

6 CBDR as a Principle of Inspiring Actions rather than Justifying Inaction in the Global Climate Change Regime

Achala C. Abeyasinghe & Gilberto Arias

Abstract

The principle of common but differentiated responsibilities (CBDR) recognises the existence of a common environmental goal and the need to differentiate between countries in the actions required to achieve that goal. The CBDR principle is at the centre of the current negotiations under the United Nations Framework Convention on Climate Change's Ad-hoc Working Group on the Durban Platform for Enhanced Action, which deliberates on multilateral arrangements for the post-2020 period. This contribution analyses the CBDR principle in the context of the current climate change regime, and discusses the ways in which the principle can be applied in order to encourage increased global actions to address climate change in the post-2020 regime. It argues that the CBDR principle can be operationalised for increased climate action by focusing not only on differentiated responsibilities, but also on the respective intrinsic and supported capabilities of countries in the new regime.

A. Introduction

The principle of common but differentiated responsibilities (CBDR) is one of the cornerstones of the global climate change regime. The CBDR principle appears explicitly in the United Nations Framework Convention on Climate Change (UNFCCC) and informs the associated Kyoto Protocol. The principle has been applied to climate change actions by states parties through various UNFCCC decisions. The increasing impacts of climate change prove that no state is a sealed-off island with impassable boundaries. The interconnectedness and complex nature of the climate change problem requires each state to bear responsibility for all its actions and inaction. The key question to answer is how global responsibilities should be divided between

and encouraged within nation states. The UNFCCC applies CBDR for this purpose.

The CBDR principle recognises the existence of a common environmental goal and the need to differentiate between countries in the actions required to achieve the said common goal. It includes two fundamental elements: the first concerns the common responsibility of states to protect the environment at a global level; the second recognises states' different obligations in the actions required to achieve the common goal. The ultimate objective of the UNFCCC is the "... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."¹

The challenge for the UNFCCC is in devising enough action under its terms and among its states parties so as to achieve this ultimate objective. As such, the interpretation and application of CBDR have been heavily debated in UNFCCC negotiations. This debate has found its place at the core of the current negotiations undertaken by the Ad Hoc Working Group on the Durban Platform for Enhanced Action, which deliberates on multilateral arrangements for the post-2020 period.

The aim of this article is to analyse the CBDR principle in the context of the current climate change regime and discuss the ways in which the principle can be applied in order to encourage increased global actions to address climate change. The article argues that the CBDR principle can provide profound and compelling reasons for countries to be responsible and act in a certain manner. The article also argues that the CBDR principle can facilitate a basic and inevitable logic to emphasise that states have to act in a certain manner, and to guide countries in selected directions for safeguarding the climate for future generations.

The article is organised into three main parts. Firstly, it analyses the theoretical basis of the CBDR principle; secondly, it describes the evolution of CBDR in the global climate change regime; and thirdly, it sets out how CBDR could be used in a future regime to encourage more common global actions, and presents conclusions.

1 Article 2, UNFCCC.

B. Theoretical Basis of the CBDR Principle

The CBDR principle has two main elements. The first is *common responsibility*, which describes the shared obligations of two or more states towards the protection of a particular environmental resource.² Common responsibility is likely to apply where the resource is shared, under the control of no state, or under the sovereign control of a state, but subject to a common legal interest, such as biodiversity or climate.³

The second element is *differentiated responsibility*, which recognises the different obligations of states in the actions required to achieve the common goal – protecting the environment. In general, the differential standards are set on the basis of a range of factors. These include historical contributions to the evolution of a particular environmental problem; the ability and capacity to prevent, reduce and control the threat by taking response measures; special needs and circumstances; and states' future economic development needs. In most of the international environmental legal regimes, differentiated responsibility places weightier environmental obligations and standards on developed countries and, thus, brings a unique proposition to international law by establishing substantive equality.⁴

Although the idea of differentiated responsibilities predates the 1992 Rio Declaration, CBDR was first clearly articulated by Principle 7 of that Declaration, which reads as follows:

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

The mounting number of international instruments that recognise CBDR indicates that it is moving from being a 'soft' international legal principle to an increasingly robust component of international law. But without further

2 Sands (2003:286).

3 CISDL (2002).

4 *Substantive equality* emphasises the treatment which is based on different factors and takes into account the welfare of disadvantaged members of the society. The core idea of this concept is that entities that are alike should be treated alike, and those that are different should be treated differently according to their different circumstances.

operationalisation, CBDR does not by itself generate any legal obligations for states: it is principally an obligation to cooperate in developing international law.⁵ CBDR has no strictly fixed content,⁶ and, therefore, has to be elaborated to have legal force.

Most international legal obligations come from customary international law or treaties. For a principle to become legally binding as part of customary international law, there needs to be widespread state practice adhering to the principle, and states need to act out of legal obligation. Most commentators agree that these two requirements have not been met for CBDR, and that CBDR is therefore not in itself legally binding.⁷ On the other hand, once treaties operationalise the principle, as many multilateral environmental agreements do, states parties to these agreements become legally bound by them.

Recent literature on the CBDR principle demonstrates that it has attracted much attention, especially in relation to agreements to combat transboundary environmental problems.⁸ Hey notes that the CBDR principle in international environmental law entails that, while pursuing a common goal, states take on different obligations, depending on their socio-economic situation and their historical contribution to the problem at stake.⁹ Rajamani notes that, by building on the acknowledgement by industrial countries that they bear the primary responsibility for having created many global environmental problems and, hence, by taking into account the contributions of states to environmental degradation in determining their levels of responsibility, the principle recognises broad distinctions between states, whether on the basis of economic development or the level of consumption.¹⁰ However, Birnie and others suggest that the CBDR principle is not intended to be a permit for developing countries to pollute – even though obligations of developing states are conditional on the provision of technical and financial assistance from developed country parties.¹¹

5 Birnie et al. (2009:133).

6 Honkonen (2009:258).

7 Sands (2003:Ch. 6); Bodansky (1993:501–502, in Stone 2004:299–300).

8 Environmental problems that span administrative boundaries and are felt regionally and globally.

9 Hey (2009).

10 Rajamani (2005:133).

11 Birnie et al. (2009).

C. *Evolution of the CBDR Principle in the UNFCCC*

The climate change problem is a global phenomenon that has been created by the use of the global atmosphere as a free good, and – in part because of a lack of foreseeability – without consideration of the consequences for the environment, the economy or future generations. The UNFCCC aims to address this problem by stabilising greenhouse gas (GHG) concentrations in the atmosphere “at a level that would prevent dangerous anthropogenic interference with the climate system”. The Convention aims to do so “... within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”¹²

The formulation of CBDR in the UNFCCC is noticeably different from other Rio Conventions, namely the Convention on Biological Diversity and the Convention to Combat Desertification. Unlike Principle 7 of the Rio Convention, Article 3(1) of the UNFCCC does not refer to the greater contribution of developed country parties to climate change, and emphasises respective capabilities together with the principle of CBDR.¹³

As such, Article 3.1 of the UNFCCC reads as follows:

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.

In addition to Article 3.1, the preamble of the UNFCCC acknowledges –

... that the 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.

Accordingly, developed country parties should “take the lead in combating climate change and the adverse effects thereof”. The preambular paragraphs of the UNFCCC also recognise that the largest share of historical and current global emissions of GHGs has originated in developed countries, and that per capita emissions in developing countries are still relatively low. The

12 Article 2.

13 Rajamani (2005:101).

common responsibility element of the CBDR is reflected in the preambular paragraphs with phrases such as “the Earth’s climate and its adverse effects”, which is a “common concern of humankind”.¹⁴

Paragraph 18 of the Preamble requires “... developed countries to take immediate action ... as a first step towards comprehensive response strategies at the global, national and where agreed, regional levels.” As such, under the UNFCCC, developed countries have differentiated, higher responsibilities with respect to assistance (e.g. financial assistance or technology transfer¹⁵), implementation, and central obligations (e.g. Annex I emission reduction commitments) towards the ultimate aims of the Convention. This higher responsibility emanates from their historical contributions to the problem and their greater respective capability for action; however, debate on the issue is complicated because of the evolving GHG emission profiles of developing countries – at present, the world’s largest emitter is a developing country.¹⁶

Under the UNFCCC, all parties are subject to general commitments to achieve its central objective: they are required to compile an inventory of their GHG emission and submit reports, known as *national communications*, on actions they are taking to implement the Convention.¹⁷ However, in accordance with the CBDR principle, although the core elements of the national communications for both Annex I and non-Annex I parties deal with information on emissions, the removal of GHGs, and details of the activities each party has undertaken to implement the Convention, elements from Annex I parties have to contain information on policies and measures,¹⁸ in addition to the information on national circumstances; vulnerability assessment; financial resources and transfer of technology; and education, training and public awareness, which should be submitted by all parties.¹⁹ Moreover,

14 UNFCCC, Preamble.

15 See *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, Decision 24/CP.7., UNFCCC/CP/2001/13/Add.3, available at <http://unfccc.int/resource/docs/cop7/13a03.pdf>, last accessed 29 October 2009.

16 UN Statistics, available at <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=749&crd=>, last accessed 15 April 2013.

17 Article 4(1) and Article 12.

18 Article 4(2)(a) and (b).

19 Most of the 41 Annex I parties have submitted four National Communications since 1994. Since 1996, Annex I parties have also been required to submit an annual inventory of their GHG emissions to the Secretariat. Separate reporting and review procedures have been established for Annex I GHG inventories. For submitted

Annex I parties that have ratified the Kyoto Protocol²⁰ are required to include supplementary information in their national communications and their annual inventories of emissions and removal of GHGs to demonstrate compliance with the Protocol's commitments. In terms of timetables, Annex I parties are required to submit information on their national inventories annually, and to submit national communications periodically according to dates set by the Conference of the Parties (COP). These measures seek to articulate that "developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions", as mentioned in Article 4(2)(a) of the UNFCCC. Under the Convention, developing countries submit their national communications within four years of the initial disbursement of financial resources to assist them in preparing such communications.²¹ At COP16, with guidelines adopted at COP17, developing countries agreed to report updates of national GHG inventories, including a national inventory report and information on mitigation actions, as well as needs and support received.

Moreover, the Convention supports CBDR in terms of the provision of financial assistance to developing countries. The Convention establishes differentiated "general obligations" on developed countries to assist developing countries in mitigation and adaptation through its financial mechanism, while the Kyoto Protocol obliges Annex I countries with quantified emissions reduction obligations. Additionally, both the UNFCCC and the Kyoto Protocol establish general obligations of cooperation towards technology transfer, and provide developing countries with financial assistance for mitigation and adaptation. Article 10 of the Kyoto Protocol explicitly requires taking the CBDR and specific national and regional development priorities, objectives and circumstances into account: the Article obliges parties to engage in management and other programmes to reduce GHG emissions on the basis of the CBDR principle.

National Communications, see UNFCCC's *National Communications Annex I* available at http://unfccc.int/national_reports/annex_i_natcom/items/1095.php, last accessed 8 May 2013.

20 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (Kyoto Protocol).

21 For National Communications submitted by non-Annex I states parties, see UNFCCC's *National Communications from Non-Annex I Parties*, available at http://unfccc.int/national_reports/non-annex_i_natcom/items/2716.php, last accessed 8 May 2013.

The strong application of the CBDR principle in the climate change regime has led some to argue that the CBDR is “best reflected” in the climate regime,²² while others consider the climate regime to be the “clearest attempt to transform [CBDR] from a legal concept into a policy instrument”.²³ Some see the UNFCCC as the “most dramatic stage”²⁴ for CBDR while some refer to the Kyoto Protocol as “CBDR in its most rigid application”.²⁵

As the climate change negotiations evolve, the focus on CBDR has grown stronger. Parties have sought to reframe discussions, strengthen their negotiating positions and ensure a fairer outcome by invoking different elements of CBDR. As a result, the elements of historical responsibility as well as respective capabilities have become a central part of the current climate debate. While some say that the developed countries should take greater responsibilities due to their historical contributions to the problem,²⁶ others argue that climate change is indeed a collective global problem that can only be combated if all countries put in every effort to resolving the problem.²⁷ In particular, for most countries that are vulnerable to climate change, the main argument is that all the parties need to act in order to achieve a stabilisation of GHG concentrations in the atmosphere, so that the problem will not create further damage to the countries in question.

D. Application of CBDR in a Future Regime

Any metric ton of GHG emissions emitted anywhere in the world will affect the climate system equally. During 2012, extreme weather and climate events in the form of hurricanes, heat waves, droughts, fires, and flooding have been recorded all around the world. Just in the second half of 2012, millions of people have been affected across the globe – from Europe suffering from the worst cold snap in a quarter century; extreme flooding in

22 Rajamani (2005:176).

23 Joyner (2002:358).

24 Stone (2004:276, 281).

25 Weisslitz (2002:473, 483).

26 Declaration on 21 November 2012 by Ministers of the BASIC countries (Brazil, South Africa, India and China), available at <http://www.indianembassy.org.cn/newDetails.aspx?NewsId=381>, last accessed 15 April 2013.

27 See IEA (2012) and other International Energy Agency (IEA) reports from 2012 on.

Australia, Brazil, China, and the Philippines; to drought in the Sahel.²⁸ While Hurricane Sandy caused billions of US Dollars' worth of damage in the United States (US), Australia suffers from record-breaking heatwaves.

Evidently, the most crucial prerogative under the current climate policy regime must be the urgent implementation of global climate action policies, understood as climate action programmes in general, attending to, *inter alia*, mitigation and adaptation policies directed to low-carbon development. The international discussion is currently converging around a 2°C (3.6°F) target (corresponding to a concentration of GHGs in the atmosphere of approximately 450 parts per million (ppm) of carbon dioxide equivalent compared with pre-industrial times, to avoid unmanageable climate risks. The Intergovernmental Panel on Climate Change scenarios suggest that, if GHGs could be reduced (in relation to 1990 levels and without Land Use, Land-use Change and Forestry – LULUCF) by 25–40% by 2020 and by 80–95% by 2050, global warming could be stabilised at the 2°C threshold. To date, several countries have announced possible GHG emission limitations and reductions, but most argue that even the most ambitious of those pledges are not sufficient to achieve the Convention's ultimate objective.²⁹

Faced with the overwhelming evidence of enormous impact costs emanating from current warming, even if it is a fraction of the 2°C target the multilateral process has identified as a ceiling, climate action becomes an imperative when we note the increase in incidence in just the 2000–2009 decade, where, even if focusing only on flood and storm events, Latin America has seen a tripling of incidents compared with those that occurred between 1990 and 1999.³⁰ More often, extreme climate events remind us that enhanced and bold actions are required from all countries.³¹ It is clear that countries need to act very quickly in taking action to cut emissions and to

28 For a timeline on extreme weather events in 2012, see <http://insights.wri.org/news/2012/09/timeline-extreme-weather-events-2012>, last accessed 1 February 2013.

29 See UNEP Gap Report 2012 at <http://www.unep.org/pdf/2012gapreport.pdf>; last accessed 15 April 2013.

30 See e.g. UNEP & ECLAC (2010); see also EM-DAT, the Centre for Research on the Epidemiology of Disasters (CRED) International Disaster Database, available at <http://www.emdat.be/database>, last accessed 8 May 2013.

31 As Mr Kapil Sibal, the Indian Minister of Science and Technology and Head of the Indian Delegation, mentioned in his closing statement in Bali, “It is not a question of what you will commit or what I will commit. It is a question of what we will commit together to meet that challenge!”; authors’ personal notes.

close the mitigation gap before all opportunities³² evaporate. The science is clear and continues forecasting that it is still possible to correct the global GHG emissions trajectory and avert irreversible climate change, but time is fast running out.

Many developing countries have stated that a temperature increase of 2°C on average would have devastating impacts on their countries and economies and have, therefore, called for GHG concentrations to be limited to well below 350 ppm of carbon dioxide equivalents, and a temperature increase limited to below 1.5°C. These countries have also called on Annex I countries to undertake considerably more extensive domestic emission reductions – more than 40% by 2020, and 95% by 2050 – as a contribution to this goal.

Achieving such high expectations requires greater contributions to collective efforts. In order to stabilise climate change to the level that science requires, it will be necessary not only to reduce emissions in high GHG-emitting countries radically, but also to diverge considerably from a conventional, fossil-intensive and highly GHG-emitting development trajectory in developing countries. However, the required global resolve will only materialise within an equitable framework that reflects leadership by developed countries and provides new strategies, tools and resources to incentivise the facilitation of environmentally friendly technologies and scientific know-how to poor and vulnerable developing countries, and especially climate action by all. This makes the ongoing climate negotiations even more important, since they will determine how CBDR is operationalised in the climate change regime, with a view to truly global, yet differentiated, climate action.

E. Countries' Common Responsibility and Common Purpose

Common responsibility in addressing the global climate change problem is rooted in the principle of cooperation, a principle that posits that states are obliged, in the spirit of solidarity, to cooperate in preventing the climate change problem. The element of common responsibility that requires states to take action driven by a sense of common rather than national interest exerts an interest as well as a pressure on countries that were or are reluctant to take

32 See http://climatechange.worldbank.org/sites/default/files/Turn_Down_the_heat_Why_a_4_degree_centrigrade_warmer_world_must_be_avoided.pdf, last accessed 1 February 2013.

measures to protect the environment. Such interests and pressures based on the international community's common concern to combat the global climate change problem, for example, could be exerted on the US to take more responsibility and on major developing countries to take more actions to mitigate their rapidly accelerating GHG emissions.

It is now evident that climate change and its impacts present real threats to all states' development potential and development opportunities. For example, the DARA climate vulnerability monitor demonstrates with piercing clarity that the least-developed countries will suffer increasing economic losses unless all countries rapidly reduce GHG emissions. The DARA report³³ confirms many earlier scientific assessments, including those by the Intergovernmental Panel on Climate Change, but adds hard economic numbers to the earlier qualitative conclusions. According to the report, least-developed countries will lose 8% of their gross domestic product by 2030.³⁴

As discussed, climate change impacts affect all countries, albeit in different forms, and require each state to plan, prioritise and implement particular adaptation and resilience strategies affecting its particular population, industry and resources. But because of the cross-cutting nature of climate change impacts, states are forced to give immediate priority to the rebuilding of destroyed infrastructure, usually as a matter of emergency, and so must postpone or subordinate investment in new infrastructure or in new resilient infrastructure for the welfare of the country, as studies have noted for Latin America.³⁵ Thus, this regular prioritisation of emergency repair and replacement comes at the cost of other state actions which may, *ceteris paribus*, have proven more efficient in national development in the longer term. Similar examples can be seen in other countries such as Bangladesh and Pakistan, particularly in respect to vulnerability to flooding or storm surges associated with annual climactic cycles. This is especially burdensome for smaller developing countries, in that repair and adaptation costs can amount to a far greater proportional expense than in larger economies.

Indeed, an informed, sensible argument is that, inasmuch as impact costs are the principal expense to be borne by developing countries from climate change, then these are minimised in a regime with collective, high-ambition strategies to which all countries contribute substantially, rather than in a

33 See <http://daraint.org/climate-vulnerability-monitor/climate-vulnerability-monitor-2012/report/>, last accessed 18 April 2013.

34 (*ibid.*).

35 See UNDP & ECLAC (2012:53).

collective low-ambition regime to which countries contribute nothing.³⁶ This control of the overriding burden of impact costs can be construed as an alternative aim of the Convention: if the impact costs could be managed, there would be no need for an international convention on stabilising emissions; the Convention would simply be on adaptation and impact costs. In this sense, beyond the equitable, beyond the transboundary elements that were discussed at the beginning of this article, the imperative for global climate action also needs to include support from a simple economic angle, applicable to each country, in that a disposition to inaction invites a subsidy to the principal cost of climate change. While it is true that these costs will not fall to all countries equally, it is entirely inequitable to subsidise those costs on others, or for future generations.

It is clear that national, domestic climate action policies which do not curb emissions imply transboundary effects: not only in connection with emissions, but also in the suboptimal mitigation efforts by any country. This also implies effects and costs which will impinge not only on the particular country's development potential, but also on the development priorities of every other country on the planet. This is perhaps not an innovative element as multilateralism in the climate action space has to deal with the domestic political temptation to a 'free ride', that is, to do as little as possible domestically and to benefit from the actions of others. Yet, as we have noted, inaction or 'free-riding' attracts domestic impact cost consequences as well.

Following from this, every nation's *common* responsibility in respect of climate action must also include a responsibility not only to its own future development paths, but also to the future development paths of all nations. This argument is clearly stronger among smaller states, as larger states may decide that their internal development priorities override any consideration – even if such policies will ultimately drive up their own internal impact costs. However, as proposed here, impact costs will outstrip the economic benefits of mitigation-averse policies, especially in the context of a globally interconnected mercantile system, where national prosperity – even by larger states – is ultimately linked to economic development in other states.

Doubtless, we will find different positions on where a given state's actions have affected the development of another, or where a second state has contributed, but these points do not detract from a more generalised view that, indeed, on an abstract analysis, conscious climate action by one state which

36 See Garibaldi (2009).

actively contributes to limiting the development of others is unconscionable. This much is indeed *common* to all states.

However, it is also true that this concept of *common responsibility* to action cannot be understood to be equal amongst all countries, as climate change action is intimately related to levels of national development. The imperative may be common, but the capability to redirect economies is not within the immediate grasp of all countries. So, as has been expressed in negotiations,³⁷ universality of application cannot mean uniformity of performance, as the capacity for deviation from pre-established growth pathways, given the economic and developmental constraints faced by developing countries, is clearly different between developed and developing countries. If we look to the components of an effective, global regime under the UNFCCC's principles, and especially since the agreement at the Durban COP17, which sought a more effective and inclusive regime while still remaining faithful to the fundamental principles of the Convention, a pragmatic view should not preclude the fact that CBDR includes elements that are *common* to all nations. This much is clear from the earlier discussion herein on the CBDR principle.

F. Differentiated Responsibilities Based on Respective Capabilities

Since the 1990s, most climate negotiations related to CBDR have centred on the nature of differentiation between Annex I and non-Annex I countries, with the emphasis on burden allocation, support and action, and discussions of conditions for action between different parties. However, it has become evident from domestic political prerogatives and realistic emission projections that this focus is not enough.

How do we move away from a narrative primarily focused on burden allocation to one implying emphasis on climate action at all levels, while still preserving the precepts of CBDR?

37 See e.g. India and China's submissions to the Second Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP2), Workstream 2, March 2013; see also Opening Statements of ADP1 by India and others; available at <http://unfccc.int/bodies/awg/items/7398.php>, last accessed 9 May 2013.

Many³⁸ have argued that, given the seriousness of the global climate change problem, more common action is needed, without necessarily meaning that it would imply application of reciprocity where each country would be treated as having the same quantified obligations. More relaxed requirements from less-developed countries than developed countries should be accepted mainly to treat less-developed countries differently; this by and large has been in the spirit of the development of concepts in the UNFCCC, and is entirely consistent with the principal doctrine of CBDR and respective capabilities.

Over the years, it has become clearer that some countries or groups have more resources in contributing to the objectives of the global climate change action regime. Therefore, a concept which emphasises different treatments for different individuals or groups based on their respective capabilities will be fairer in deciding the treatment of law than a principle which treats everybody equally.

The seriousness of the global climate change problem also means that every country which has the capability for taking action has to do so, and it can be argued that addressing the climate change problem based on respective capabilities brings more justice to the climate change regime. Focusing more on respective capabilities justifies many commonly accepted arguments such as that the poor are the victims of and most vulnerable to environmental degradation without being responsible for it, and that the suffering increases due to their lesser capacity for adaptation to climate change. On the contrary, the fact that the developed countries suffer less from environmental degradation and bear more capacity for responding to environmental problems justifies greater levels of responsibility from them.

Unlike the element of historical responsibility, differentiated treatment based on capacity to respond is less contested by developed countries and much applied by international agreements, yet its articulation through negotiation has become more complex in an era where developing countries now in some cases emit more GHGs than many developed countries do.³⁹ It also seems that developed countries claim a leadership role in taking response measures to environmental degradation based on their capacity. For exam-

38 See e.g. Submission of 30 September 2008 to UNFCCC by Panama on behalf of Costa Rica, El Salvador, Honduras, Nicaragua and Panama, available at <http://unfccc.int/resource/docs/2008/awglca4/eng/misc05.pdf>, last accessed 2 May 2013.

39 See UN Statistics, available at <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=749&crid=>, last accessed 15 April 2013.

ple, at Rio, whilst disagreeing with differentiated treatment based on their historical responsibilities, the US agreed to take the leadership. When the US issued an interpretative statement to Principle 7 of the Rio Declaration, it attributed its acceptance of a leadership role to “industrial development”, “experience with environmental protection policies and actions”, and “wealth, technical expertise and capabilities”.⁴⁰

Much discussion during the life of the Convention has focused on the *differentiated* element of the CBDR principle. Yet this focus does little towards encouraging progressive climate change action and policies as it involves a narrative of burden allocation, which naturally results in a much more conservative approach to climate action under the Convention.

This stance cannot be faulted in the multilateral negotiation process because, in terms of international law, tremendous care is afforded to the concept of *precedent*. Under multilateral international law, there are few sources of custom; and, as noted under Article 38(1) of the 1946 Statute of the UN Chartered International Court of Justice,⁴¹ custom is a principal aid in the interpretation of the proper and legal application of international rules.

Thus, it is not surprising that the preponderance of practical interpretation of the principle of CBDR has been conservative, emphasising the differentiation of the responsibility rather than on the more proactive *common* element which needs to include some degree of domestic climate action initiatives within the global context. Ostensibly, the concern would be that, with practice and custom advancing largely the *common* elements of the concept of an interpretation, the differentiation of the responsibility may become diluted.

Under this sequence of logic, neither group of actors, i.e. neither Annex I nor non-Annex I countries, has an incentive to act at more than an absolute minimum, as it is clear under the aegis of *customary application* that any actions which are not reciprocal could be construed as becoming a baseline for the application of any legally binding regime under the Convention. Developed countries, whilst responsible for historical emissions, could not condone a regime where the lion’s share of current emissions would continue unchecked, as developing countries could not accept an interpretation of climate action which has shifted away from the differentiation inherent in the original concept.

40 1992 Rio Declaration.

41 Available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II, last accessed 18 April 2013.

Today, because of its particular architecture of differentiation of action and because of domestic political reasons arguably emanating from this architecture,⁴² the Kyoto Protocol covers less than 20% of projected global emissions and its effect has not tallied to a net reduction on global emissions.

The issue arising, as is clear by now, is that the political conditions for ambitious movement to low emission growth trajectories will not happen broadly in these circumstances. As is evident from many recent scientific reports,⁴³ the international community is still not doing enough to change emissions pathways so as to bring atmospheric GHG concentrations to levels projected to bring peak warming within 2°C of pre-industrial levels. How can we return to the original concept of CBDR with an interpretation which maintains the core balances inherent in the original formulation, but that will engender action, promoting hope towards a climate outcome consonant with the agreed intent of limiting global warming below 2°C, and above pre-industrial averages?

If we return to the original formulation of the CBDR concept, thinking positively about the construct and about its logical intent, it is clear that its intent is to limit GHG emissions under an agreed framework. This interpretation may be seen as contrary to arguments of atmospheric space, and equity thereto. However, *ceteris paribus*, the *common* descriptor towards responsibilities can only be interpreted as meaning that no country has a right to emit contaminants indiscriminately. This is part of the transboundary discussion we have seen above, and is, in essence, the source of the concept of *historical responsibilities*: it is unacceptable that any one country be construed as having a superior *right* over any other to emit anthropogenic GHGs, especially as the accumulated effects of those emissions impact all countries.

In this sense, returning to the concept of *respective capability* for the CBDR principle, an element of balance, of fairness, to the commonality of responsibility can be addressed. In this formulation, differentiation of responsibility seeks to attend, as much as possible, to the concept of *historical responsibility*, but *respective capability* seeks to temper the element of com-

42 See Byrd-Hagel Resolution of 25 July 1997, where the US Senate unanimously resolved to prevent the ratification of any international agreement that (1) did not require developing countries to make emission reductions, and (2) “would seriously harm the economy of the United States”; available at <http://www.nationalcenter.org/KyotoSenate.html>, last accessed 1 February 2013.

43 See IPCC (2007) and World Bank and International Energy Agency reports from 2009 onwards.

mon responsibility to what is just, or fair, within the development context of each country.

This view to action in climate change policy generally, as opposed to a stance of resultant inaction, is not a reinterpretation of the principles of the Convention; rather, it is a reading following the literal meaning of principles of equity and of CBDR and respective capabilities, namely that all countries share a common responsibility to climate action, though there is indeed a differentiation in the degree of response, that countries do have different capabilities, and that action needs to be undertaken accordingly.⁴⁴

With these ideas in mind, negotiations for any future agreement need to try to move from a focus on differentiation under CBDR – which could yield a logic of inaction, especially from the perspective of ‘free-riding’, domestic political objections, and a possibly narrow emphasis of differentiation aimed at burden transfer and action subject to conditions – to one building on common action based on respective capability, without losing the elements of differentiation so essential for a just approach to multilateral climate action.

Over the past few years, there have been numerous examples of valuable and ambitious climate action in circumstances far beyond the expected or anticipated ambit of a given nation. The underlying motivations are diverse, complex and subject to more development than can be discussed here, but two immediate, contrasting and perhaps surprising examples can be cited.

The first example to note was the pledge by the Dominican Republic at Doha COP18, being a commitment sanctioned under national law to reduce their absolute GHG emissions by 25% or more by 2030, while projecting per capita income growth by 140% in the same period, without a requirement or condition of support.

It should be noted that this commitment by a developing country – which is a vulnerable small island state – is enacted under national law, with no obligation to do so under international law.

A second example is in the State of California in the US, individually one of the top ten economies in the world, and the largest state in the US. In 2006,

44 See the submission to the UNFCCC’s Ad Hoc Working Group on the Durban Platform by Colombia, Costa Rica, the Dominican Republic and Peru, May 2012, available at <http://unfccc.int/resource/docs/2012/adp1/eng/misc03a01.pdf>, last accessed 1 February 2013.

California enacted legislation to cap its emissions at 1990 levels by 2020, with a long-term reduction goal of 80% from that figure by 2050.⁴⁵

Again, it has to be noted that this is a commitment to a developed country's state, and was enacted under domestic law, with no obligation to do so under any applicable federal law or international obligations, and indeed contrasting with the US's negotiating stance on climate action, which projects distance from commitments to climate change action policy.

To the extent that domestic political inertia, concerns over 'free-riding' and burden-transfer mentalities in a conservative reading of the current climate action regime tend to limit climate change action programmes, these examples are exceptional inasmuch as they overcame inertia and delivered truly ambitious and firm commitments to action. However, if we look at the CBDR principle with a view to action, why are the benefits of the Dominican Republic's plan so particular to that country, and why are more developing countries not moving this way? Moreover, in the case of California, why are more developed countries not moving this way? Whilst there are many other such examples, it is clear that the multilateral regime we seek to nurture has to function in a way that promotes these types of initiatives without deviating from the necessary global actions and fundamental principles of the Convention. These examples of ambitious climate action, beyond the prevalent legal requirements, should not be outlier examples.

In terms of what is *common* to all, but within the *respective capability* of each, without losing sight of the differentiated context of the overall responsibility for action, the construct of *common responsibilities* can be understood to mean that small economies do what they can, medium-sized economies do more, and large economies do the most of all – but all countries contribute to the purpose of the Convention, and all countries have to be part of the solution.

Moreover, even in the simplest commercial sense, a vital issue at stake is clearly that the impact costs of climate change under business-as-usual scenarios will far outstrip economic growth⁴⁶ affecting all countries, especially the poorest. Thus, even on a bare economic appraisal, it makes no sense to follow an interpretation which subsidises the principal costs which the Convention seeks to avoid; this would be especially unconscionable for least-

45 See the 2006 Global Warming Solutions Act, available at <http://www.arb.ca.gov/cc/ab32/ab32.htm>, last accessed 24 March 2013.

46 See Garibaldi (2009).

developed countries and small island states, whose impact costs would proportionately be highest.

It is fair to argue that all nations need to adopt actions in line with their intrinsic capabilities to climate action, moving in a global environment of evolving higher levels of climate action. In other words, all countries have the capacity to act on climate change with support, so our aim should also be to tap the intrinsic capacities of all countries to act, and build on such intrinsic capacities with subsidised capacities. It is true, as was noted above, that capacities differ between Annex I countries and non-Annex I countries, and it has been a well-established argument that the high emitters are obliged to take stronger actions to limit their emissions. However, it is also true that capacities within non-Annex I countries vary greatly; the argument here is that these different capacities are to be taken into account in a future regime. As such, the *common* element of the CDDR principle may also mean that all countries act according to their respective capabilities towards an agreed aim of limiting concentrations of GHGs, starting from their intrinsic capacity for action, and building on that over time.

Naturally, the poorest countries will have little intrinsic capacity to act. Despite this, their intrinsic capacity may be geared to allow for the easier uptake of low carbon development pathways, for example, which in this case may come through subsidised capacity from wealthier countries⁴⁷ with higher emissions levels. In this case, the poor country is doing what its capacity allows it to do; but, even here, the country would be putting itself in a position not to follow high carbon-intensity development pathways and instil higher levels of climate action programmes from wealthier countries.

If one returns to the question of fairness in the system, then it is evident that a multilateral system espousing increased action will ultimately be the most *fair*. Yet, climate action, in a literal interpretation of the fundamental principles of the Convention, is required to be tempered with the concept of *respective capabilities*. In this view, all countries are obliged to act towards climate change – because all countries need to be part of the solution – in accordance with their intrinsic capabilities. More capable countries can act more, and the most capable can not only act with the most ambition, but can also support other countries and unlock further subsidised climate action

47 Some poor countries have started doing so; see e.g. Ethiopia's well-established Green Economy Strategy, available at <http://www.epa.gov.et/Download/Climate/Ethiopia's%20Climate-Resilient%20Green%20economy%20strategy.pdf>, last accessed 22 April 2013.

capacities. Such contributions will encourage even the less-developed countries to contribute towards more progressive climate change policies.

G. Conclusions

If we revisit the ultimate objective of the UNFCCC, and bear in mind the irrefutable illustrations of global impact inherent in the problem of anthropogenic climate change, it is clear that the imperative towards a regime of positive global climate action gathers many arguments beyond a conservative zero-sum or burden-allocation narrative, which imperative has to include differentiated action by all. It has been argued here that the transboundary nature of climate change action and impacts includes both environmental and developmental repercussions for all countries, derived from impact costs which affect all countries and, by the same token, that climate action derives benefits for all countries.

From these considerations it is proposed that the imperative for climate change action has to exist in an environment of real yet differentiated action by all, and that a more progressive paradigm, where domestic action – both intrinsic and supported – can be aligned to cross-border benefits, should be conceived as an important component for a new regime.⁴⁸

However, movement towards this new understanding needs to preserve the fundamentals of the UNFCCC consensual regime for climate change. Innovation in the regime has to include returning to these concepts with a view to fostering cooperation, solidarity and action among states so as to move to a view of *common* action where national intrinsic capacity can place every country as part of a solution towards a coordinated and mutually cooperative global climate regime, with supported action leading to more ambition and even more capacity for low carbon development and climate action.

Yet, this new regime should not be conceived as promoting a uniform application of action on all countries, as this would not encompass a solution that is consonant with the underlying CBDR philosophy. The argument is that, whilst the regime will be universally applicable, respective capabilities

48 Roberts & Edwards (2012).

will dictate the extent of *common* efforts, and the differentiation of responsibilities will support even greater efforts.⁴⁹

In the new regime, there will be several challenges to overcome, not the least of which will be an equitable and fair view of the intrinsic capabilities of countries, which is essential not only for delivering more climate action and ensuring that climate action is mainstreamed in all countries, but also to overcome arguments of ‘free-riding’ which would jeopardise domestic political support for a broad agreement on action.

The new regime also needs to deliver on maintaining and supporting action and progress not only in developing countries, but also in supporting the leadership of developed countries in action to the level that is commensurate with their differentiation. Indeed, further action by developed countries, over and above their high intrinsic capabilities, be it through public funding, direct investment, capacity-building or market-based initiatives, has to work to incentivise more capacity for low carbon development in developing countries, as well as driving down their own emission pathways as required by science and the ultimate objective of the Convention.

Examples such as California should be mainstreamed into global action for all countries. This would herald a multilateral regime which truly deals with what science has required: the most drastic de-carbonisation in history.⁵⁰ Many questions will remain to be discussed over the coming years as a new regime is crafted, but it is clear that the new regime will need to both sustain CDDR and invigorate it with a narrative which incentivises climate action by all countries.

References

- Birmie, Patricia, Alan Boyle & Catherine Redgwell, 2009, *International Law and the Environment* (Third Edition), Oxford, Oxford University Press.
- CISDL/Centre for International Sustainable Development Law, 2002, The Principle of Common but Differentiated Responsibilities: Origins and Scope, CISDL Legal Brief for World Summit on Sustainable Development, Johannesburg, 26 August 2002, available at http://www.cisd.org/pdf/brief_common.pdf, last accessed 20 April 2009.
- Cullet, Phillipe, 1999, Differential Treatment of International Law: Towards a New Paradigm of Inter-state Relations, *European Journal of International Law* 10, 3.

49 Garibaldi et al. (2012).

50 See PwC (2012); Sachs (2012).

- Garibaldi, José A., Monica Araya & Guy Edwards, 2012, Shaping the Durban Platform: Latin America and the Caribbean in a Future High Ambition Deal, Policy Brief, Energeia, Climate and Development Knowledge Network & Fundación Futuro Latinoamericano, available at http://www.intercambioclimatico.com/wp-content/uploads/Shaping-Durban-Platform_Final-April_2012.pdf, last accessed 9 May 2013.
- Garibaldi, José, 2009, *The Economics of Boldness*, London/Lima, Energeia, available in Spanish at http://libelula.com.pe/IMG/pdf/La_Economia_de_la_Audacia.pdf, last accessed 15 April 2013.
- Hey, Ellen, 2009, Common but Differentiated Responsibilities, in: Wolfrum, Rüdiger (Ed.), *Max Planck Encyclopaedia of International Law*, Oxford, Oxford University Press.
- Honkonen, Tuula, 2009, The Principle of Common but Differentiated Responsibility in Post-2012 Climate Negotiations, *RECEIL* 18 (3), 257–268.
- IEA/International Energy Agency, 2012, *Turn Down the Heat: Why a 4°C Warmer World Must be Avoided – A Report for the World Bank by the Potsdam Institute for Climate Impact Research and Climate Analytics*, Washington, DC, International Bank for Reconstruction and Development/The World Bank, available at http://climatechange.worldbank.org/sites/default/files/Turn_Down_the_heat_Why_a_4_degree_centrigrade_warmer_world_must_be_avoided.pdf, last accessed 15 April 2013.
- IPCC/Intergovernmental Panel on Climate Change, 2007, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Core Writing Team: Pachauri, Rajendra K. & Andy Reisinger (Eds), Geneva, IPCC, available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm, last accessed 13 January 2013.
- Joyner, Christopher, 2002, Common but Differentiated Responsibilities, *Proceedings of the American Society of International Law*, Washington, DC, ASIL 96, 358–368.
- PwC/PricewaterhouseCoopers, 2012, *Too Late for Two Degrees?: Low Carbon Economy Index 2012*, London, PwC, available at http://www.pwc.com/en_GX/gx/low-carbon-economy-index/assets/pwc-low-carbon-economy-index-2012.pdf, last accessed 8 May 2013.
- Rajamani, Lavanya, 2005, *Differential Treatment in International Environmental Law*, Oxford, Oxford University Press.
- Roberts, Timmons & Guy Edwards, 2012, A New Latin American Negotiating Group: The Greenest Shoots in the Doha Desert, 13 December 2012, available at <http://www.intercambioclimatico.com/en/2012/12/13/a-new-latin-american-climate-negotiating-group-the-greenest-shoots-in-the-doha-desert/#more-5684>, last accessed 15 April 2013.
- Sachs, Jeffrey D., 2012, Secretariat on Climate Change: First Workshop on Long-term Finance, available at http://unfccc.int/files/cooperation_support/financial_mechanism/long-term_finance/application/pdf/sachs9july2012.pdf, last accessed 9 May 2013.
- Sands, Philip, 2003, *Principles of International Environmental Law*, Cambridge, Cambridge University Press.
- Stone, Christopher, 2004, Common but Differentiated Responsibilities in International Law, *American Journal of International Law* 98, 276–281.

- UNDP & ECLAC/United Nations Development Programme and Economic Commission for Latin America and the Caribbean, 2012, *Sustainable Development 20 Years on from the Earth Summit: Progress, Gaps and Strategic Guidelines for Latin America and the Caribbean*, New York, United Nations.
- UNEP/United Nations Environment Programme, 2012, *UNEP Gap Report 2012*, available at <http://www.unep.org/pdf/2012gapreport.pdf>, last accessed 15 April 2013.
- UNEP/United Nations Environment Programme & ECLAC/United Nations Environment Programme and Economic Commission for Latin America and the Caribbean, 2010, *Vital Climate Change Graphics for Latin America and the Caribbean*, available at <http://www.grida.no/publications/vg/lac2/>, last accessed 8 May 2013.
- Weisslitz, Michael, 2002, Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context, *Colombia Journal of International Environmental Law and Policy* 13, 473–483.

