyway, exploring the CBDR-principle in the climate change regime does impose some methodological queries concerning the material and sources of law used that need to be addressed.

[8] cf section 2.1. below.

[9] Section 2.2. below.

Naturally, this essay operates within the realm of international law, but from a legal dogmatic perspective, the sources of law wherein CBDR is found could be considered limited. Article 38 of the Statute of the International Court of Justice (ICJ) identifies international treaties, customary law, general principles of law, case law and juridical doctrine.[10] The concept of CBDR is generally manifested in MEAs, which are considered treaties and thus primary sources of international law.[11] Although few scholars have specialized in the topic of differentiation, and the selection of juridical doctrine is somewhat limited, this source is also of great value to this study. However, juridical doctrine is regarded a subsidiary source of law and is thereby serving as a supplementary means of determining the applicable legal function of the CBDR-principle.[12] No case law is relevant to the purpose of this essay, nor do general principles of law have much significance with regards to determining the role of CBDR within the climate change regime. But, it has been widely debated whether the concept of CBDR itself has reached the status of international customary law. For the scope of this paper, however, it is sufficient to note that the consensus seems, for the moment at least, to be that it has not, despite diverging opinions on the matter.[13] Nonetheless, in practice, it is probably of relatively little significance since the principle is *de facto* operating in the legal climate change regime.[14] Still, to what extent and how is certainly part of the scope of this paper. To this end, these two main sources of law should be sufficient from the perspective of a positivistic legal analysis.

It seems relevant to mention that this paper, much due to the nature of the topic, operates somewhat on the margin between law and politics. This is partly a logical consequence of dealing with international law, but perhaps becomes even more clear when evaluating a

[10] The terminology differs and in a rather old fashioned way, article 38.1 of the ICJ Statute refers to 'a. international conventions […]; b. international custom […]; c. the general principles of law recognized by civilized nations; d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[11] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031 (ICJ Statute), article 38.1(a); Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331, article 2.1(a); Daniel Bodansky, 'The Legal Character of the Paris Agreement' [2016] 25(2) Review of European Community and International Environmental Law 142-150 at 144 and 150.

[12] ICJ Statute (n 11) article 38.1(d); Bring, Mahmoudi and Wrange (n 3) at 32.

[13] Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Kluwer Law International 2009) at 301.

[14] ibid at 303.

principle whose legal status remains contested. For this reason, some theoretical premises need consideration.

The problem of anthropogenic climate change is often referred to as a 'tragedy of the commons', where the atmosphere can be seen as a common but limited resource and where each country stands to gain from the usage of it, but generates a communal loss in the process.[15] The dilemma is that every positive component for each actor, i.e. economic growth on behalf of GHG emissions, is afflicted by merely a fraction of the negative aspect, this negative being the actual effects of climate change (floods, droughts, etc.). Hence, by this theory, the most rational behaviour is for each country to continue maximizing its economic profits through GHG emissions, which in turn could bring ruin for everyone.[16]

A principle like CBDR is expressed in treaties that have been negotiated with the specific individual premises and optimally desired outcome of each and every party in mind. A sensible approach is therefore to assume that states will only try to maximize their own interests into the end product of a negotiation. Yet, one could also say that common interests are nothing more than the combined self-interests of the negotiating parties.[17] Such kind of pragmatic realism is the theoretical premise that this work assumes international negotiations are operating in, and thus uses it when analysing the notion of CBDR. Legal realism is based on the theory that the law is more than a logically closed system of written rules ('*law-in-books*'). Rather, the law is what we empirically acknowledge it to be and the relationship between law and politics is thus seen as intersecting.[18] Political arguments and decisions influence the law-making and, as this paper shows, the concept of CBDR is of rather vague and open-ended language, which facilitates an openness to state politics and individual party agendas.[19] Hence, negotiation reports also constitute an important source of information to determine this '*law-in-action*'.

Since the principle of CBDR is operating both within the legal sphere as well as the political sphere, and especially with this intersecting nature of law and politics, the two perspectives are arguably not conflicting, but rather complement each other in exploring the legal concept of CBDR.

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[15] The term is attributed Garrett Hardin, from an article in Science Magazine, 13 December 1968, in which he describes the problem of overpopulation as a 'tragedy of the commons' that will never be solved without regulation. The term has since been adopted by many scholars within environmental law as well as economics.

[16] Garrett Hardin, 'Tragedy of the Commons' [1968] 162(3859) Science Magazine 1243-48 at 1244.

[17] Honkonen (n 13) at 24-25.

[18] Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer-Verlag 2008) at 88.

[19] ibid at 100 in fine.

1.5. Outline

To fully grasp the principle of CBDR and its significance in the wake of the Paris Agreement, this paper will methodically present the principle and its historical background in three different chapters. Each of these will be concluded with a short summary.

Firstly, in Chapter 2, the fundamentals of the CBDR-principle will be given in a brief introduction. Not only will the particular components of CBDR be explained, but also how usual expressions of CBDR has come to be categorized within the legal discourse. Furthermore, some comments on the dichotomy of developed-developing countries will follow, which is central to discussing CBDR.

In Chapter 3, the birth and establishment of CBDR within the climate change regime will give some background on how this concept started to develop. The political landscape that preceded the constitutional phase of the climate change regime will be described initially. Following this, a deep dive into the architecture that constitute the very basis of all climate regulation, the 1992 United Nations Framework Convention on Climate Change (UNFCCC), will be conducted.

Subsequently, in Chapter 4, the study will move on to construe the two different main approaches that have been used to tackle the issue of climate change; so-called 'top-down' regulation and 'bottom-up' regulation. The former was introduced with the adoption of the Kyoto Protocol to the UNFCCC (Kyoto Protocol) in 1997 and the latter mainly emerged from the 2009 Copenhagen Climate Change Conference (Copenhagen Conference) and then became the hallmark model of the recently adopted Paris Agreement. The different sections of the chapter will identify the operationalization of CBDR in each of the regulatory instruments and continuously analyse its role within each model.

Finally, the last chapter (Chapter 5) will summarize this essay by answering each of the research questions that were formulated initially. These three questions will be addressed individually in subsequent sections of the chapter and thereby conclude the paper.

2. A Brief Introduction to CBDR

2.1. The Two Components

The principle of CBDR consists of two elements. The responsibility to confront climate change is *common* for all nations, yet *different* for each actor. First, CBDR delineates that the responsibilities of actors are shared, meaning that everyone is entitled, or even obliged, to engage in climate change response measures. The aspect that responsibilities are 'common' is said to originate from the simple fact that all countries will be, or are already, affected by a changing climate.[20] Moreover, each country will have to recognize that national legislation and policies concerning this issue are not only a matter of domestic jurisdiction. Since effects of climate change are global, consideration will also have to be made to the entire international community when deciding on such issues.[21]

Just like the term indicates, this 'common responsibility' is closely linked to 'a common heritage/concern of mankind', which is a term that has been prevalent in many international regulatory contexts for quite some time. It is also stated first in the preamble of the UNFCCC that 'change in the Earth's climate and its adverse effects are a common concern of humankind'. The 'common' responsibility of CBDR can be regarded as building on that notion, which means that an issue – in this case the environment – forms a collective heritage to which everything else is linked, thus also calling for cooperative action from all mankind to address associated concerns.[22]

Second, the CBDR-principle also states that these common responsibilities are differentiated between states. This can partly be ascribed to the fact that states are varyingly accountable for the anthropogenic changes to the climate, yet also because all states have different possibilities

[20] Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' [2004] 98(2) American Journal of International Law 276-301 at 276.

[21] Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Kluwer Law International 2009) at 1-2. Naturally, this calls the range of CBDR into question seeing as most domestic policies are concerned with climate change issues one way or another (energy, agriculture, transportation etc). Obviously, in practice, national sovereignty usually prevails.

[22] ibid at 68.

and resources to tackle climate change issues.[23] Furthermore, the special needs for environmentally vulnerable countries are also an argument for differentiation.[24] For example, the more vulnerable one country is to a rising sea level, the greater the obligation might be for another country to address this issue, even if this country is not affected to the same extent. Hence, the differentiating dimension of the principle can be said to regard historical differences, while also encompassing current and future disparities.[25] With differentiation, it is the discrepancy in verbalized commitments that is intended, not necessarily how the undertakings affect the parties.[26]

2.2. Categorization of CBDR

To get a more concrete idea of what the principle of CBDR entails, it might be helpful to describe the different manifestations of the principle in terms of different categories. These different types of differentiation mechanisms are then being exemplified throughout the essay. There have been many suggestions on how to categorize expressions of differential treatment in treaties. In this section, some light is shed on such categories that leading authors on this subject propose and how this study relates to these.

Tuula Honkonen suggests two main categories into which differentiation could be divided; concrete or contextual differentiation. By *concrete differentiation*, Honkonen refers to commitments in a treaty that are clearly differentiated between specific parties. For example, within the climate change regime, this could mean that one group of countries are obliged to reduce emissions by X % within a certain timeframe, while another group of countries need to

[23] ibid at 2.

[24] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) article 3.2; Rio Declaration on Environment and Development (adopted 13 June 1992) UN Doc. A/CONF.151/26 (vol. I) (Rio Declaration) principle 6.

[25] cf Jutta Brunnée, 'The Stockholm Declaration and the Structure and Processes of International Environmental Law' in Aldo Chircop and Ted Mcdorman (eds), *The Future of Ocean Regime Building: Essays in Tribute to Douglas M Johnston* (Kluwer Law 2009) at 7 in fine. Brunnée acknowledges this as an 'intertemporal dimension' but argues that it is the concept of sustainable development that factor in future needs for developing countries, while CBDR is more focused on past activities in order to determine current responsibilities.

[26] Stone (n 20) at 277. Seeing as nearly every agreement impacts the specific parties differently, Stone makes a point of distinguishing between material and formal differentiation.

make Y % reductions within that same time or X % within a shorter or longer period of time. The possibilities are endless as to how concrete differentiation could be operationalized, but the essence is that either the obligations themselves are materially differentiated or the countries that need to abide by them are different, or maybe even both.[27] In other words, as Philippe Cullet puts it, treaties can provide specific commitments for some countries that are not applicable to other countries.[28]

Contextual differentiation, on the other hand, is when obligations in a treaty are the same for a certain group of countries but made contingent on individual circumstances. If contextual differentiation was to be generalized, it could be described as differentiation that is conditional to unspecified factors that are individual to every country and relate to the development status of the country.[29]

Lavanya Rajamani proposes three categories in which differential treatment can be identified. First, there are provisions that differentiate with respect to the *central obligations* of a treaty. These are provisions that are essential to the purpose of the treaty and directly relate to achieving its objective. For example, rules that mandate different emission reduction targets are typical central obligations.[30]

Second, differentiation can be identified in rules that facilitate *implementation* of a treaty. States that do not have the capacity to implement specific commitments could have more easy-going standards to which their implementation need to adhere.[31] This could mean, for example, that developing countries can choose different base years to which their emission reductions should relate, have extended time frames with regards to reporting or complying, or be permitted more lenient approaches to non-compliance. Within this category, Rajamani also includes 'context', by which she basically refers to the same notion as Honkonen's contextual differentiation.

Thirdly, Rajamani identifies *assistance* as a category in which differentiation is present. This relates to provisions that facilitates financial assistance or transfer of technology to developing countries, as well as capacity-building efforts. The two former types of assistance are rather

[27] Honkonen (n 21) at 111-12.

[28] Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate 2003) at 28.

[29] Honkonen (n 21) at 111-12.

[30] Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006) at 93-94.

[31] This is also a category that is recognized by Cullet (n 28).

self-explanatory, but capacity-building deserves an explanation; it refers to initiatives that promote sustainable development.[32] There are also other types of assistance included in this category, mostly accommodating the participation of developing countries in negotiations and decision making. Generally, this is done by aiding practical arrangements like travels to and from meetings, but also training to ensure that participation is meaningful and effective.[33]

The two models of Honkonen and Rajamani are ostensibly different, since the former is focusing on what kind of differentiation is at hand, while the latter identifies the type of provision that is subject to differentiation. Arguably, Rajamani's model is thus of greater explanatory significance, while Honkonen's model seems more suitable for analysis when examining provisions that embody the principle of CBDR. Hence, the following study uses both models as a matter of identifying and analysing CBDR in the climate change regime, but in an overlapping manner. Largely borrowed from Rajamani, the matrix below attempts to synoptically summarize the relation between the above-mentioned categories.[34] The overview can hopefully assist in understanding how this paper considers and assesses the concept of CBDR.

<table>
<tr><td colspan="5">Concrete Differentiation</td></tr>
<tr><td colspan="2">Implementation</td><td>Central Obligations</td><td colspan="2">Assistance</td></tr>
<tr><td>Leniency on Non-Compliance</td><td>Discretionary Base Years</td><td rowspan="2">E.g. emissions reduction commitments</td><td>Financial Assistance</td><td>Technology Transfer</td></tr>
<tr><td>Extended Time Frames</td><td>(Context)</td><td>Capacity-Building</td><td>Others (reporting etc.)</td></tr>
<tr><td colspan="2">Implementation</td><td>Central Obligations</td><td colspan="2">Assistance</td></tr>
<tr><td colspan="5">Contextual Differentiation</td></tr>
</table>

[32] Rajamani (n 30) at 113. The concept of 'sustainable development' will be further addressed in section 3.1.3. below.

[33] ibid at 114.

[34] cf ibid fig 4.1 at 94.

2.3. The Developed-Developing Dichotomy

Within the context of differentiation, there is always a distinction to be made between those parties that are considered eligible to receive special treatment and those that are not, or even those that are obliged to assist that former group with onerous obligations. In other words, there is always a necessary division between what is generally classified as either developed or developing countries.[35] Because such a division is rather unprecise, a few comments on this dichotomy are warranted.

The traditional criterion for classifying a country's status has generally been its economic development. Most often, this directly relates to other attributes that indicate the strength of a country, such as overall military and political influence in the international community, and therefore serves well as a benchmark in the comparison between countries. Moreover, it usually reflects historical differences relating to colonization of the so-called 'third world', which in turn is closely connected to the industrialization of 'the west'. The term 'third world', alone, suggests inequalities between countries. And the following industrialization was of course the main catalyst for the problem of global warming that subsequently arose, which has been (and still is) a strong argument for differentiation.[36] Without going too much into the different economic criteria that can be used to distinguish between economic development among countries, it is still important to note that, within the climate change regime, economic development has generally been synonymous with membership in the Organization for Economic Co-operation and Development (OECD). This becomes evident when comparing these members (by 1990) to the list of countries included in Annex I to the UNFCCC, which was a way to negatively define the beneficiaries of differentiation under the Convention.[37] The idea with such a categorical division of countries was that Annex I would be periodically reviewed and countries that had reached a certain level of development could thereby be reassigned from non-Annex I to Annex I status. This, however, turned out to be difficult.[38]

[35] Other terms of reference can be north/south, rich/poor, industrialized/third world or Annex I/non-Annex I countries.

[36] Cullet (n 28) at 50.

[37] The countries excluded from Annex I did not have the same obligations as the countries that were listed there. For more on the criteria of developing/developed countries, see Cullet (n 28) at 11-12.

[38] Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' [2016] 110(2) American Journal of International Law 288-319 at 298.

While the general division of developed and developing countries is the most commonly used, there is also an intra-dimensional aspect to differentiation. It has become increasingly clear that nuances are needed within these very rough categories, seeing as the needs and circumstances of countries are very different. As a consequence, subsets of these groupings have emerged. For example, a distinction is generally made between developing and least developed countries (LDCs). This is an important distinction considering the gap between newly industrialized countries, i.e. countries at the top of the 'developing spectrum', and LDCs usually is greater than between that of newly industrialized countries and an average OECD country.[39] Among developed countries, former communist countries that previously had belonged to the Soviet Union and whose economies were transitioning into a market economy became known as 'countries with economies in transition' (CEITs) and prompted the formation of a new subgroup under Annex I.

Without foregoing the following presentation of the CBDR-principle, it should be noted that there are also other factors that motivate differentiation that lately have become more important. Mostly, such growing concerns are related to changing circumstances in the climate change area. Geographical factors, for example countries with low lying coastal areas and the small island developing states (SIDS) are being increasingly recognized as particularly vulnerable to the effects of climate change because of rising sea levels.[40] Also, the *per capita* emissions profiles of countries is a criterion that is advocated by large industrialized developing countries that need to accommodate concerns of a rapidly growing population.

2.4. Summary

CBDR consists of two components. It establishes that the obligation to combat climate change is a common responsibility for all nations, but also that this responsibility may be different for each country. The differentiation is partly linked to a historical responsibility, but also to present and future vulnerability and economic inequality.

[39] Cullet (n 28) 53.

[40] Such recognition was emphasized early on but lately it has become an even more pressing matter due to noticeable loss of land etc. See, for example, United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) article 4.8(a)-(b).

The analysis and assessment of CBDR throughout this paper is primarily classifying CBDR into two main categories; concrete differentiation and contextual differentiation. Within these categories, however, there are also subsets of categories that will be used to further explain the operationalization of CBDR. These subsets describe the kind of provisions that are subject to differentiation and are either related to the central obligations of a treaty, provisions regarding the implementation of the decided commitments, or provisions that facilitate assistance between developed and developing countries.

When trying to construe the concept of CBDR it is essential to comprehend the dichotomy of developed/developing countries. Economic strength has been, and still is, the most fundamental factor to distinguish between the benefactors and beneficiaries in formal treaty differentiation. There are also intra-dimensional aspects of differentiation within these two groupings. Furthermore, new aspects like geographical vulnerability to adverse effects of climate change and per capita emissions are emerging as increasingly important factors that should affect country classification.

3. The Birth and Establishment of CBDR Within the Climate Change Regime

A full account of the development of CBDR is a hefty and complicated task. As stated in the introduction to this paper, the evolution of the CBDR-principle is not just isolated to the climate change regime. Although mainly emerging from the environmental domain, the notion of CBDR has also developed within the general system of international law and has been influenced by a myriad of factors that have come to shape the concept.[41]

Initially, this chapter will briefly describe the political landscape, with regards to economic inequalities, that had emerged by the 1960s and 1970s. A brief segment on what is often referred to as the policy catalyst of CBDR, the Stockholm Declaration, will then follow. Another subsection will broadly point to a few of the other milestones that have been central to the development of CBDR. Furthermore, some background to how the scene was set before the 1992 United Nations Conference on Environment and Development (UNCED) will also be touched upon.

Finally, the official negotiations of the UNFCCC will be illustrated, with an account of the resulting framework convention from a CBDR-perspective. The way the principle of CBDR is being reflected in the UNFCCC will be identified, discussed and analysed for the sake of establishing a full picture of the architecture that the climate regulation is built upon.

3.1. Early Manifestations

3.1.1. A New International Economic Order

Parallel to the emergence of global environmental negotiations was a movement by developing nations to establish a new international economic order (NIEO). This movement started growing in the 1960s and 1970s as demands of more systematic differential treatment within the international economic community were voiced by developing countries.[42] Back then, the

[41] For example, CBDR is also prevalent in the international trade regime. For further discourse, see Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Kluwer Law International 2009) at 49-67.

[42] ibid at 40.

world economic regime was separate from any environmental concerns, seeing as developing countries regarded the latter to be a problem that only developed nations had the luxury of devoting themselves to. Nevertheless, the significance of this process in terms of recognizing differential treatment within environmental regulation should not be underestimated. The principal idea of a NIEO was to make developed countries share the wealth and resources that they had acquired at the expense of colonialism. More specifically, demands included transfer of technology and resources, regulatory exemption, as well as weighted decision-making procedures in favour of developing countries.[43] Even though the attempts were unsuccessful, the new rhetoric of developing countries had changed the dynamics of international negotiations.[44] Considering this development, the following Stockholm Declaration and its many illuminating examples of a materializing equity-principle are hardly surprising.

3.1.2. The 1972 Stockholm Declaration

Within the environmental regime, the starting point for the principle of CBDR was with the 1972 UN Conference on the Human Environment, in Stockholm.[45] Although the term was not explicitly mentioned in the resultant declaration (Stockholm Declaration),[46] its spirit was clearly expressed. Statements on securing the development potential of developing countries when forming national policies were included, as well as proclamations regarding the special circumstances of developing countries that need consideration when planning for national resource development.[47] Also, their need for technical and financial assistance was acknowledged. Another representation of CBDR included in the Stockholm Declaration was that the extent to which developed countries apply environmental standards may be inappropriate and of unwarranted social cost for developing countries.[48] Finally, Principle 24 of the Stockholm Declaration states that '[i]nternational matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big

[43] ibid at 41.

[44] ibid at 45-46. It is argued that these harsh voicings by developing nations backfired, thereby deadlocking the NIEO-negotiations and prevented any substantial reform.

[45] ibid at 69.

[46] Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) UN Doc A/Conf.48/14/Rev.1 (Stockholm Declaration).

[47] ibid principles 11 and 12.

[48] ibid principle 23.

and small, on an equal footing' and that 'due account [needs to be] taken of the sovereignty and interests of all States'.

It is clear that no substantial commitments of differentiation between states were made with these statements, however, it sent a reassuring signal to developing countries that their individual circumstances and capabilities would be considered. The most significant contribution of this declaration could be that it highlighted the global concern of environmental degradation and its complex transboundary nature.[49] Thus, the importance of the examples above are not so much their actual legal meaning, but rather that they laid the foundation of a normative process that influenced the shape of international environmental law to come. It is evident that the character of the Stockholm Declaration, although being more of a policy document, has shaped the argumentation that developing countries subsequently applied in future climate change negotiations.

3.1.3. Other Important Milestones

Other landmarks in the early CBDR evolvement are the final report of the 1987 World Commission on Environment and Development (Brundtland Commission)[50] and the declaration resulting from the Ministerial Conference on Atmospheric Pollution and Climatic Change held in Noordwijk, the Netherlands in 1989 (Noordwijk Declaration).

The final report of the Brundtland Commission is said to have founded the concept of sustainable development, which itself has a clear link to CBDR within the climate regime. The Brundtland Commission addressed the concern that economic growth needed to be confined within the limits of our environmental resources while also reducing the growing global poverty.[51] Arguably, a strong element of equity is embodied within the notion of sustainable development. There is no specific reference to CBDR in the report, but it does mention, for example, that wealthier countries are better equipped to deal with the effects of climate change and that the 'inability to promote the common interest in sustainable development is often a

[49] Jutta Brunnée, 'The Stockholm Declaration and the Structure and Processes of International Environmental Law' in Aldo Chircop and Ted Mcdorman (eds), *The Future of Ocean Regime Building: Essays in Tribute to Douglas M Johnston* (Kluwer Law 2009) at 19.

[50] World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987).

[51] ibid in preamble para 3. The report defines sustainable development as 'development which meets the needs of current generations without compromising the ability of future generations to meet their own needs', see pt I s 3 para 27.

product of the relative neglect of economic and social justice within and amongst nations'.[52] In other words, if a more general environmental perspective is adopted, the report identifies that differentiation must be addressed in order to secure inclusion of all states within future environmental action.

The Noordwijk Declaration was important, not only because particular elements of a future climate change convention were discussed, but also because it addressed the responsibility of industrial countries to take the lead in the work against climate change. Furthermore, typical elements of burden-sharing, like financial assistance and transfer of technology from developed to developing countries, were also topics of deliberations.[53]

3.1.4. Emerging Alliances

In the early climate change negotiations leading up to 1990, a clear division between developed and developing countries had emerged.[54] Developing countries were worried that environmental issues would overshadow their need for development. Hence, efforts were made to make the United Nations General Assembly (UNGA) hold the upcoming UNCED in Rio de Janeiro in 1992, which was originally intended to be led by the Intergovernmental Panel on Climate Change (IPCC) – a research group put together to assess the scientific basis of climate change and advise policymakers on response strategies.[55] These efforts turned out to be successful and the change of forum thus shifted the agenda in a more socio-political direction.[56]

However, it is important to mention that groupings within the very general faction of 'developing countries' had also appeared. Larger developing countries like Brazil, South Africa, India and China (BASIC) were concerned with not being limited in their efforts to pursue industrial development, and thus sought to argue the importance of sovereignty. Also, countries that relied heavily on oil production had their obvious reasons to remain sceptical to

[52] ibid ch 2 pt II para 26.

[53] Daniel Bodansky, 'Prologue to the Climate Change Convention' in Irving M Mintzer and J Amber Leonard (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge University Press 1994) at 55-56.

[54] Daniel Bodansky and Lavanya Rajamani, 'The Evolution and Governance Architecture of the United Nations Climate Change Regime' in Urs Luterbacher and Detlef F Sprinz (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention* (forthcoming, 2nd edn, MIT Press 2016) at 8.

[55]IPCC, 'Report of the First Session of the WMO/UNEP Intergovernmental Panel on Climate Change (IPCC)' (Geneva: World Climate Programme Publications Series 9-11 November 1988) TD - No 267 at 4; ibid at 9.

[56] UNGA Res 45/211 (21 December 1990) UN Doc A/RES/45/211 para 5.

the science of climate change, thus arguing a 'go slow' approach. Conversely, smaller island states were very committed to establishing ambitious binding targets due to the imminent threat of rising sea levels, subsequently forming an alliance during the second World Climate Conference in Vienna 1990.[57] This Alliance of Small Island States (AOSIS) later came to play an important role in the subsequent UNCED negotiations in Rio de Janeiro.[58]

3.2. Setting Up the Architecture: The UNFCCC

In 1992, the UNCED, also known as the Earth Summit, was held in Rio de Janeiro. Many important documents came out of the conference, among them the Rio Declaration, in which 27 principles of sustainability were posited. Considering the close relationship between CBDR and sustainable development,[59] it is worth noting that Principle 7 of the Rio Declaration expressly recognizes CBDR '[i]n view of the different contributions to global environmental degradation'. However, the most important outcome of the conference was probably the UNFCCC, which entered into force two years later, in March 1994. This legal framework set the stage for the international environmental regulation and cooperation that is still the principal forum for international climate change negotiation today.

The term 'framework convention' does not have an intrinsic legal meaning, but can rather be described as a basic structure to which additional legal efforts, like protocols and agreements, can build on by gradually stipulating further commitments of the parties.[60] This basic structure consists of procedural arrangements, the role of established institutions, implementation mechanisms, as well as general objectives and fundamental goals.[61] The benefit of a framework/protocol approach is primarily that parties are more inclined to commit to an arrangement if the initial obligations that come with it, if any, are more of a general character

[57] Bodansky and Rajamani (n 54) at 9.

[58] ibid. AOSIS now have 39 members. For further information, see http://aosis.org/about/members/.

[59] cf section 3.1.3. above.

[60] WHO/Daniel Bodansky, 'The Framework Convention/Protocol Approach' (Technical Briefing Series, Paper 1, Framework Convention on Tobacco Control, World Health Organization 1999) UN Doc WHO/NCD/TFI/99.1 at 15.

[61] ibid at 19.

and not overly burdensome.[62] This is particularly true of an area like climate change, which, at the time of the UNCED, was filled with many uncertainties. The UNFCCC is often considered to be a successful example of such an approach as it quickly gained large acquiescence by the world community. Because the UNFCCC is fundamental to the climate regulation, it is essential to analyse its content regarding CBDR.

3.2.1. Negotiating the UNFCCC

In December 1990, the UNGA established the Intergovernmental Negotiating Committee (INC) to initiate negotiations of the UNFCCC.[63] Already in the general debate of its first session, an explicit concern for some countries was that the CBDR-principle should be taken into full account in any future work on addressing climate change.[64] More substantially, the INC adopted guidelines for the negotiation which clearly stated that the final agreement on the future framework convention should include both transfer of technology as well as funding mechanisms for developing countries. It was also decided that the intended outcome should include adaptation measures and that these would be specifically aimed to support SIDS.[65] Two working groups were established to prepare draft texts on 'Commitments' (Working Group 1) and 'Mechanisms' (Working Group 2) for consideration by the plenary committee.[66]

By its second meeting, some delegations in Working Group 1 – the working group on commitments – had presented arguments explicitly deriving from 'the concept of common but differentiated responsibilities'.[67] Opinions had been voiced that industrialized countries should be assigned specific commitments, which developing countries and CEITs should be exempted. This sparked some discussion on how to categorize countries in relation to development. Moreover, schisms became evident when some delegations proposed that industrialized

[62] ibid at 17. The UNFCCC is considered to contain rather detailed obligations and institutional mechanisms compared to other framework conventions. ibid at 19.

[63] UNGA Res 45/212 (21 December 1990) UN Doc A/RES/45/212 para 1.

[64] INC 'Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its First Session' (Held at Washington DC From 4 to 14 February 1991) UN Doc A/AC.237/6 para 41 at 12.

[65] ibid para 4 at 23.

[66] ibid paras 4-7 at 23-24.

[67] INC 'Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Second Session' (Held in Geneva 19 August 1991) UN Doc A/AC.237/9 para 51 at 13.

countries were to commit to emissions reduction in both the short and long term, while also providing financial aid and technology transfer on favourable conditions. Opposing delegations insisted that developing countries should also make commitments aimed at reducing emissions.[68]

By September 1991, consensus had begun to develop in Working Group 1 regarding which principles should be included in the UNFCCC. The CBDR-principle was broadly supported, but there was still disagreement on how it would be formulated and where in the UNFCCC it was to be placed. There was, however, a general understanding in the working group that there should be variable degrees of commitments regarding emissions reductions for developing and developed country parties. A subject of debate, on the other hand, was whether the Polluter Pays principle (PPP) should be included in the UNFCCC.[69] The PPP is essentially saying that those responsible for environmental damage also should be responsible for rectifying and compensating that damage. This controversy, as far as CBDR is concerned, could very well be an indication that developed countries did not want to admit liability to historical emissions, thus giving the CBDR-principle far more substantial legal implications than it has on its own.

On the matter of financial resources and transfer of technology, it was made clear by developing countries that these mechanisms were key to whether commitments by developing nations could be successfully fulfilled. Conversely, several developed parties took the position that any financial aid should be contingent on whether developing nations would implement any of the obligations under the UNFCCC. Some delegations argued that strengthened bilateral arrangements should constitute adequate support, while others preferred the establishment of an international climate fund through which financial aid could be channelled from developed to developing countries.[70]

A rather undisputed matter in the negotiations seemed to be differentiation due to special situations. Full recognition was given to those developing countries that were particularly exposed to the adverse effects of climate change. Also, problems typical for CEITs were given recognition insofar as flexibility should be granted in how this category of countries could

[68] ibid paras 51-52 at 13-14.

[69] INC 'Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Third Session' (Held in Nairobi September 1991) UN Doc A/AC.237/12 paras 75-59 at 18-19.

[70] ibid para 82 at 19.

contribute.[71] Thus, already at this early stage, differentiation by assistance as well as by more condoning implementation requirements were brought up for discussion.

3.2.2. The Final Outcome

The UNFCCC was adopted in May 1992 and opened for signature in June that same year. The ultimate objective of the UNFCCC, and thus the fundamental legal scope of what the international community set out to accomplish in the domain of climate change, is to achieve 'stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[72] In some ways the UNFCCC was a success, mainly seeing as it now enjoys near universal ratification and includes elements for nearly every negotiating party.[73] However, in other respects it could also be considered a disappointment due to its lacking ambition in setting specific targets. Also, because of its dispersed scope, no country was completely satisfied with the outcome.[74] Insofar as CBDR is concerned, the UNFCCC ended up embodying the principle in a number of instances throughout the treaty.

3.2.2.1. Identifying CBDR

The most fundamental example of where the CBDR-principle is found in the UNFCCC is in article 3.1, under the heading 'Principles':

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

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 PPP,[75] this was an attempt by developed countries to evade themselves of

[71] ibid para 85 at 20.

[72] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) article 2.

[73] 197 countries are parties to the UNFCCC (n 72), see http://newsroom.unfccc.int/about/.

[74] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2012) at 277-78.

[75] cf section 3.2.1. above.

responsibility for historical emissions and instead let the onus be associated with the positive factor of 'capabilities'. The following sentence reinforces this idea when stating that developed countries should 'take the lead', which emphasizes technological and financial capabilities rather than prior over-representation in exploiting and combusting fossil resources.[76] Irrefutably, 'taking the lead' also implies that others, i.e. developing countries, will follow. However, instead, the mention of developed countries as leading emitters of GHGs was put in the preamble of the UNFCCC, wherein the parties noted that 'the largest share of historical and current global emissions of GHGs has originated in developed countries'.[77] The legal implications of this placement, however, are yet uncertain.[78] The preamble also specifically acknowledges that:

> [T]he global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.[79]

Aside from yet again emphasizing CBDR in relation to capabilities, key words to notice in this phrasing are 'participation' and 'social and economic conditions'. The importance of full participation in combatting climate change was first brought to attention in the initial IPCC sessions.[80] Hence, it seems plausible to assume that this was an embodiment of such concerns.

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[76] Thomas Deleuil, 'The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' [2012] 21(3) Review of European Community and International Environmental Law 271-281 at 272.

[77] This had previously been established by the UNGA. See UNGA Res 44/228 (22 December 1989) UN Doc A/RES/44/228 para 9.

[78] Article 31 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 states 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'. Furthermore, when read together with article 31.2, it becomes clear that the context comprises the whole of its text, including the preamble. On this same note, it is interesting to observe the fact that the United States also tried to restrain the legal effect of article 3 on a general level by adding a footnote to the heading of article 1 stating that '[t]itles of articles are included solely to assist the reader'. Thus, CBDR would not obtain the status of customary law. Nevertheless, the same complex of interpretational issues ought to apply. See further Honkonen (n 41) at 123; Sands and Peel (n 74) at 100.

[79] UNFCCC (n 72) preamble.

[80] cf section 3.1.4. above. The IPCC had initiated the negotiations of a legal instrument prior to the INC negotiations. However, the IPCC mandate was more based on scientific discussions rather than political. IPCC

Furthermore, regard to 'social and economic conditions' suggests a strong connection to the sustainable development regime.[81] Another example of such a link is the assertion that 'per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs'.[82] This statement indicates that there is a recognized, but unspecified, allowance of emissions for developing countries that they should be granted to facilitate economic and social development.

3.2.2.2. Differentiated Obligations

With regards to the *central obligations* that follow from the UNFCCC, article 4 distinguishes between commitments applying to all parties and commitments applying only to 'developed country Parties and other Parties included in Annex 1'. This is a clear example of *concrete* differentiation as it explicitly provides for varying obligations depending on classification. For example, all parties must develop national emissions inventories, provide mitigation programs and facilitate adaptation measures.[83] However, only Annex I-parties have the obligation to adopt policies and corresponding measures to mitigate climate change by limiting GHG emissions. The burden of mitigation is therefore primarily placed on Annex I-countries, even though the targets are 'soft' and the time frame is vague at best.[84]

The universal commitments in article 4.1 of the UNFCCC, however, are *contextual* in the sense that the parties must fulfil these while taking 'their common but differentiated responsibilities and their specific national and regional development priorities' into account, thus allowing for a wide level of circumstantial discretion. Likewise, the situation of developing country parties with vulnerable economies are to be particularly considered when implementing the

'Report of the Second Session of the WMO/UNEP Intergovernmental Panel on Climate Change (IPCC)' (Nairobi: World Meteorological Organization 28-30 June 1989) at 18.

[81] cf section 3.1.3.

[82] UNFCCC (n 72) preamble at 1.

[83] ibid article 4.1(a)-(b).

[84] Anna Huggins and Md Saiful Karim, 'Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime' [2016] 5(2) Transnational Environmental Law 427–448 at 434. 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. Sands and Peel (n 74) at 280.

commitments under the UNFCCC, specifically states that in some way depend on fossil fuels.[85] 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.[86] This flexibility, however, did not fully operationalize until the Kyoto Protocol came into play.[87]

Differential treatment by *assistance* also appears in the UNFCCC in the form of financial aid and technology transfer.[88] The benefactors of these provisions are Annex II-countries, a subsection of developed countries that are listed in Annex I. According to article 12.1, all countries shall communicate those national emissions inventories that are required in article 4.1(a). Consequently, Annex II-parties are obliged to provide the financial resources and transfer of technology that is needed for developing countries to fulfil this commitment.[89] Furthermore, in what could seem like an implicit reference to their preambular acknowledgement of being the largest historical and current emitters of GHGs, developed countries pledge to financially assist those developing nations that are 'particularly vulnerable' with adaptation measures.[90] This provision is especially interesting when considering that these two statements combined suggest that developing nations, although indirectly, somewhat admits responsibility for causing climate change.[91]

3.3. Summary

The early signs that aided the evolvement of CBDR were seen already in the 1960s and 1970s when the NIEO-movement emerged. The real starting point of CBDR, however, came with the 1972 Stockholm Declaration, which clearly incorporated elements that subsequently became typical features of the CBDR concept. And, perhaps most importantly, the Stockholm

[85] UNFCCC (n 72) article 4.10.

[86] ibid article 4.6.

[87] cf section 4.1.2. below, in fine.

[88] UNFCCC (n 72) article 11.

[89] ibid article 4.3.

[90] ibid article 4.4.

[91] Sands and Peel suggest that article 4.4 could be 'one of the more unusual, contentious, and perhaps costly, commitments in the Convention'. Sands and Peel (n 74) at 282.

Declaration sparked global concern for the environment while also calling attention to the individual circumstances and needs of developing countries. Other important milestones were the Brundtland Commission's final report, which founded the concept of 'sustainable development', and the Noordwijk Declaration, wherein elements of a possible future regulation were considered. A clear division between developed and developing countries had begun to emerge during the early negotiations, and the INC eventually began outlining a forthcoming climate change convention, which would later be adopted in Rio de Janeiro in 1992.

The result was the UNFCCC, which fully established the CBDR-principle in the international climate change regime. Although the decided emission targets were 'soft' and time frames were vague, the UNFCCC entrenched a concrete approach to differentiation by listing all developed countries that were subject to commitments in a separate annex to the Convention – Annex I. The UNFCCC constitutes the fundamental architecture that subsequent instruments build on. It also established a dynamism in political negotiations that highlighted arguments closely related to CBDR. Hence, strong concrete differentiation became the paradigm.

4. Two Different Approaches

4.1. Top-Down Regulation: The Kyoto Protocol

The fact that the UNFCCC had been drafted, adopted and subsequently entered into force, did not mean that the negotiations had come to an end, but rather signalled an important milestone in an ongoing process of negotiations.[92] The UNFCCC had outlined the architecture that future efforts would build on and now was the time to establish the additional measures that most countries agreed were needed. Already at the first meeting of the Conference of the Parties (COP)[93] in Berlin it was decided that the commitments under the UNFCCC were insufficient in relation to its objective. Hence, the so-called 'Berlin Mandate' was to negotiate 'quantified limitation and reduction objectives within specified time frames' for Annex I-countries, which finally resulted in the Kyoto Protocol to the UNFCCC.[94]

This first extension to the UNFCCC was adopted at the third COP, held in Kyoto in December 1997.[95] The intention with the Kyoto Protocol was to strengthen and substantiate already existing commitments under the UNFCCC and while doing so, still taking differentiation and issues of equity into account.[96] In other words, developed countries were to make further commitments while developing countries merely were to reaffirm those commitments that already existed under article 4.1 of the UNFCCC, i.e. mainly monitoring

[92] Daniel Bodansky and Lavanya Rajamani, 'The Evolution and Governance Architecture of the United Nations Climate Change Regime' in Urs Luterbacher and Detlef F Sprinz (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention* (forthcoming, 2nd edn, MIT Press 2016) at 10.

[93] The COP is the supreme decision making body of the UNFCCC. Representatives from all parties to the Convention constitute the COP. The COP meets yearly to review the progress of their decisions and decide on future action. See further https://unfccc.int/bodies/body/6383.php.

[94] COP Decision 1/CP.1 'The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2(a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up' (Berlin: 7 April 1995) UN Doc FCCC/CP/1995/7/Add.1 (Berlin Mandate) para 2(a); Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 22 (Kyoto Protocol).

[95] COP Decision 1/CP.3 'Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change' (Kyoto: 11 December 1997) UN Doc FCCC/CP/1997/7/Add.1 (Adoption of the Kyoto Protocol).

[96] Berlin Mandate (n 94) para 2(a).

national emissions.[97] The Berlin Mandate specifically stated, with reference to article 3.1 of the UNFCCC, that this process of strengthening commitments by developed country parties should be guided by nations' 'common but differentiated responsibilities and respective capabilities'.[98] It also emphasized that developing countries had legitimate needs of economic growth and development as well as reaffirmed the historical 'debt' of developed country emissions, as already noted by the UNGA and previously recognized in the UNFCCC.[99]

4.1.1. Differentiated Obligations

As illustrated by the guidelines set within the Berlin Mandate, the negotiations of the Kyoto Protocol were heavily relying on the principle of CBDR, which also profoundly came to embody the spirit of the final treaty. The reference to article 3 of the UNFCCC was incorporated into the preamble of the Kyoto Protocol and perhaps the most noticeable manifestation of CBDR is in the way that the instrument operates, by putting a cap on Annex I-country emissions while allowing developing countries to avoid targets.[100] The unspecified emissions allowance for developing countries that had been granted with the UNFCCC to facilitate development had thus been even further entrenched.[101] Initially, however, when studying the Kyoto Protocol by the letter, it does not seem to go much into explicit differentiated regulation. But in article 10, which focuses on advancing the implementation of existing commitments, it reaffirms the CBDR-principle and basically reiterates the Berlin Mandate-mantra; that developing countries are not subject to any new commitments.

During the negotiations, there was a proposal that would allow for developing nations to set emissions reduction commitments later on, through so-called 'grace periods'. This would essentially mean that the time frames that these reductions were to be made in would differ depending on the development status of the party. This way, developing nations would have

[97] ibid para 2(a)-(b). cf section 3.2.2.2. above.

[98] Berlin Mandate (n 94) para 1(a) and (e).

[99] ibid para 1(c)-(d). cf text to n 77 above.

[100] Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Kluwer Law International 2009) at 126. The countries included in Annex I to the UNFCCC are also listed in Annex B to the Kyoto Protocol (n 94).

[101] Pieter Pauw and others, *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations* (Discussion paper 6/2014, German Development Institute 2014) at 9. cf section 3.2.2.1. in fine.

been involved in contributing to mitigation efforts, but without jeopardizing essential economic growth. However, developing countries heavily resisted this suggestion by using CBDR as an argument for being totally exempted any commitments and it was never included in the final version of the Kyoto Protocol.[102]

The core of the Kyoto Protocol, the reduction commitments by developed countries, was also differentiated among the committing parties. The percentages by which each nation would reduce their emissions in relation to the set base year were negotiated and finally established in Annex B to the Protocol.[103] Not so much relying on the CBDR-principle or even climate science, but rather a product of political bargaining, the way in which these differentiated commitments were reached has been criticized for being quite arbitrary and lacking a consistent methodology.[104] The only negotiated targets that are said to derive from any distinctive logic are those of the EU, the United States and Japan, which are all based on *per capita* emissions and previous attempts to reduce fossil fuel consumption. Other targets were based on pledges and each country's 'willingness to pay'.[105] It is probably not a controversial statement to claim that the differentiation that came with the Kyoto Protocol was somewhat rough and unsophisticated. Perhaps this is a reason why the Kyoto Protocol never reached the anticipated success it initially had prompted.

4.1.2. Kyoto Flexibility

Important features of the Kyoto Protocol are the so-called 'flexibility mechanisms' that were introduced; joint implementation, the clean development mechanism (CDM) and emissions trading. The mechanisms are based on the idea of primarily reducing emissions in countries where the marginal costs are low, thus rationalizing the abatement process. Together, they seek to consolidate the pursuit of climate change mitigation by allowing national circumstances to

[102] Honkonen (n 100) at 127-28. The 'grace period-model' had been previously successful under the Montreal Ozone Protocol.

[103] See n 100 above. Most countries committed to 8% reduction, while for example Australia and Iceland were allowed 8% and 10% increases respectively. See Annex B to the Kyoto Protocol for further details.

[104] Honkonen (n 100) at 128.

[105] Hermann E Ott, 'The Kyoto Protocol: Unfinished Business' [1998] 40(6) Environment: Science and Policy for Sustainable Development 16-20 at 20.

determine the best methods of reaching the assigned targets. Hence, the three mechanisms can be thought of as systems of differentiated country commitments.[106]

The idea of emissions trading under the Kyoto Protocol is simple in theory, but has raised some seriously complicated issues in practice. For every metric ton of GHGs that each Annex B-country is allowed to emit, an assigned amount unit (AAU) is issued and then allocated accordingly. At the end of the commitment period, each country is liable to surrender the same number of AAUs that correspond to their emissions. The basic principle of emissions trading is that, instead of reducing its own emissions to comply with the Kyoto targets, a country can buy AAUs from another country subject to emissions limitations and thereby comply with its target. Conversely, countries that manage to reduce their emissions by more than its target can sell their surplus units.[107]

Both joint implementation and CDM allows Annex I-countries to, instead of reducing their own emissions, engage in projects in another country that lower emissions there. Essentially, joint implementation means that such a project is implemented in another Annex I-country, while CDM involves a developing country as host country.[108] It could therefore be said that joint implementation differentiates among developed parties, while CDM focuses on differentiation in the 'traditional' sense – between developed and developing countries. Anyway, the emission reductions that a project generate are then converted into emission reduction units (ERUs) or certified emission reductions (CERs), which subsequently can be used by the Annex I-party that is funding the project to comply with its target.[109] Hence, these mechanisms could be said to form an integrated part of the emissions trading mechanism. It should be noted that any such project, whether within the joint implementation- or CDM-scheme, shall be additional to any reductions in emissions that would occur anyway.[110]

Furthermore, the Kyoto Protocol took advantage of the flexibility that the UNFCCC had opened to CEITs by allowing these parties to have optional base years or periods as a point of reference

[106] Honkonen (n 100) at 134-35.

[107] Kyoto Protocol (n 94) articles 3.10-12 and 17; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2012) at 287.

[108] These mechanisms are defined in the Kyoto Protocol (n 94) articles 6 (JI) and 12 (CDM).

[109] ibid articles 3.10-12. Any such units are then added to the assigned amount of the acquiring party and subtracted from the assigned amount of the transferring party.

[110] ibid articles 6.1(b) and 12.5(c).

for reduction targets.[111] Accordingly, most of these countries chose base years where they had much higher emissions than in 1990 (the 'standard' base year), which thereby meant concrete differentiation even among Annex I-countries.[112] This proposal, supported by Poland and the EU, was strongly opposed by the United States, who suggested there be no differentiation with respect to base year, target year or level.[113] Furthermore, CEITs does not have the same obligations as other Annex I-countries with regards to financial resources and transfer of technology to developing nations.[114]

4.1.3. Kyoto Aftermath and CBDR-Related Issues

Generally, the Kyoto Protocol followed a top down-approach to addressing the objective that had been set with the UNFCCC – to 'prevent anthropogenic interference with the climate system'.[115] Developed countries had been assigned quantified emission targets while developing countries had managed to completely avoid commitments. In this way, the differentiating component of the CBDR-principle had been given quite a prominent standing insofar as to how it had directed the outcome of the Kyoto Protocol. Besides this, however, the Kyoto Protocol introduced new flexible mechanisms that would demonstrate another dimension of CBDR. The most prominent significance of this flexibility from a CBDR-perspective is probably the CDM, which facilitates a link between parties that are subjected to targets and those that are not. Besides, establishing projects in developing countries advances the transfer of technology.[116] But also, under emissions trading and the joint implementation mechanism, targets became interconnected, thus signifying that the Protocol in some sense embraced the aspect of 'commonality' imbedded in the concept of CBDR. On a side note, if we apply an economical perspective, it has been argued that this way of pooling marginal costs is the most rational form of differentiation since it eludes any notions of fairness and still produces Pareto-

[111] ibid article 3.5.

[112] Honkonen (n 100) at 127.

[113] UNFCCC/Joanna Depledge, 'Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History' [2000] (Technical Paper, Prepared under contract to UNFCCC) UN Doc FCCC/TP/2000/2 para 236 at 50.

[114] Honkonen (n 100) at 127.

[115] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) article 2.

[116] This, in turn, fosters sustainable development, which also is the purpose of the CDM for developing countries. Honkonen (n 100) at 136.

effective outcomes.[117] Nonetheless, both the stark contrast in division of responsibilities as well as the flexibility of the Kyoto Protocol proved to be troublesome for its future success. And both features had been the consequence of the CBDR-principle, at least to some extent.

4.1.3.1. Issues with the Differentiated Obligations

Looking at the bigger picture, the ambition of Kyoto was to lower GHG emissions by making developed countries commit to quantified, legally binding targets that would gradually become more ambitious with each consecutive commitment period.[118] However, this strictness would also turn out to be its biggest problem. The 'success' of developing countries to exclude themselves from obligations backlashed on the climate. Probably the most significant issue was that the largest emitter of GHGs at that time, the United States, never ratified the Protocol. And China, who passed the United States in 2006 as leading CO_2 emitters,[119] successfully claimed 'developing-status' and was therefore never included among the Annex B-parties. India is another example of a major GHG emitter that never undertook any commitments. Also, Canada eventually withdrew from the Protocol, leaving only 36 countries with actual obligations under the treaty. Considering the 192 parties that have acquiesced, the effort seems futile.[120]

Bearing this outcome in mind, the uncertainty of whether a second commitment period after 2012 would be implemented at all was perhaps not that unexpected. The European Union strongly advocated such a continuation but also wanted to make sure the United States and China was on board this time. China on the other hand, along with the other big developing countries, also propagated for a second commitment period but not with themselves included. This, combined with the ambivalence of the United States, certainly made the outlook for any future advancement of the Kyoto Protocol seem bleak.[121]

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[117] cf Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' [2004] 98(2) American Journal of International Law 276-301 at 284 and 286-87. If an agreement is Pareto-improving it leaves at least one party better off and no party worse off than prior to the agreement.

[118] Daniel Bodansky, 'A Tale of Two Architectures: The Once and Future UN Climate Change Regime' [2011] 43(3) Arizona State Law Journal 697-712 at 697. The first commitment period was running between 2008-2012.

[119] 'China overtakes U.S. in greenhouse gas emissions' *The NY Times* (London, 20 June 2007) <https://nyti.ms/2okkvJz> accessed 10 April 2017.

[120] United Nations, '7. a Kyoto Protocol to the United Nations Framework Convention on Climate Change' (Status of Treaties, vol 2, ch XXVII Environment, UN Treaty Database) <https://treaties.un.org> accessed 10 April 2017.

[121] Bodansky (n 118) at 698.

4.1.3.2. Flexibility Issues: 'Hot Air' and Other Criticisms

The accepted flexibility for CEITs along with the possibility of joint implementation and the previously mentioned *ad hoc* methodology of setting targets caused a major issue that would come to harm the legitimacy of Kyoto; 'hot air' units. Because of the collapse of the Soviet Union, some CEITs, mainly Russia and Ukraine, had already reduced their actual emissions by almost 30% compared to 1990-levels. In fact, this was well known at the time of the negotiations.[122] Nevertheless, Russia and Ukraine were assigned a 0% reductions commitment. *Prima facie*, this seemed to mean that these countries could increase their emissions correspondingly, the argument being that their emissions would return to previous levels as their economies recovered. From a climate change perspective, the uncertainty of such an assumption seems bad enough. However, the problem that really came to question the integrity of the Kyoto Protocol was that these redundant 'hot air' units could be sold at a discount, thus flooding the market by increasing supply. Basically, the surplus AAUs that were allocated to Russia and Ukraine could be 'laundered' into ERUs and then sold to other countries or individual emitters whom then could use these credits to 'pay' for their emissions.[123] The net effect was that emissions could increase without any corresponding reduction, thus undermining the decided emissions caps.[124]

Furthermore, a criticism of the CDM has been that it unfairly grants 'a right to pollute'. Annex I-countries can invest in emission reductions projects in developing countries and thereby maintain their polluting lifestyle while still fulfilling their obligations under the Kyoto Protocol. In fact, the same argument goes for joint implementation and emissions trading in general. Still,

[122] Christine Batruch, '"Hot Air" as Precedent for Developing Countries? Equity Considerations' [1999] 17(1) UCLA Journal of Environmental Law & Policy 45-66 at 54-55.

[123] Because the problem of surplus AAUs was identified in the negotiations, any trade with such units was prohibited by regional emissions trading schemes. However, for some reason, the 'laundered' ERUs were still tradeable.

[124] Regarding this paragraph, see Morgan Foundation/Geoff Simmons and Paul Young, 'Climate Cheats: How New Zealand Is Cheating on Our Climate Change Commitments, And What We Can Do to Set It Right' [2016] particularly at 6-8, and; Stockholm Environment Institute, 'Policy Brief: Has Joint Implementation Reduced GHG Emissions? Lessons Learned for the Design of Carbon Market Mechanisms' [2015] (Policy Brief based on Working Paper 2015-07 by Anja Kollmuss, Lambert Schneider and Vladyslav Zhezherin).

seeing as all three mechanisms are supplemental to domestic action, this critique is probably not the most alarming.[125]

However, developing countries have stressed that CDM-projects would worsen the situation for the host country since the only mitigation measures that might remain, when developing countries eventually need to commit to domestic action, are the more expensive options. Considering the 'historical debt-argument', i.e. that developing countries should take lead in mitigation efforts because their previous industrialization is the root of the problem, this claim is not without merit.[126] Nevertheless, although it remains to be seen, the CDM will probably need to adapt to future changes in the regime, perhaps by allowing developing countries to account for CDM-projects in their reductions when also they need to be making contributions.

4.2. Bottom-Up: From Copenhagen to Paris

The Paris negotiations basically started when the Kyoto Protocol came into force in 2005, as the international community realized that the post-2012 period, when the Kyoto Protocol's first commitment period ran out, was unsure. Because opinions on future models of regulation was highly contentious, the compromise was to assume parallel discussions along two different tracks. The 'Kyoto-track', i.e. that a second commitment period would resume after the first one had ended, and the 'Bali Action Plan', which focused on 'a comprehensive process to enable the full, effective and sustained implementation of the [UNFCCC] through long-term cooperative action, now, up to and beyond 2012, in order to reach an *agreed outcome* and adopt a decision at its fifteenth session'.[127] Both tracks would thus come together at COP-15 in 2009, and expectations on the Copenhagen Conference were therefore huge.[128] However, due to a growing chasm between developed and developing countries that severely had deepened by the 2007 Bali meetings, the chances of success were seemingly slim.[129] At one point during the

[125] Honkonen (n 100) at 137.

[126] ibid at 136.

[127] COP Decision 1/CP.13 'Bali Action Plan' (Bali: 14-15 December 2007) UN Doc FCCC/CP/2007/6/Add.1 (Bali Action Plan) para 1 at 3 (emphasis added).

[128] Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' [2016] 110(2) American Journal of International Law 288-319 at 292.

[129] Daniel Bodansky, 'The Copenhagen Climate Change Conference: A Post-Mortem' [2010] 104(2) American Journal of International Law 230-240 at 232.

Bali negotiations, there were approximately 300 pages of text with 3000 square brackets indicating disagreements.[130] In the official UN report on the dialogue on long-term cooperative action, the general attitude was amicably summarized as follows:

> The diversity of views on how [CBDR] should guide the effort was great. It was repeatedly mentioned that developed countries should continue to take the lead in reducing GHG emissions and should make more efforts in fulfilling their responsibilities under the Convention that are related to providing financial support and technology in order to help developing countries fulfil their commitments.[131]

4.2.1. The 2009 Copenhagen Climate Change Conference

From a legal standpoint, the Copenhagen Conference is largely considered a failure as the resulting document, the mere two and a half pages long Copenhagen Accord, only was 'take[n] note of' by a subset of the parties.[132] The result was more of a political than legal document, but still, it signified a turning point in the rhetoric of CBDR as well as in the general approach to addressing climate change. Before the conference, one of the main questions was which of the two negotiation-tracks to pursue; the Kyoto-track or the 'agreed outcome' (the Bali Action Plan), or maybe even both? For developing countries, it was important not to lose the advantage they had achieved in Kyoto and consensus among non-Annex I parties was that plans on a second commitment period would have to remain. However, some developing countries, like China and India, were completely against any new legal instrument, while others, there among the AOSIS, favoured the two-track approach.[133]

The negotiations leading up to the Copenhagen Conference quickly became deadlocked as countries seemed overly cautious of not yielding their positions. And even though the COP ultimately convened on a much higher level than usual, or maybe even because of this, the

[130] Adrian Macey, 'The Road to Durban and Beyond: The Progress of International Climate Change Negotiations' [2012] 8(2) Policy Quarterly 23-28 at 25.

[131] COP 'Report on the dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention' (Addendum, Bali: 3-14 December 2007 reissued 19 November 2007) UN Doc FCCC/CP/2007/4/Add.1 para 71 at 20.

[132]COP Decision 2/CP.15 'Copenhagen Accord' (Copenhagen: 18 December 2009) UN Doc FCCC/CP/2009/11/Add.1 (Copenhagen Accord) at 4.

[133] Bodansky (n 129) at 233.

outcome never reached the level of expectations that had been built up.[134] Nonetheless, the political stalemate of the conference resulted in a document – the Copenhagen Accord – that probably deserves more credit than it generally has been given. For the first time, a long-term temperature goal was stipulated (2 ºC) and non-Annex I parties were subjected to implementing 'nationally appropriate mitigation actions'.[135] Both achievements came to be significant hallmarks of future developments, and particularly the latter signalled that even major developing countries had softened in their rhetoric concerning how CBDR should guide future efforts. It was the first time that the BASIC countries had accepted that their domestic climate change policies would be subject to international scrutiny. Certainly, Copenhagen appeared to have shifted the static relations between the developed and developing world that had culminated in 2007.[136]

4.2.2. COP-21: The 2015 Paris Agreement

The Paris Agreement was the result of a changing attitude among the bigger developing countries. Because of the failure to reach a legally binding agreement in Copenhagen, together with the inability in Cancún the following year to determine the future of both the Kyoto-track and the Bali Action Plan, the COP decided to 'launch a process to develop a protocol, another legal instrument or an *agreed outcome with legal force* under the Convention applicable to all'.[137] This came to be known as the Durban Platform for Enhanced Action (Durban Platform) and included the mandate for the negotiations leading up to COP-21 in Paris. The following year, in Doha, a second commitment period of the Kyoto Protocol was established, which in turn led the BASIC countries to accept the mandate of the Durban Platform and thus also the United States to do the same.[138] The Durban Platform made no mention of CBDR, the desired outcome would be 'applicable to all' and there was no indication as to whether the formalistic Annex I/non-Annex I division would remain.[139] The shadow that concrete differentiation had

[134] Bodansky (n 129) at 234. The whole second week of the conference was held at ministerial level and in the last few days, countries were even represented by heads of state.

[135] Copenhagen Accord (n 132) paras 1 and 5 at 5-6.

[136] Bodansky (n 129) at 240.

[137] COP Decision 1/CP.17 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' (Durban: 11 December 2011) UN Doc FCCC/CP/2011/9/Add.1 (Durban Platform) at 2 (emphasis added). cf phrasing of the Bali Action Plan in text to n 127 above.

[138] Bodansky (n 128) at 293.

[139] Macey (n 130) at 23-28.

cast over climate change negotiations throughout so many decades seemed to slightly have faded, and now was the time to cement this new paradigm. However, the mandate of the Durban Platform was to reach an agreement 'under the Convention', which indirectly meant that CBDR was to be regarded. The question was still how.[140]

4.2.2.1. Differentiated Obligations

The principle of CBDR moved to centre stage in Paris, but this time in a more contextual sense rather than categorically classifying countries as either Annex I or non-Annex I countries. In the preamble to the Paris Agreement, the principle is first mentioned as it was phrased in the UNFCCC, putting it in relation to the 'respective capabilities' of countries. But also, more importantly, it was added that this principle is to be seen 'in the light of different national circumstances'. In the other three instances throughout the Paris Agreement where CBDR is mentioned, it consistently follows this wording.[141] Most notably, it means that countries that were previously considered to be developing but now are among the richest, like Singapore and Qatar, cannot claim special treatment anymore.[142] The formulation disrupts the static dichotomy that has been prevalent ever since the UNFCCC. This version of the principle was originally introduced through a joint announcement by China and the United States and signalled a far more flexible approach.[143] Not only did the announcement indicate that the two largest players in the negotiations had understood that the concept of differentiation needed to change, but also, it inspired hope to the negotiations in general.[144]

The heart of the Paris Agreement is found in article 2, where the effort is set out to limit warming of the average global temperature to 'well below 2 ºC above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 ºC above pre-industrial levels'.[145] The

[140] Bodansky (n 128) at 299.

[141] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) Reg No 54 113 Forthcoming UNTS (Paris Agreement) article 2.2, 4.3 and 4.19.

[142] cf Bodansky (n 128) at 298.

[143] White House Press Release, 'U.S.–China Joint Announcement on Climate Change' (Beijing: 12 November 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change> accessed 15 April 2017 para 2.

[144] Bodansky (n 128) at 293 and 299.

[145] Paris Agreement (n 141) article 2.1(a).

way this is to be achieved, however, is very different from the 'cap and trade'-approach of the Kyoto Protocol.

The main mitigation mechanism of the Paris Agreement is founded on increasingly progressive 'nationally determined contributions' (NDCs) that are to reflect each party's highest possible ambition with regards to its 'common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.[146] Using the term 'contributions' rather than 'commitments' was an intentional strategy to soften the legally binding appearance of the NDCs, which helped facilitate advancement in negotiations.[147] Exactly what the information in these NDCs should include is not regulated except that the information provided should be necessary for 'clarity, transparency and understanding' and 'to track progress made in implementing and achieving its nationally determined contribution'.[148] Every country need to communicate their new NDCs every five years, but the ambition level of these contributions are decided individually by each country.[149] Some support on implementing these provisions is granted for developing countries,[150] but the only general guidance given on the ambition of the NDCs is that 'Parties aim to reach global peaking of GHG emissions as soon as possible' and that the information communicated together with these NDCs '*may* include […] how the Party considers that its nationally determined contribution is fair and ambitious, in light of its national circumstances'.[151] This kind of self-differentiation, of course, suggests a very wide level of discretion that could prove problematic to the overall goal of the Paris Agreement. In the adjoining COP decision that was concluded in Paris,[152] the COP even notes that the emission reduction efforts that are associated with the communicated contributions leading up to the Paris Conference (the *intended* nationally determined contributions) are insufficient to keep the increase in temperature below 2 ºC.[153]

[146] ibid article 4.3.

[147] Bodansky (n 128) at 297.

[148] Paris Agreement (n 141) articles 4.8 and 13.7(b).

[149] ibid article 4.9.

[150] ibid article 4.6.

[151] Paris Agreement (n 141) article 4.1; COP Decision 1/CP.21 'Adoption of the Paris Agreement' (Paris: 12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev.1 (Adoption of the Paris Agreement) para 27 (emphasis added); Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' [2016] 6(1-2) Climate Law 1-20 at 7.

[152] The Paris Agreement was originally attached in an annex to the decision. See Adoption of the Paris Agreement (n 151).

[153] Adoption of the Paris Agreement (n 151) para 17.

Since the Paris Agreement is based on voluntary levels of contribution, compliance is obviously more difficult to track. This issue was also the most contentious with respect to differentiation. India and China pushed for differentiation by way of self-monitoring for developing countries while developed countries were to adhere to strict rules of transparency.[154] Nevertheless, it was mainly the developed country line that prevailed seeing as all countries became subject to review of their submitted information.[155] There is, however, some differentiation in the transparency and compliance framework. There is room for flexibility aimed at developing countries in regard to the technical expert review, but this is linked to 'capacities' and 'national capabilities and circumstances' rather than CBDR.[156] Anyway, it has been suggested that this implies a shift in CBDR utility, in the sense that it is being given more procedural than substantial regard.[157] In other words, CBDR may now dictate the 'how' rather than the 'what'. Surely, this is an indicative example of changing dynamics in the differentiation process. The principle of CBDR, at least as it once was, has become too contentious and now needs caution in its application in order to move climate talks forward.

Although there are instances in which the Paris Agreement still have elements of more concrete differentiation, like provisions on finance, technology and capacity building, the categorization of developed/developing countries is undefined and therefore leaves the structure much less rigid than before.[158] It should, however, be noted that all these mechanisms, perhaps especially capacity-building efforts, aim to lessen the gap between developed and developing countries and thereby minimize the future need for differentiation.[159] In other words, the ends may in this case justify the means.

[154] Doelle (n 151) at 11.

[155] Paris Agreement (n 141) article 13.11.

[156] ibid articles 13.1-2 and 13.12.

[157] Anna Huggins and Md Saiful Karim, 'Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime' [2016] 5(2) Transnational Environmental Law 427–448 at 428.

[158] Bodansky (n 128) at 300.

[159] Doelle (n 151) at 12.

4.3. Summary

The Kyoto Protocol assumes a top-down approach to climate change regulation. Hard targets were set for those parties that were included in Annex B to the Protocol and developing countries were free of obligations because of their need for economic development. Hence, the Kyoto Protocol continued to build on the rigid approach to differentiation that the UNFCCC initially had created. To make the Kyoto Protocol more attractive to developed countries, certain flexibility mechanisms were introduced that would facilitate emissions reductions wherever the marginal cost would be the lowest. However, loopholes in the system proved problematic and the flexibility schemes lost credibility. The Kyoto Protocol only ended up accounting for a minor part of global emissions since major emitters like China and India were excluded and the United States never could agree to this. The rigid top-down differentiation seemed to have been the major contributing factor to the failure.

A new track of negotiations was initiated for long-term action post-2020. The Copenhagen Accord, despite being a legal failure, successfully instilled a new paradigm that infused future negotiations with optimism. The Paris Agreement could subsequently commit all parties to a legally binding treaty that promotes mitigation of GHG emissions by all signatories. The bottom-up approach adopted with the Paris Agreement represents a much more open-ended system that truly is flexible. Each party contributes by submitting targets at their own discretion through so-called NDCs. However, concerns regarding the compliance of the Paris Agreement, i.e. that states will reach their set targets, have been debated.

5. Conclusions

It was stated in the introduction that the purpose of this paper was to be fulfilled by answering a set of questions that were formulated as follows:

- *How has the CBDR-principle emerged in the international climate change regime and what was its original purpose?*
- *How is the principle of CBDR operationalized in regulatory climate change instruments and how has it affected the climate change negotiation process in general?*
- *Why, if at all, is the principle of CBDR needed and what role does it have in the current and future climate change regime?*

In the following, summarizing answers will be provided to these questions and discussions on what conclusions can be drawn will follow each section.

5.1. The Emergence of CBDR and Its Original Purpose

How has the CBDR-principle emerged in the international climate change regime and what was its original purpose?

Looking at the evolvement of CBDR and how it has emerged in the climate change regime, it seems clear that the main reason for why this principle gained traction to begin with was the huge gap in economic development between the so-called developed and developing countries. The developed world had built their wealth at the expense of developing countries, mostly due to colonization and thereby been able to capitalize on industrialization. Political pressure started to mount when developing countries wanted to establish a 'new international economic order'. The NIEO-movement demanded concrete differential treatment in terms of assistance and regulatory exemption, i.e. leniency on implementation. Thus, when the following UN Conference on Human Environment in Stockholm took place, in 1972, the materializing principles of accommodating national circumstances when addressing shared environmental concerns were not completely unfamiliar. Subsequently, in the 1980s, the Brundtland Commission coined the term 'sustainable development' which coupled the issue of economic

inequality with environmental degradation even further. As did the Noordwijk Declaration, which also exemplifies the evolvement of climate regulation at the time. Moreover, there was a growing polarization between developed and developing countries that would come to influence the structure of the coming framework.

Between 1990 and 1992, comprehensive negotiations took place under the auspices of the INC to reach an agreement on the upcoming climate change conference in Rio de Janeiro. A framework approach was used to attract a wide ratification level, which also turned out to be successful. The negotiations continued to reflect the divide between developing and developed countries that had emerged in the preceding negotiations. Early on, the CBDR-principle was generally accepted, but discussions remained on how it was to be incorporated into the UNFCCC. Developed countries were worried that the concept of CBDR would have too far-reaching implications, but still, the CBDR-principle was given quite substantial regard considering that concrete differentiated commitments were accepted in the negotiating working group.

The outcome of the negotiations resulted in the UNFCCC, which was adopted by the parties in May 1992, and the Convention came to express the CBDR-principle in several ways. Most significantly, it was affirmed as a leading principle in article 3.1, under which the ultimate objective of the UNFCCC – stabilizing the climate by reducing anthropogenic GHG emissions – is to be achieved through. Parties are to protect the climate 'on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities', which is a typical example of contextual differentiation. Besides this, differentiation that is relative to the specific situations of countries is also noticeable in the preamble to the UNFCCC. Moreover, the preamble notes that developed countries are accountable for the most part of past emissions and that developing countries should have room to develop. Recalling the UNGA resolution,[160] this historical responsibility, although not quite clear on which legal effect it would have, was thereby enshrined into climate regulations.

Concrete differentiation was incorporated under article 4 of the UNFCCC, wherein the commitments of developed nations were explicitly more demanding than they were for developing countries. Hence, strict differentiation in the central obligations of the UNFCCC sent a strong signal of which direction the operationalization of CBDR would develop into.

[160] Text to n 77 above.

Financial mechanisms also accommodated the principle of CBDR, but more so in a procedural (rather than substantial) regard. Furthermore, Annex II-parties must assist developing countries in fulfilling their communication requirements under the UNFCCC. It has also been argued that the historical responsibility of climate change is admitted in the UNFCCC, which probably strengthened the position of developing countries in their agenda.

The original purpose of the CBDR-principle, at the time of constituting the climate change regime, must surely be different depending on which perspective is adopted. On the one hand, for developed countries that recognized the early science on climate change, the concept of CBDR presumably represented a fair trade off for getting the larger developing countries (like BASIC) to engage in climate change talks and ultimately ratifying the UNFCCC at all. On the other hand, for developed countries whose economies were strongly dependent on fossil fuels, like the United States, CBDR was perhaps more considered a threat to their economic superiority since it partly aimed at levelling the playing field. For the very same reason, the BASIC countries probably saw an opportunity to use the momentum that the dialogue on CBDR had created and thus try to get on a more equal economic footing with the leading economies. For the AOSIS, who were facing the most adverse effects of climate change, the principle must have been necessary as leverage to get major economies to accept responsibility for the situation and thus take a proportionate share of action. Objectively, however, it is probably fair to say that the original purpose of CBDR was to offset the inequalities between countries that had developed in the post-war era while simultaneously trying to involve as many nations as possible in addressing the common concern of global warming. Although the principle was introduced to the climate change regime as a rather blunt instrument, which even seemed to further polarize the dialogue between countries, it is clear that the original purpose of the principle must be seen in the light of the interests of the various parties. Not surprisingly, these interests were essentially of economic nature.

5.2. Operationalization of CBDR and Its Effects on Climate Change Negotiations

How is the principle of CBDR operationalized in regulatory climate change instruments and how has it affected the climate change negotiation process in general?

The three main regulatory instruments that govern the climate change regime and that have been presented in this paper are the UNFCCC, the Kyoto Protocol and the Paris Agreement. The UNFCCC constitutes the basis for all subsequent regulation and, looking at article 3.1, it clearly expresses that the principle of CBDR is fundamental to the work of protecting the climate system. Even though the CBDR concept was extended to consider the 'respective capabilities' of countries, which contextualizes the principle, it is probably safe to say that the UNFCCC operationalized CBDR in a very divisive and concrete fashion. The parties to the UNFCCC were divided into either Annex I or non-Annex I countries and the central obligations of the treaty, primarily the commitments to mitigate GHG emissions according to article 4, were reserved exclusively for developed countries. Furthermore, it has been argued that the leadership imposed on developed countries (by having to 'take the lead in combatting climate change') meant a 'double burden' since their responsibility to decrease fossil fuel emissions then also needed to include developing country emissions.[161] This may be a slightly far-reaching conclusion considering how the outcome of the UNFCCC was implemented in practice, but it is definitely clear that CBDR was the reason for the established dichotomy of developed/developing countries, which then became the constitutional model that future negotiations would follow.

The Kyoto Protocol strengthened the principle of CBDR as it had come to be expressed in the UNFCCC. In fact, the operationalization of CBDR in the Protocol probably represents the most rigid application of the principle to date.[162] The Kyoto Protocol meant further commitments for countries included in Annex I/B,[163] while developing countries would have no restrictions with

[161] Michael Weisslitz, 'Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context' [2002] 13(2) Colorado Journal of International Environmental Law & Policy 473-509 at 483.

[162] ibid.

[163] Annex I under the UNFCCC is basically the same as Annex B to the Kyoto Protocol. See n 100 above.

respect to GHG emissions. And it was all done in the name of CBDR. Historic responsibility and current capabilities of addressing this issue was still the prevalent approach to the problem, instead of embracing a more comprehensive environmental approach. Moreover, there was even differentiation between developed countries as to what level of reductions that each of these countries had to commit to, and the arbitrariness in deciding these targets was striking. In an attempt to make the Protocol slightly more attractive to those countries that were subjected to emission targets, various flexibility mechanisms were introduced that were meant to facilitate the implementation. This flexibility, in an already non-flexible system, would lead to many problems. Due to the differentiated regulation of CEITs and the accompanying 'hot air', the whole emissions trading system would come into question.

The operationalization of CBDR in the Kyoto Protocol could almost be described as a failure in three stages. Firstly, the harsh negotiation climate between developed and developing countries, which was brought on by the unyielding application of the CBDR-principle, forced developed nations into concrete emission targets in line with a top-down methodology of regulation. Secondly, these concrete emission targets were arbitrarily determined and altogether too low to reach the overriding objective of the negotiations, i.e. a stabilized climate system. Finally, probably due to concerns that the balance of economic power would be affected to the detriment of the United States, the largest emitter at the time could ultimately not accept and ratify the Kyoto Protocol.

In the wake of Kyoto, and highly due to the operationalization of the CBDR-principle, there was an increasing stalemate in negotiations which was at its peak by 2007. A total breakdown seemed to be the remedy that was needed to productively move forward in negotiations, and as it turned out, the Copenhagen Conference had to take the fall. The resulting Copenhagen Accord was more of a political than legal document, but nevertheless, the Durban Platform subsequently injected optimism and confidence in a more flexible system that was embracing more of a 'bottom-up' approach. Accordingly, the Paris Agreement eventually adopted this approach and CBDR was operationalized in a much more contextual manner than before.

While the two different models of top-down and bottom-up regulation are generally regarded as just different methods of approaching the climate change problem, it should be noted that the underlying operationalization of CBDR also corresponds to each method. In fact, the operationalization of CBDR has obviously been a key driver in the development of the climate change regime and probably the main underlying reason for the entire system change. Such an

insight would unquestionably increase the importance of understanding how CBDR may develop in the future and its general significance for the climate change regime.

5.3. The Current and Future Role of CBDR

Why, if at all, is the principle of CBDR needed and what role does it have in the current and future climate change regime?

Evidently, CBDR has played a major part in the development of the negotiations in the climate change regime. Historically, the principle has been used as a tool to alleviate economic gaps between countries, while the ambition to solve the climate change issue has been the main objective. From a climate perspective, this has proved unfortunate. The criticism directed against CBDR has primarily been that it has made it easier for developing countries to grow in a much too carbon friendly direction, which then undermines the progress on emission cuts made in the developed world. If developing countries can allude environmental liability, it will be difficult to achieve the overarching goal. However, another major problem with CBDR is as much its detrimental effect on developed countries' 'willingness to pay'. The negotiated regulatory instruments prior to the Paris Agreement have been demonstrably unsuccessful both because of a restrained approach from developed countries and all too scarce commitments from developing countries. However, when the approach to tackling the climate change issue (and to CBDR) changed, new opportunities were presented.

In the current regime, concrete differentiation has been omitted in the provisions that constitute central obligations under the Paris Agreement. Instead, the objective of the Paris Agreement, to keep the increase in temperature 'well below' 2 ºC, is intended to be achieved through NDCs, which all countries, regardless of their level of development, must regularly communicate to the COP secretariat. However, with these 'contributions', each country is free to choose its own target in terms of emissions cuts. Moreover, the overall meaning of CBDR has to some extent been further contextualized with the addition of 'in light of different national circumstances' to the principle. Implementation of commitments is also contextually differentiated insofar as the review of the submitted information, i.e. the transparency framework, takes national circumstances into consideration, and that support in the form of finance, technology and capacity-building is provided to facilitate the requirement of communicating NDCs according

to article 4 of the Paris Agreement. In this sense, it seems as if CBDR now has the potential to become more procedurally weighted. However, what this possibility for differential treatment implies in practice is still unclear. Nevertheless, it is evident that the system of NDCs mainly seem to rely on some sort of 'self-differentiation' principle.[164] Hence, unfortunately, some familiar question marks regarding the efficacy of the instrument are recurring, seeing as it already has been recognized that the current contributions of the parties are not sufficient to reach the objective of the Paris Agreement. A counter-argument to such concerns may be that the levels of ambition of the NDCs are intended to constantly increase, which is even inscribed as a binding commitment in the Paris Agreement. If support regarding implementation can lead to a higher ambition for developing countries, like article 4.6 aims to accomplish, there are also a good chances of spinoff effects. Differentiation in the Paris Agreement by way of this new, modified CBDR-principle, can thus be said to facilitate prerequisites for a 'race to the top'. This should be contrasted with the outcome of the Kyoto Protocol, which rather meant a 'race to the bottom'.

The future role of the CBDR-principle is likely to continue to evolve in a more contextual direction. The only obstacle would be if developing countries obstruct the process in fear of losing the influence that the notion of CBDR previously has had on negotiations. The traditional dichotomy that has ruled differential treatment, however, needs to disband. It has been recognized that a more particularized distinction is needed among the beneficiaries of CBDR,[165] but such a distinction needs to be operationalized as well. Much of the details of the Paris Agreement must still be outlined by the COP and there is room for regarding a more nuanced form of CBDR operationalization in this process. Furthermore, an empirical observation is that the international political climate progressively seems to be moving away from a traditional state-oriented order, thus presumably making more room for non-governmental organizations in the climate change negotiation process. Hence, a logical development would be to conceptualize elements of CBDR that took such realities into account.

[164] cf Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' [2016] 110(2) American Journal of International Law 288-319 at 300; Daniel Bodansky and Lavanya Rajamani, 'The Evolution and Governance Architecture of the United Nations Climate Change Regime' in Urs Luterbacher and Detlef F Sprinz (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention* (forthcoming, 2nd edn, MIT Press 2016) at 18.

[165] Section 2.3. above.

A continued flexible approach is the most reasonable way forward for the concept of CBDR. One of the primary concerns when the concept started to develop was the participation of developing countries in climate negotiations. Ironically, the concept of CBDR almost had the opposite effect since developed countries were discouraged to make commitments when a rigid differentiation model was the norm. Thus, in the future regime, more adaptability and flexibility in country commitments will ensure a greater inclusion of states (and perhaps non-state actors) in working on reducing GHG emissions. Furthermore, as the threat of climate change is becoming increasingly imminent, more countries will probably commit to more substantial action on a voluntary basis.

Also, shifting energy sources present new opportunities for the future dynamics of CBDR. From a legal realistic point of view, concepts in international law are constantly being reminded of the political realities it operates in, and CBDR is no exception. Major emitters of GHGs, like China and India, have much to gain economically in transforming their energy needs to be met by renewable energy sources instead of fossil fuels. A challenge for CBDR, however, is to make these emerging markets help even the weakest countries to adapt to climate change. Adaptation is likely to become an increasingly important aspect that the climate change regime and CBDR need to work towards addressing further.

Moreover, the perception of a legal concept like CBDR has proved to be highly determinant of its effects. If the current contextual model of approaching the CBDR concept is perceived to be non-excluding and formally equal, self-differentiation may have an empowering effect. In this regard, the fundamental ‘dilemma’ of international law that this paper initially noted, i.e. the tension between national sovereignty and submission to binding commitments, can thus to some extent be considered resolved. Parallel to the emergence of other key actors than states, national sovereignty is gaining more space in the new regime. Hopefully, this can also underpin an increased sense of empowerment among countries and lead to more ambitious efforts. If such a sense of empowerment turns out to be successful, common but differentiated responsibilities in the climate change regime ought to be a natural way forward to refining climate change differentiation.

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