

COMMON BUT DIFFERENTIATED RESPONSIBILITIES

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INTRODUCTION

Equity has been a central concern in international environmental law since the 1970s. At the Stockholm Conference in 1972, states already agreed that there was a need to take into account the ‘circumstances and particular requirements of developing countries’ and called for ‘additional international technical and financial assistance’ to ensure the availability of sufficient resources for protecting the environment (Stockholm Declaration, 1972). Two decades later, the Rio Declaration was much more specific and included two equity-related principles. Principle 6 recognised the need to consider the special situation of developing countries while Principle 7 provided the policy context for taking measures based on the division of the world into developed and developing countries. It 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 (Rio Declaration, 1992).

This principle of Common But Differentiated Responsibilities (CBDR) formalised at Rio in 1992 quickly became a pivotal principle of international environmental law. Conceptually, it reflects equity concerns in a world marked by high inequalities in levels of human development and environmental resilience. This paves the way for redistributive measures that are at the core of differential treatment (Cullet, 2003). In practice, CBDR has provided the basis on which the special situation of global South countries has been taken into account in environmental treaties. This has taken the form of a series of differential measures structured around a division of the world in two groups of countries, developing and developed countries.

CBDR has led to challenging one of the most cherished bases of international law, that of the reciprocity of obligations linked to the formal equality of states. This is what gives CBDR its potential to foster change and also explains the opposition from some countries. Yet, in practice, the success of CBDR, as measured in terms of the number of differential measures adopted in international environmental law, is linked in large part to much more pragmatic considerations. Indeed, particularly in the case of global environmental issues, the global South has been able to a certain extent to bargain its participation in international agreements. This was, for instance, the case of the treaties addressing the ozone layer hole where the global North was virtually the sole contributor to a problem affecting it in the first place but a problem that could not have been solved without participation of the global South.

This chapter is divided in three sections. The first section examines the conceptual framework underlying the development of CBDR and the progression in international law from judicial equity to differentiation in norms. The second section moves on to examine the different instruments of differentiation in international environmental law, from its basis in the principle of CBDR to specific differential tools used in legal instruments. It also considers the question

of who the beneficiaries of differentiation should be in a context where the amorphous category of developing country has shown its limits, and examines the legal status of CBDR and differentiation. The last substantive section considers the place and continued relevance of differential treatment and the principle of CBDR in a rapidly evolving world. It considers developments and challenges in the climate change regime that have attracted significant attention, looks at the relevance of CBDR in environmental law and beyond and looks at avenues to rethink CBDR to effectively address global environmental issues at the global level.

I. EQUITY IN INTERNATIONAL ENVIRONMENTAL LAW

Contemporary international environmental law developed from the 1970s partly in response to concerns about environmental degradation. Yet, because environmental protection is intrinsically linked with the use of environmental and natural resources, livelihoods and the realisation of human rights, the necessity to adopt a broad view of environmental regulation quickly became apparent. Fairness, equity and justice have thus always been of great importance in environmental law.

At the outset, it is necessary to distinguish between compassionate measures and environmental justice. The former is based on the idea that some countries need to be helped because they suffer specific disadvantages. This is not rooted in any sense of obligation but rather altruism. Indeed, development aid, such as financial aid or technology transfer, can largely be seen as a measure of benevolence since no obligation to provide aid has developed in international law. This would generally correspond with the idea that Rawls had, of a duty of developed countries to help other countries (Buchanan, 2004). This may imply transfers of food or funds but it neither implies any structural changes in the international order nor grants the global South a right to request such aid.

The latter is based on the perception that justice is a compulsory part of international environmental law, not an optional addition (Gonzalez, 2015). The central role of justice in environmental law derives from the basic fact that life – and human life in particular – is impossible without a clean environment. There is therefore an intrinsic relationship not only between environmental protection and justice but also between the conservation and sustainable use of resources, such as water or agricultural biodiversity, and human survival. This confirms that justice and fairness are particularly important in an environment context. Yet, the argument is much broader insofar as there would be no legitimacy for an international law that is not built on principles of justice (Buchanan, 2004: 215). Given historical and present distribution of resources and power, a form of distributive justice is thus an essential part of international law and international environmental law in particular (*contra* Rawls, 1999: 114).

Justice can be realised in a variety of ways. At the international level, the fiction of equality of states as a basis for inter-state relations conditioned thinking about equity for a long time. Yet, in recent decades, there has been increasing recognition that formal equity is insufficient to foster equity. This leads to the consideration of substantive equality as an alternative route to ensure equity.

A. EQUITY THROUGH FORMAL AND SUBSTANTIVE EQUALITY

International law has been based for centuries around the idea that rules are deemed to be just if they apply to all states similarly. This is based on an understanding of the world organized around the legal equality of states as the appropriate basis for realizing fairness. At the same

time, this implies that existing inequalities are not taken into account in the structuring of legal norms.

The idea of formal equality has been applied between individuals and states. It generally provides that all subjects of the law are to be treated similarly with an ultimate aim of fostering a society where resources are distributed so as to maximize aggregate welfare (Young, 1994). A strict application of the theory of formal equality posits that a right is justly acquired as long as it was acquired according to the rules in force at the time of acquisition (Nozick, 1974). Under this entitlement theory, existing patterns of wealth are grandfathered, unless goods were acquired illegally under the laws prevailing at the time of acquisition. Interestingly, upholding existing inequalities has been widely condemned as being counterproductive even by utilitarian standards, since there is little incentive to encourage productivity while essential commodities are denied to the majority (Franck, 1995: 151). The Rawlsian theory of justice constitutes a less extreme application of justice based on formal equality. While Rawls accepts the inevitability of inequalities in the basic structure of societies (Rawls, 1972: 7), he asserts that inequalities in access or distribution must have advantages for the beneficiaries as well as for everyone else. The bottom line of the Rawlsian theory is that the poorest must not become relatively poorer (Rawls, 1972: 151).

At the international level, the principle of formal equality translates into the notion of sovereign equality of states, which constitutes a cornerstone of international law (UNGA, 1970). Historically, the neutrality of the law was premised on the legal equality of all states with the consequence that treaties were traditionally deemed just if they provided for reciprocity of obligations amongst contracting states. Here, reciprocity implies that states accord each other similar benefits (Craven, 2005). One of the attributes of formal equality is that every member of the community gets equal opportunities. Internationally, this conception translates, for instance, into the notion that states have the right to take any amount of shared common resources on a first-come, first-served basis (Brown Weiss, 1993). This is theoretically appealing but in practice tends to allow states having the most advanced technological capacity to appropriate a disproportionate share of the resources while less technologically advanced states benefit less despite the status of such resources as *res communis*. In the case of deep seabed resources where advanced technology is required for the exploitation of these resources, formal equality would privilege states, which can make better use of the opportunities offered.

A justice system based on formal equality can produce an optimal aggregate outcome, such as a high rate of overall economic growth, but tends to overlook the welfare of disadvantaged individuals. In fact, equality of rights or opportunities does not necessarily bring about equality of outcomes. This is especially relevant in a world characterized by disparities in resources and capabilities, between individuals and between states. Accordingly, even if the international community adopts a system built on the rule of law, in which the weak and strong are treated equally and where all have a chance to benefit from an open, market-based, global economy, the least favoured will continue to be relatively disadvantaged. One of the justifications for focusing on formal equality is that the existence of rules that apply similarly to all individuals is best suited to ensure stability and foreseeability. Yet, this does not hold in the face of severe inequalities that still characterize the North-South divide when looking at the gap between countries with very high and very low human development (UNDP, 2018).

An alternative basis to rules that apply similarly to all is to provide that like cases be treated alike and that dissimilarly situated people should be treated dissimilarly (Hart, 1994: 159). This is based on the principle of distributive justice, according to which relevant dissimilarities between subjects of the law warrant special attention or special treatment (Aristotle, 1991). In this view, the realization of substantive equality implies that existing inequalities, such as

inequalities in wealth or natural endowments should be acknowledged and taken into account. In the context of the current international community, this may preclude reliance on the theory of the veil of ignorance advocated by Rawls (Rawls, 1972: 12). Indeed, Rawls' veil of ignorance implies that members of the community do not know whether their society will be a developed or a developing country (Rawls, 1999: 33). However, given the existing distribution of resources and wealth across the world, the choice between being born in a developed or a developing country may well be more significant than arrangements within a given society (Barry, 1973: 129).

Contractarian principles may also prove misplaced at the international level because they are usually developed for national societies and do not imply redistributive obligations between persons situated in different societies (Beitz, 1985: 286). In other words, an enquiry into matters of equality cannot be based exclusively on theoretical preferences but must relate to existing realities. Further, discrepancies that cannot be traced to individuals' choices should be taken into account and may constitute grounds for redistributive claims.¹ This is true both in the case of a country lacking primary natural resources and in the case of an individual born without wealth.

Overall, since inequalities witnessed in the real world occur, in large part, independently of people or states' actions, the necessity arises to devise exceptions, which take into account some existing inequalities to bring about substantively equal results. As Sen recalls, this is a difficult task since '[t]he demands of substantive equality can be particularly exacting and complex when there is a good deal of antecedent inequality to counter' (Sen, 1992: 1). The development of differential treatment in international environmental law confirms this prognostic.

B. RATIONALE FOR DIFFERENTIAL TREATMENT

Differential treatment can be based on two separate but related conceptions of justice, corrective and distributive justice. Corrective justice posits that wrongs must be compensated by the wrongdoer (Brilmayer, 1996). The wrong and the compensation need not be identical and this opens the way for a broader understanding of measures that go beyond simple retribution. A first justification for corrective justice in favour of the global South is the harm done to countries that were earlier colonized, for instance, in terms of exploitation of their environmental resources for the benefit of the metropolises (Ferguson, 1987). In an environmental context, the temporal dimension of corrective justice can, for instance, be applied to climate change, given the long-term impacts of greenhouse gas emissions. The corrective justice argument is linked to the fact that a limited number of countries historically contributed most of the build-up of harmful gases responsible for ongoing climate change (cf Prost & Camprubi, 2012: 392). The historical argument can be extended to a broader point, which puts forward the need for compensation on the basis that different states have made or make different contributions to the creation of environmental problems. Yet, Principle 7 of the Rio Declaration fails to emphasize historical responsibilities (Lavallée, 2010: 59).

Distributive justice goes beyond corrective justice insofar as it is not limited to compensating acknowledged harm but also seeks to identify whether the existing distribution of entitlements and resources is appropriate to ensure substantive equality. Relevant dissimilarities between subjects of the law may warrant special treatment, which can take the form of a redistribution

¹ On the contrary, as acknowledged by Rakowski, 1991: 1, differences resulting from voluntary wagers cannot serve as a basis for redistributive claims.

of entitlements or resources. There has been a long-standing debate as to whether distributive justice can justifiably be given a role in international law. Some argue that redistribution is not desirable, even as an ideal, because states are better-off being self-reliant (Brilmayer, 1996: 618). Yet, despite such reservations, it is unthinkable to justify international law without a distributive justice component (Buchanan, 2004: 193). The reason for the controversial nature of the inclusion of distributive justice in an international law framework is that it justifies the redistribution of resources from rich to poor countries or in an environmental context the redistribution of resources from countries having caused more environmental degradation or countries having the technological or financial capacity to address environmental degradation.

At the international level, there is no institution that is capable of enforcing redistribution on the more powerful and richer countries. Yet, such redistribution remains necessary in a highly unequal international society made of small and poor countries as well as big, powerful and rich countries. There are numerous situations where states have acknowledged the need for redistribution, for instance, through development aid or technology transfers but this has not easily translated into legally binding long-term commitments.

C. FROM JUDICIAL EQUITY TO DIFFERENTIAL TREATMENT

The shortcomings of formal equality as a tool to achieve just results have been recognised for a long time. The first answer given was for judges to use equity considerations in taking decisions in individual cases of application based on formally equal rules (Akehurst, 1976). In this instance, the idea is to avoid results that are undesirable according to broader justice, moral or social concerns (*Georges Pinson (France) v. United Mexican States*, 1928: 355). This approach excludes permanent exceptions to rules but provides remedial measures to the potentially harsh consequences of the application of a rule of law applying to all in a similar way.

Judicial equity can be an appropriate solution but this implies that inequalities between states are not so significant as to make a system based on formal equality inappropriate and that there is a fully-fledged judicial system in place to address the various situations where a specific case of application may not lead to fair results. This does not obtain in practice. Firstly, the relative cohesion of the international community of states that may have existed until the middle of the twentieth century was shattered by the accession to statehood of many formerly colonized nations. Secondly, recourse to the courts at the international level is relatively infrequent, particularly in an environmental context, and cannot be a substitute to a rule-based framework that fosters fair results in most cases of application.

This led to the introduction of preferential measures seeking to achieve substantive equality at the level of norms. Preferential, or differential, treatment refers to instances where, because of pervasive differences or inequalities among states, formal legal equality and reciprocity are sidelined to accommodate extraneous factors (Byers, 1999: 90). These include divergences in levels of economic development, different contributions to the creation of a problem or unequal capacities to tackle existing problems. At the same time, differential treatment does not encompass every deviation from the principle of sovereign equality but refers only to non-reciprocal arrangements that seek to foster substantive equality. In practice, this mainly includes deviations that seek to favour least favoured states, usually equated with developing countries and, in some cases, least developed countries.

II. CBDR: DEVELOPMENT AND IMPLEMENTATION

Differential treatment in international environmental law builds on a series of measures adopted following decolonization in the broader field of development to take into account the structural inequalities between what were now called developed and developing countries. The growth of what was then known as ‘preferential treatment’ reflected the incapacity of a legal framework based on the legal equality of states to effectively take into account inequalities, such as in the field of economic development.

A number of preferential treatment measures were adopted from the 1950s onwards, as in the case of an amendment to the General Agreement on Tariffs and Trade that granted developing countries with low standards of living permission to derogate from some of the obligations that applied to all other members (GATT, 1947: Art. XVIII). This eventually coalesced in the 1970s into a broader call for a New International Economic Order (NIEO), reflected in a series of UN General Assembly resolutions seeking to create rules of international law meeting the specific needs of developing countries based on their different levels of economic development (UNGA, 1974: § 4.p).

The call for an NIEO led to a broader realization that the principle of formal legal equality could be not upheld in all situations among states that are unequal in many respects. At the same time, this did not lead to any significant changes in the structure of international law, partly because the push came mostly from developing countries, with developed countries resisting the proposals (Virally, 2010: 326), and partly because developing countries found themselves battling what came to be known as the lost development decade in the 1980s. By the 1990s, developed countries had managed to retake the initiative in the context of the Uruguay Round of trade negotiations that led to the setting up of the WTO in 1995 on the basis of a return to formal equality as the preferred principle in international trade law (Michalopoulos, 2000).

Interestingly, while preferential treatment in the international law of development came under sustained attack, specific conditions saw the rapid growth of international environmental law be linked to the development of new forms of preferences for the global South. One of the triggers was the emergence of global environmental problems that first became of concern in the global North but could only be effectively addressed with the cooperation of the South. The development of differential treatment in international environmental law was thus substantially different from preferential treatment in the era of the international law of development. The premise was not mainly the claims of the global South for a more equitable international law but also a confluence of interests between the global North and the global South.

A. THE PRINCIPLE OF CBDR AS A BASIS FOR DIFFERENTIAL MEASURES

The principle that underlies differential treatment in international environmental law finds its most common expression in Principle 7 of the Rio Declaration quoted above. CBDR reflects the equity concerns of UN member states in the environmental sphere. It is built on a twin foundation of partnership and equity. Principle 7 first emphasises the duty of all states to cooperate to ensure the conservation, protection and restoration of the global environment. States are thus called upon to participate in regimes that seek to address the health and integrity of the Earth’s ecosystem, or in other words, global environmental issues.

The second element focuses on the different contributions to global environmental degradation that developed and developing countries have made over time and up to the present day. Principle 7 thus contains both aspects of intra-generational equity and inter-generational equity. It is on this basis that common responsibilities and differentiated responsibilities are recognised. This twin recognition of a common but distinct responsibility for global environmental issues seeks to balance the need to address the underlying environmental problems while reflecting equity concerns. It is a positive but limited step since the principle fails to indicate whether one prevails over the other.

The third element of Principle 7 focuses on the responsibilities of developed countries and shifts the discussion towards sustainable development. It recognises the special responsibility of developed countries that have harmed the global environment more and have at their disposal much more significant technological and financial resources to tackle these problems. In other words, under Principle 7 developed countries have to bear a disproportionate share of responsibility but this is framed more towards the future than as historical responsibility (Bartenstein, 2010: 187). The text provides for acknowledging the different capabilities of different countries but stops. Yet, it stops short of directly holding developed countries legally responsible for global environmental damage and does not offer an obligation of compensation for damage to the environment, as suggested in one of the draft versions of the principle (UN, 1992).

CBDR as defined in the Rio Declaration does not specify the types of environmental issues that fall within its scope and it thus has the potential to apply to a wide range of issues. It does, however, emphasize global environmental problems and lends itself particularly well for application in the case of climate change. In this case, there was at the time of the negotiation of the convention a clear correlation between levels of economic development, and historical and present contribution climate change that generally coincided with the division of the world in the two categories of developing and developed countries. This contributed to the overall framing of CBDR around an opposition between the two groups countries. This simple dichotomy was never sufficient to reflect the complexity of the world. This has become more pronounced over time as some global South countries have become major contributors to global environmental harm. In this context, the lack of specificity of Principle 7 in terms of categorisation of countries is a bonus since it leaves space for moving beyond a simple dichotomy between the global North and global South (cf Pauwelyn, 2013: 41).

The principle of CBDR is found in a number of legal instruments besides the Rio Declaration. It holds, for instance, a central place in the UN Framework Climate Change Convention where it is one of the basic principles on which the whole regime is based.² In addition to being a basic principle of the convention, CBDR also underlies the main commitments that member states take since it provides the contextualisation for all commitments taken (UNFCCC, 1992: Art. 4.1). CBDR is also specifically restated in the context of the compliance regime instituted under the Kyoto Protocol. Indeed, with regard to the Facilitative Branch, CBDR is the principle that guides it in its general ‘advice and facilitation’ function and in the ‘consequences’ it applies (Decision 27/CMP.1, 2005: paras IV and XIV).

CBDR has also been restated in the 2001 Stockholm Convention that includes in its preamble a specific restatement of CBDR (Stockholm Convention, 2001: preamble). Similarly the 2013 Minamata Convention’s preamble specifically singles out CBDR (Minamata Convention, 2013: preamble). CBDR has also been integrated in treaty regimes where the original

² UNFCCC, 1992: Art. 3(1). Note that the Convention adds the additional concept of ‘respective capabilities’, which comes to complement ‘differentiated responsibilities’.

instrument did not mention it, as in the case of the 1987 Montreal Protocol where it is explicitly mentioned in later decisions of the Meeting of the Parties (Decision XVI/7, 2004). Various soft law instruments also restate the principle, such as in the case of the plan of action of the 2002 World Summit on Sustainable Development (WSSD, 2002: para. 75), and the outcome document of the Rio+20 Conference that reaffirmed the Rio principles, among which the only principle singled out is CBDR (UNGA, 2012: para. 15).

B. FORMS OF DIFFERENTIAL TREATMENT

Differential measures in international environmental law have taken various forms over the years (cf Voigt, 2014: 53). These include situations where commitments are explicitly or indirectly different. This may be based explicitly or implicitly on CBDR. These also include differences concerning the ways in which similar or different commitments are to be implemented, as well specific differential tools, such as implementation aid and technology transfer.

The first type of differentiation is where norms are strictly differential norms, namely where different countries take on different commitments. This was, for instance, the case under the Kyoto Protocol, where Annex I countries take on emission reduction commitments while developing countries do not take on similar commitments (Kyoto Protocol, 1997: Art. 3). Differentiation can also be reflected in provisions that make developing countries' implementation of their commitments conditional upon developed countries' fulfilment of their pledges concerning financial aid and technology transfer (CBD, 1992: Art. 20.4). In effect, commitments that developing countries take only become operative after developed countries comply with their own commitments.

Another type of differentiation is the frequent use of contextualization of commitments. This may concern binding provisions that are qualified with statements allowing member states to take into account their 'particular conditions and capabilities' or to implement certain obligations 'as far as possible and as appropriate' (CBD, 1992: Arts 6, 7). Contextualisation introduces an element of flexibility giving states some discretion in deciding how to implement their commitments. This allows all countries to sign up to the same commitments while being aware that not all countries have the same capacity to implement the obligations they take. It therefore contributes to making treaties more widely acceptable and ratified,³ therefore strengthening the broader architecture of environmental law. At the same time, the flexibility inbuilt in contextualization has been criticized by some, arguing that this threatens the certainty of the legal framework (Akehurst, 1976: 809). There is indeed a level of uncertainty that seems to be introduced on a superficial reading of such provisions. However, they must be read together with financial provisions and other support measures that are included to ensure that developing countries are in fact able to deliver on their commitments to an extent that may not match the efforts of developed countries but ends up being at least comparable.

Differentiation is also much in evidence at the level of the implementation of commitments. Implementation aid for developing countries has become a standard component of environmental treaties (Xiang & Meehan, 2005). Implementation aid is less controversial than differential commitments because aid is never promised on a permanent basis, hence is always subject to periodic renegotiation. While aid may never be provided to the extent desired by recipient states or to the extent necessary to address the environmental issues at stake

³ See, for example, Voigt, 2014: 67 concerning the Gothenburg Protocol to the Convention on Long-range Transboundary Air Pollution.

effectively, it constitutes a concrete differential measure. In principle, the same could be said about technology transfer, often linked to aid commitments, that has been one of the key demands of developing countries for decades. In some cases, like in the ozone layer regime, technology transfers have indeed been central to the success of the regime (Fahey, 2013). At the same time, technology transfer remains in general terms one of the great unfulfilled promises of ‘development’ and their frequent occurrence in environmental treaties masks an overall limited implementation of these provisions (WTO, 2013).

Thirdly, differentiation can intervene at the level of procedural arrangements. In particular, delayed implementation for developing countries has been used as a way to agree on commitments that are similar for all countries but are implemented in a staggered manner. This constitutes an alternative way to foster broader ratification of a given treaty. This worked particularly well in the context of the ozone layer regime where developing countries were given additional time to switch to non-ozone depleting substances (Montreal Protocol, 1987: Art. 5.1), with aid and technology transfer constituting a central component of this longer transition.

C. BENEFICIARIES OF DIFFERENTIATION: DEVELOPMENT INDICATORS AND BEYOND

Differentiation has generally been structured around a simple dichotomy dividing the world between developed and developing countries. This has the advantage of building on a well-known categorisation that is often based on self-identification and thus reduces the scope for disagreements concerning the identification of beneficiaries.

In terms of environmental agreements, the use of an economic development criterion proved to be a relatively good starting point in the first place. At the point at which some of the main international agreements were being negotiated, there was in general terms a good correlation between the contribution to environmental problems and levels of economic development. This was, for instance, the case with ozone depleting substances at the point at which the international legal regime to address the ozone layer hole was negotiated.

Yet, several reasons militate in favour of a different approach. Firstly, the division of the world into two amorphous categories fails to capture the great diversity of situations within each category. This is particularly problematic with regard to the category of ‘developing countries’ that not only includes a vast majority of the world’s countries but also includes countries as different as China and Vanuatu, which have little in common beyond being both formally classified as developing countries (UNDESA, 2019: 170). In fact, the impossibility to structure the world in such simplistic ways is already often acknowledged. A category often used in development policy is that of least developed countries that currently singles out 47 countries that are particularly weak in (economic) development terms (UNCTAD, 2018). Other categories used regularly include those of small-island developing states and landlocked developing countries. Some of these categories find reflection in environmental law agreements. Thus, least developed countries are regularly mentioned in preambles (CBD, 1992: preamble; UNCCD, 1994: preamble). They are also mentioned in several treaties in provisions concerning aid or technology transfer where developed countries are admonished to give them particular attention (Minamata Convention, 2013: Arts 13.4, 14.3; Stockholm Convention, 2001: art 13.4). In addition, the Desertification Convention singles out least developed countries among the broader group of affected developing countries (UNCCD, 1994: art 3.d). Yet, when it comes to structuring legal obligations in a differential manner, as in the case of

the Kyoto Protocol, there is no mention of least developed or any other sub-category of developing countries.

The lack of sub-categories in structuring differentiation has been a problem from the outset. It has become more serious in the past couple of decades in a context where some large developing countries have seen their economic fortunes vastly improve while the gap in levels of economic development between the majority of small developing countries and developed countries has remained relatively stable (UNDP, 2018). In addition, the identification of a country as developed or developing can be controversial since there is no grey zone in between. This is, for instance, illustrated by Kazakhstan's failed attempt to be listed in Annex 1 of the Framework Convention and to be added to the list of parties with emission reduction targets under the Kyoto Protocol (Castro, 2016: 381).

The first step that can be taken is to break down the two traditional categories. This is, for instance, what the UN has been doing in terms of apportioning expenses for peacekeeping activities by introducing ten categories of countries (UNGA, 2018a). Identifying smaller groups of states is a first positive step. At the same time, there is no conceptual obstacle to removing categories of states altogether. Indeed, with less than 200 UN member states, it is easy to consider the individual situation of each and every state. This is in fact what has been done for many years in terms of assessing member states' contributions to the UN. This has been done according to a scale of assessment where each state is classified mainly according to its capacity to pay (UNGA, 2018).

Addressing each state's own situation would be a first step in addressing one of the shortcomings of existing differentiation where allowing China or Saudi Arabia to get the same preferences as Tuvalu in the context of the climate change regime provides ammunition to detractors of differentiation. Yet, the real issue is that differentiation in environmental law should not be based on economic criteria but on environmental ones. Factors that could be taken into account include the importance of a country in the use or conservation of certain environmental or natural resources or a country's importance in addressing a certain environmental issue.

Some limited attempts to use environment-related categories have been made. This includes differentiating countries based on their importance in the production and the use of timber (ITTA, 2006: Art. 10). In the climate change regime, vulnerability to climate change was introduced as a category in the convention. It has, however, not been used as a legal basis for determining emission reduction commitments and remains seen as a sub-category of the broader group of developing countries. Further, the case of 'vulnerability' confirms that any categorization is open to being misused and must therefore be defined quite precisely. In the case of the climate change regime, vulnerable countries include low-lying and other small island countries, countries with low-lying coastal, arid and semiarid areas or areas liable to floods, drought and desertification (UNFCCC, 1992: preamble). Yet, the commitments clause of the convention also includes the vulnerability of countries that are likely to lose out from a global shift away from fossil fuels (UNFCCC, 1992: Art. 4.10). OPEC and other producer countries will potentially suffer economically in the long run from policy changes brought about by climate change but their 'vulnerability' cannot be compared to that of low-lying and other small island countries directly affected by sea-level rise or the overall vulnerability of least developed countries.

The example of vulnerability confirms that environmental criteria would need to be carefully drafted to reflect both environmental and equity concerns. Thus, one of the reasons why BASIC countries may not be included among the beneficiaries of all differential measures anymore is not so much because poverty has disappeared but more because they happen to be large countries that are much more resilient than other countries at the same level of human

development.⁴ The Gothenburg Protocol to the LRTAP offers a sense of what such new categories could be by imposing on countries whose emissions have more significant impacts on the environment or health to take more stringent action (Voigt, 2014: 67).

Overall, there is an urgent need to rethink the categorization on which differentiation is based because it does not provide an appropriate basis for taking effective and equitable environmental measures and because it contributes to opposition to differentiation in general. There are today few reasons why BASIC countries should be seen arguing for measures that are justified mostly by smaller and poorer countries. At the same time, there are good reasons why the division of the world into two broad categories has sustained until now. Indeed, those same small, vulnerable or least developed countries benefit to an extent from the fact that the global South still negotiates as a single bloc insofar as their voice is amplified by the bigger and economically more resilient countries. In addition, it is crucial to remember that a call for rethinking criteria for differentiation should not be confused with a call for making it temporary. The changing situation of BASIC and a few other countries cannot make us forget that the vast majority of developing countries have not seen their relative position in terms of human development improve significantly in recent decades and even if this was to change in the future, they would still require differentiation for many years.

D. LEGAL STATUS OF CBDR

The principle of CBDR has been included in a number of international environmental instruments and has become an integral part of international environmental law but its legal status as an independent principle remains debated. This is probably unsurprising in a context where the United States was so concerned by the potential legal ramifications of the principle that it attached an interpretative statement to the Rio Declaration indicating that it did not ‘accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries’ (UNCED, 1992: para 16).

Scholars have expressed different views concerning the legal status of the principle. On the one hand, Pallemmaerts already argued in the mid-1990s that differentiation was emerging as a new general principle of international environmental law (Pallemmaerts, 1995: 201). Hey also finds more recently that CBDR is ‘most likely to qualify as a principle of international environmental policy’ (Hey, 2011). On the other hand, Stone argued in the 2000s that CBDR has not ‘been elevated to the status of a customary principle of international law’ (Stone, 2004: 299).⁵ A variety of other positions have been articulated around the principle: Bartenstein argues, for instance, that CBDR has a certain normative value and labels it a structuring principle that plays a central role in the systematisation of legal rules (Bartenstein, 2010: 199). On her part, Rajamani finds, on the basis of a review of doctrinal positions, that ‘[t]he reluctance to stop short of characterizing this principle as one of customary international law is perhaps justified’ (Rajamani, 2006: 159).

On the whole, in common with most principles of the Rio Declaration, there is no consensus in favour of recognizing CBDR as a customary principle. It is, however, unclear whether its legal status as a principle is the most important aspect of CBDR. Rather, its main contribution

⁴ Cf. Tigre, 2016: 424 arguing that ‘Brazil, like other emerging economies, should become a regional leader and embrace stricter responsibilities on a par with its development’.

⁵ See also Deleuil, 2012: 277 arguing that CBDR is not a rule of international law and therefore has no autonomous binding force.

may lie in mainstreaming the idea that reciprocity of obligations is not the only way to achieve fairness in international law. Indeed, whether CBDR is a customary principle of international law or not, international environmental legal instruments are structured around different forms of differentiation. The pervasiveness of differential treatment is one of the central progressive features of international environmental law and this can be directly linked to the principle of CBDR that provides the reference point around which differentiation is organised.

III. CBDR IN AN EVOLVING WORLD: CHALLENGES AND CONTINUED RELEVANCE

CBDR can be analysed as a legal principle that broadens the understanding of equity in international law beyond formal equality. It is also a reflection of a broader sense of solidarity among states linked to the recognition that global environmental issues can only be effectively addressed through joint action that must reflect states' different contributions to the problem and ability to address it.

Solidarity becomes pragmatic partnership where states with different agendas and different economic trajectories come together to foster a bigger environmental good. This is, for instance, what happened in the case of the ozone layer regime. Addressing the ozone layer hole was not an immediate environmental priority for the global South in the 1980s but the right mix of partnership made the regime a global success (Fahey, 2013).

A similar confluence of events may not occur frequently but there are various environmental issues that require concerted action by all states. The relevance of the spirit of solidarity remains central in a world that faces various global environmental issues. This will need to be addressed in a spirit of partnership since the world will continue to be marked by high inequalities. Climate change has been the global environmental issue most debated and it is unsurprisingly where differential treatment has come under most severe attack. Yet, there are various other challenges that need and will need to be addressed jointly, such as the global water cycle. This will only be possible in a context that recognizes the differences between states and on the basis of differential commitments.

A. CBDR AND THE EVOLVING CLIMATE CHANGE REGIME

CBDR has been at the centre of debates in the climate change regime (Rajamani, 2016). In the first place, this was because the principle was specifically made a central part of the legal regime adopted in 1992. This then translated into some strong differential provisions in the Kyoto Protocol that provided for different commitments for the global North and the global South. These were momentous changes that unsurprisingly came under vigorous attack, particularly from the United States that showed strong reservations from the start to the idea that developing countries in general would not take on emission reduction commitments.

The long negotiations that led to the Paris Agreement confirmed both the central role of CBDR in the climate change regime and the limits of the current structure of differential obligations. On the one hand, the attempt to sideline the principle of CBDR as a basis for negotiating the new legal instrument proved unsuccessful. On the other hand, a qualification was brought to the principle by adding to it 'in the light of different national circumstances' (Paris Agreement, 2015: Art. 2.2).

This paved the way for the introduction of individual differentiation that comes in the form of ‘nationally determined contributions’ (NDCs) that each country promises to achieve (Paris Agreement, 2015: Art. 4.2). This new form of differentiation is radically different in its imagination from what is suggested in the discussion in section II(C) above (cf Voigt & Ferreira, 2016: 295). This is due to the fact that it is individual countries that determine the level of their commitments based on self-interest rather than an international process of allocation of shares. This bottom-up framework has the advantage of helping to find a common minimum denominator but this is only positive if compared to the no-agreement option that would have been even worse in terms of environmental outcomes (Bodansky, 2016). In terms of global ambition, individual differentiation is self-defeating since it strengthens the tendency of countries to negotiate on the basis of self-interest rather than in a spirit of partnership and collective bargaining.

Overall, the Paris Agreement is regressive from a differentiation point of view in terms of the main commitments taken by member states. Indeed, it is neither progressive to let states decide how ambitious they will be in their response to global environmental problems nor innovative to let countries take on voluntary commitments on an individual basis.⁶ At the same time, differentiation remains central to finding agreement around global environmental issues, as confirmed by the financial provisions of the Agreement (Paris Agreement, 2015: Art. 9).

B. CONTINUED RELEVANCE AND EVOLUTION OF CBDR

Attempts to curtail the scope and relevance of CBDR in the climate change regime have been seen as an attack on CBDR in general. This may superficially seem apt in a context where climate change occupies a disproportionate amount of space in the media and policy-making sphere. However, in legal terms, the climate change regime is only one of a number of environmental regimes that make up international environmental law. The latter cannot be subsumed under the former. Further, the specific restatement of CBDR in a number of legal instruments since the beginning of the century confirm the central role it plays. Its relevance is unlikely to wane in a context where inequalities between the poorest and richest states are likely to remain very significant.

This leads to broader questions concerning the place of CBDR in international law. As mentioned earlier in this chapter, differential treatment is but a new avatar of preferential treatment that developed in the aftermath of decolonisation. The principle of CBDR may be specific to environmental law but the underlying notions of equity that it conveys have applications that go much beyond environmental law.

Differentiation is important because it strengthens the equity dimension of international law. At the same time, it makes the adoption of legal instruments easier for a greater number of states and their implementation more effective by ensuring that all states have the means to comply with their commitments. It is therefore probably unsurprising that the progressive morphing of environmental law into sustainable development law has led to CBDR becoming more directly addressed in sustainable development instruments. This is, for instance, the case of the 2030 Agenda for Sustainable Development, which mainstreams sustainable development as the new framework guiding overall UN development policy until 2030 through the adoption

⁶ cf Jodoin & Mason-Case, 2016: 270 arguing that through ‘an innovative interpretation and application of the CBDR principle (...) developing country governments could take on voluntary commitments to reduce their carbon emissions’.

of the Sustainable Development Goals and specifically restates the principle of CBDR (UNGA, 2015: para 12).

Yet, if CBDR finds a mention in soft law instruments concerning sustainable development, this is yet to have a significant impact binding legal instruments. This can be illustrated with the case of water, which is usually considered as a separate area of law, even though water is also a subject matter of environmental law. International water law, as reflected in the main binding instrument that exists, the UN watercourses convention, has largely failed to integrate developments in environmental law (UN Watercourses Convention, 1997). This includes a failure to integrate differential treatment (Sohnle, 2014: 223). Yet, the necessity for differentiation in water law is as strong as it is in environmental law.

The limitations of water law from the point of view of differentiation are highlighted with the specific example of groundwater. At present, the only text that exists concerning groundwater is the draft International Law Commission articles on groundwater (ILC, 2008). These assert as a basic principle state sovereignty over aquifers, something that is a step back from the principles governing transboundary watercourses where elements of cooperation are recognised (McCaffrey, 2007). Yet, while the draft articles propose a very conservative understanding of groundwater, they still recognize the need to take into account the special situation of developing countries and includes a specific provision on technical cooperation with developing countries (ILC, 2008: preamble, Art. 16).

The limited recognition of the special situation of the global South in the draft articles on groundwater confirms that there is a gap that needs to be addressed more systematically. In fact, differentiation must be integrated in all related areas of sustainable development. This is, for instance, the case of agriculture that remains the single most important sector in terms of generating livelihoods in countries of the global South. While agriculture occurs in areas under sovereign control, there was until the 1980s a shared understanding that seeds were a common heritage of humankind that provided the basis for sharing and jointly protecting and developing new plant varieties with a broad rationale of food security (International Undertaking, 1983). In the meantime, the development of biotechnology led global South countries to assert sovereign rights over their biological resources and to accept the introduction of intellectual property rights in agriculture in the global South (TRIPS, 1994). Yet, despite the shift towards different forms of appropriation, the International Treaty on Plant Genetic Resources for Food and Agriculture seeks to maintain some amount of free sharing of seeds (ITPGRFA, 2001).

In effect, agriculture is an area that is ripe for a more widespread application of the principle of CBDR. Every country is concerned and every country is dependent on germplasm from other parts of the world for their main crops. This creates in principle a good basis for a strong partnership among all countries. Such a partnership did exist and was sidelined. This has not helped the majority of the world's farmers in the global South and a return to solidarity and partnership, based on CBDR and common heritage are strongly needed.

C. RETHINKING CBDR BEYOND SOVEREIGN INTERESTS

The development of CBDR like that of international environmental law in general has been centred on states' sovereign interests and assertion of sovereign rights. As a result, all international environmental issues, from bilateral transboundary issues to planetary issues, have all been addressed from the standpoint of states asserting their sovereign national interests. This is not surprising to the extent that the global South is largely made of states that only acquired the attributes of sovereignty in the second half of the twentieth century. Yet, this

fails to provide an appropriate basis for addressing international environmental issues, as confirmed by the case of the climate change regime where the Paris Agreement reflects in large part individual concerns of individual nation states rather than an international ambition to effectively tackle a problem that will probably lead to the destruction of human civilisation as we know it in the next century.

The problem is thus that CBDR is structured around an inappropriate understanding of the nature of international environmental issues that cannot be addressed effectively through the lens of sovereign interests. There are good reasons why this was the starting point and good reasons why global South countries in particular do not want to cede their hard-earned sovereignty. At the same time, humankind faces challenges that are beyond the ability of any nation to address individually or regionally and these challenges have the capacity to so radically affect life on the planet that sovereign interests are quite subsidiary in comparison. In addition, some of the main environmental regimes where CBDR has been implemented concern global problems that are quintessentially incapable of being addressed from the standpoint of discrete territorial units.

The way forward is not for states to give up control over their resources to a global government that may prove to be even less democratic than existing institutions. In fact, the starting point for rethinking structures must start at the local level by using the principle of subsidiarity. At the same time, there is a need to recognize the continuum that exists sometimes from the very local to the global level. This is, for instance, the case with local air pollution increasing choking large cities and climate change. This is also the case with access to groundwater through wells whose availability is directly linked to recharge by rainfall itself linked to the global water cycle.

This new way of looking at environmental issues calls for rethinking the issue of appropriation over the environment and natural resources. Indeed, it is both sovereign and individual appropriation that are problematic and need to be addressed jointly. Conceptually, this implies recognizing that environmental resources cannot be appropriated and are in the custody of the whole of humankind (Franck, 1993: 92). At the national level, the doctrine of public trust applied in some countries to environmental resources constitutes an attempt to address problems of individual appropriation and assertion of eminent domain (Takacs, 2008). At the international level, the concept of common heritage of humankind has been used to identify resources that cannot be owned, must be managed jointly and whose benefits are also enjoyed jointly (Stec, 2010).

Common heritage of humankind is a known legal concept that has been applied to several legal regimes, including in the context of the use and protection of deep seabed minerals on the high seas (UNCLOS, 1982: Art. 1(1)1; Part XI). It is also a controversial notion because it challenges the sovereign control cherished by states. Yet, it is particularly relevant in the context of a differential treatment discussion because debates at the time of its introduction centred around an equity rationale.⁷ The principle of common heritage of humankind is an appropriate basis for addressing global environmental issues from a redistributive perspective. It could easily be applied to a whole range of international environmental issues. In some cases, as with the case of Antarctic water resources already under some form of joint management or water found in the atmosphere that is not claimed by states, the application of the principle should be straightforward. In other cases, such as climate change where it is crucial to apply

⁷ eg Pinto, 2013: 110 noting that '[t]o the majority of participants at the Third United Nations Conference on the Law of the Sea "common heritage of mankind" came to imply distributive justice, cooperation and preferential treatment for the poor'.

common heritage, what is needed is a completely different understanding of the problem at stake. To-date countries have addressed climate change at the international level through the lens of their national self-interest. The nature of the challenge demands that states adopt a completely different perspective in which the global issue of climate change will be the lens through which regulatory measures are adopted. The principle of common heritage of humankind provides an excellent basis for doing the same.

CONCLUSION

The principle of CBDR is the main manifestation of equity in international environmental law. It builds on similar efforts in the international law of development in the aftermath of decolonization but the specificity of some international environmental issues ensured that the basis for negotiating a different legal regime was based on shared interests of the global South and the global North, something that did not obtain in the era of the New International Economic Order.

It is today difficult to imagine international environmental law without preferential measures. Indeed, even in the Paris Agreement where a lot of pressure was put to avoid or dilute the principle of CBDR, there are various references to the special circumstances of developing countries, including in the general commitment clause that specifies the need for ‘recognizing the need to support developing country Parties for the effective implementation of this Agreement’ (Paris Agreement, 2015: Art. 3). In all other respects, international environmental law is and will likely remain structured around a South-North axis. This is in part unavoidable in a context where the vast majority of countries of the global South has not seen its human development increasing faster than countries at the top of the human development index scale. The issue that already existed in the last quarter of the twentieth century but has become much more visible in the meantime is the fact that the global South cannot easily be reduced to a single entity. This is why without breaking the South solidarity, it is crucial to ensure that a more refined system of reflecting CBDR in treaty provisions is found so that a landlocked least developed country or a small-island state is not given the same rights and obligations as a BASIC country.

Overall, CBDR has contributed to making international environmental law a dynamic area of international law that includes innovations from which other fields can learn. Within the field of international environmental law, it has been crucial in bringing on board the global North and the global South in a multiplicity of treaties where their interests did not necessarily coincide at the outset. The new tools that differentiation offers to negotiating states, from differential provisions to implementation aid, have been crucial in building consensus among the largest number of states. In this sense, CBDR has not only contributed to strengthen the equity dimension of environmental law but also contributed to its relevance and effectiveness by ensuring that global environmental issues are effectively addressed by nearly all states. CBDR has lost none of its relevance in a highly unequal world and will remain a central principle of international environmental law.

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