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Differential Treatment in International Environmental Law and the Climate Regime: From "Common but Differentiated Responsibilities" to "Common but Differential Responsibilities and Respective Capabilities"

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Abstract
Conducting a doctrinal analysis using historical and descriptive reporting, hermeneutics for the interpretation of texts, and literature synthesis for connecting relevant themes in representative bodies of literature, the article argues for the redefinition of differential treatment in international environmental law (IEL) and the climate regime. The principle of differential treatment underlies differential partnership. Under the principle, countries bear different levels of responsibility for environmental protection. While this supported the economic aspirations of developing countries ab-initio by giving them lower environmental protection responsibilities, its modification with the phrase "respective capabilities" seems to have varied its interpretation and, perhaps, application. This suggests that there might be disparities between its popular notions: common but differentiated responsibilities (CBDR), and common but differentiated responsibilities and respective capabilities (CBDR-RC). CBDR operates under general IEL while CBDR-RC is peculiar to the climate regime. The variation across these notions might have embedded implications for environmental protection. Given this, there is the need to redefine differential treatment to ascertain these variations and their potential implications. In any case, since the climate regime appears to be the most popular in IEL, CBDR-RC currently tends to overshadow CBDR. This makes it an extremely important notion for environmental protection at the moment, and a point to start redefining differential treatment. In the light of the CBDR-RC politics in climate policy, the recent emergence of concepts such as "national circumstances" and "nationally appropriate mitigation actions" has crystalized into the idea of "intended nationally determined contributions" (INDCs) in an effort to reflect domestic capacities while creating a balance in the commitments of parties. However, as attractive as this development might seem, it has the risk of making climate control commitments precarious. For example, how could Nigeria reasonably advance climate control in view of its current financial struggles, due to the oil crash, without some certainty about the amount of support it might receive, and how could one ensure that China makes sufficient commitments in view of its increasing capabilities? While there are currently no all-encompassing answers to these, a starting point could be that the new climate regime should set baselines for INDCs. In any case, all parties should bear responsibilities for mitigation. But then, since some might have insufficient capabilities to implement reasonable commitments, the new climate regime might also need to renew the sense of differential partnership, acknowledging differences with effect on responsibilities.

Keywords: differential treatment; international environmental law, climate regime; common but differentiated responsibilities; common but differentiated responsibilities and respective capabilities

1. Introduction

The practice of having non-uniform obligations in international relations and law, now often expressed as the principle of differential treatment, appears to be the foundation of the notions of common but differentiated responsibilities (CBDR) as well as common but differentiated responsibilities and respective capabilities (CBDR-RC). This practice seems to have emerged not later than 1919[1] at the end of World War I. The Treaty of Versailles 1919— one of the peace treaties signed to end the state of war between Germany and Allied Powers— acknowledged the impossibility of having a uniform labour condition, hence setting the pace for differential international agreements. Treaties with non-uniform obligations have since increased with the creation of the United Nations (UN) and the proliferation of international regimes in the post-World War II era, notably in international environmental law (IEL).

The global community became aware of the limits of economic growth in the 1960s and 1970s, and the need to develop responsibly. Driven by this, the United Nations General Assembly (UNGA) in 1967 acknowledged the idea of common responsibility based on the notion of common heritage of mankind, expressing the concern for the depletion of natural resources,[2] and the emerging concerns about the state of the environment.[3] Soon after, and despite the increasing awareness about the deteriorating state of the environment, it became obvious that developing countries still yearned for unqualified economic growth as this, they claimed, was necessary for their survival, particularly in the immediate post-independent period. To strike a balance between the environmental protection ambition of developed countries and the economic growth ambition of developing countries, the Stockholm conference acknowledged the special needs and

[1] De Lucia V., 'Common but differentiated responsibilities' in Philander S.G. (Ed.), *Encyclopedia of global warming & climate change, Second edition,* (Online version: Sage, 2012). Retrieved on 21 October 2015 from http://knowledge.sagepub.com/view/globalwarming2ed/n180.xml?rskey=7EP4lU&row=1

[2] Epstein Epstein C., **'**Common but differentiated responsibilities' in Bevir M. (Ed.), *Encyclopedia of governance,* (Online version: Sage, 2007]. Retrieved on 21 October 2015 from http://knowledge.sagepub.com/view/governance/n72.xml?rskey=7EP4lU&row=2.

[3] Swedish Delegation to the UN Conference on the Human Environment, 'Statement by Prime Minister Olof Palme in the plenary meeting, June 6, 1972' (Online version: Olof Palme Organization, 1972). Retrieved 4 January 2016 from http://www.olofpalme.org/wp-content/dokument/720606a_fn_miljo.pdf.

circumstances of developing countries[4] that should qualify their commitments, laying the foundation for their differential responsibilities vis-à-vis developed countries.

The 1987 report of the World Commission on Environment and Development (WCED) entitled "Our Common Future" also popularized the tension between the environmental protection ambitions of developed countries and the economic growth interests of developing countries. In addressing this tension, the commission laid the foundation for the idea of global partnership in environmental governance, which it carried into the United Nations Conference on Environment and Development (UNCED) at Rio de Janeiro in 1992. Given the already emerging idea of differential responsibilities, this partnership became a differential one.

This differential partnership has thus become central to IEL. Over the past four decades, many international environmental agreements have incorporated it in one form or the other, for example the Declaration of the UNCHE (Stockholm Declaration) 1972, the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 — a protocol to the Vienna Convention for the Protection of the Ozone Layer 1985— and its 1990 amendment, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989. In these instruments, it is either vaguely embodied as an acknowledgement of the special needs of developing countries warranting a particular treatment, or a sort of accommodation of developing countries stemming from their peculiar circumstances.

The UNCED institutionalized this differential partnership.[5] However, UNCED institutionalized more than just this, in that some of its agreements, say the Convention on Biological Diversity 1992, emphasized the additional idea of parties' capabilities rather than merely differential treatment, as one would gather from the text. In any case, the international community concluded at the conference that developed and developing countries should not have equal standards of responsibility for environmental protection. This conclusion, known as differential treatment, has been replicated in many international agreements.[6]

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[4] Bukovansky, M., Clark, I., Eckersley, R., Price, R., Reus-Smit, C., and Wheeler, B.J., *Special responsibilities: Global problems and American power* (New York: Cambridge University Press, 2012) 126.

[5] French D., 'Developing states and international environmental law: The importance of differentiated responsibilities' *49 (2000), International and Comparative Law Quarterly,* 35 at 36.

[6] Stone C., 'Common but differentiated responsibilities in international law' 98(2) (2004) *American Journal of International Law,* 276 at 279.

At the UNCED, the Rio Declaration (RD) officially labelled this IEL differential treatment idea as CBDR.[7] This label derives from the notion of common responsibility that arose in 1967 and differentiated responsibilities that arose in 1972.[8] CBDR was adopted by the United Nations Framework Convention on Climate Change (UNFCCC) in the same year and the Kyoto Protocol (KP) in 1997, although adding the phrase "respective capabilities," apparently based on the prior idea of parties' capabilities. In the years that followed, almost every Conference of the Parties (COP) to the UNFCCC and other climate negotiations have employed the latter nomenclature, gaining further popularity after the World Summit on Sustainable Development (WSSD) 2002.[9]

Hence, one problem the article addresses is the disparity between the notions of differential treatment in IEL. The differential treatment notion found in the IEL documents preceding the UNFCCC, as labeled CBDR by the RD, represents the "real" or "original" principle, while the CBDR-RC notion found under the UNFCCC and other subsequent climate regime instruments represents a variation. It should be noted that while CBDR and CBDR-RC seem to be predominant in IEL, this does not suggest that the principle of differential treatment might not operate under other notions, for example in international trade law.

Another problem the article addresses is the popular disagreement over the status of differential treatment in the climate regime. While not apodictic, some scholars[10] are generous in their legal and/or normative interpretations, but majority of scholars[11] are skeptical, claiming that the principle is largely vague, discretionary and does not qualify as a norm of customary

[7] Bukovansky et al. supra note 4 at 126

[8] De Larragán J., *Distributional choices in EU climate change law and policy: Towards a principled approach?* (Alphen aal den Rijn: Kluwer Law International, 2011); Epstein supra note 2.

[9] See Segger M.C., Khalfan A., Gehring M., and Toering M., 'Perspectives for principle of international sustainable development law after the WSSD: Common but differentiated responsibilities, precaution and participation' 12(1) (2003) *Review of European, Comparative & International Environmental Law,* 54.

[10] French supra note 5; Cullet P., *Differential treatment in international environmental law* (Hants: Ashgate Publishing, 2003); Matsui Y., 'Some aspects of the principle of "common but differentiated responsibilities"', 2 (2002), *International Environmental Agreements: Politics, Law & Economics,* 151; Rajamani L., *Differential treatment in international environmental law* (Oxford: Oxford University Press, 2006); Rajamani L., 'The changing fortunes of differential treatment in the evolution of international environmental law', 88(3) (2012), *International Affairs,* 605.

[11] Stone supra note 6; Rajamani L., 'The principle of common but differentiated responsibility and the balance of commitments under the climate change' 9(2) (2000), *Review of European, Comparative & International Environmental Law,* 120; Deleuil T., 'The common but differentiated responsibilities principle: Changes in continuity after the Durban conference of the parties' 21(3) (2012), *Review of European, Comparative & International Environmental Law,* 271; Joyner C.C., Biniaz S., and Di Leva C.E.. 'Common but differentiated responsibility' 96 (2002), *American Society of International Law Journal Proceedings,* 358.

international law. Stakeholders, especially state actors, also disagree on its meaning and application. To a lesser extent, the disagreement has been on whether or not there should be differential treatment, and to a greater extent, on what responsibilities should be differentiated and how.

The article examines the two prevailing differential treatment notions, CBDR and CBDR-RC, to address these problems. It conducts a doctrinal analysis using historical and descriptive reporting, hermeneutics for the interpretation of texts, and literature synthesis for connecting relevant themes in representative bodies of literature. It argues for the redefinition of differential treatment in IEL and the climate regime.

Four other sections follow. Section two reflects on the prevailing notions of differential treatment in IEL. Section three summarizes the north-south differential treatment politics and policy. Section four reconceptualizes differential treatment in the new climate regime. Section five concludes.

2. The notions of differential treatment

The interpretation, classification and application of the notions of differential treatment, CBDR and CBDR-RC, are still contested. The focus here is on the interpretation and general application guidelines, not the classification or types.[12]

CBDR and CBDR-RC provide the foundation for differential partnership based on the general principles of equity.[13] They have developed from the doctrine of differential treatment[14] in international relations and law, and have emerged to mean that states bear unequal responsibilities for the protection of the environment.[15] They also serve as an exception to the principle of sovereign equality in international law.[16]

2.1.The justifications

[12] For classifications or types, see French supra note 5; Cullet supra note 10; Rajamani 'Differential treatment' supra note 10.
[13] See also De Lucia supra note 1.
[14] See also Rajamani 'Differential treatment' supra note 10.
[15] See also Epstein supra note 2.
[16] See also De Larragán supra note 8 at 173; Cullet supra note 10.

CBDR is foremost in IEL, having developed based on the general principle of fairness or equity. It has two popular justifications generally based on historical responsibility explanations. These can be found, for example, in Article 7 of the RD and the preamble to the UNFCCC.

The first justification is that developed countries have benefited from and, by implication, harmed the environment more than developing countries.[17] As such, developing countries should also have the liberty to equally benefit, which might mean that, in so doing, they could harm the environment relatively. This justification seems to stem from the idea that humans are co-owners of the environment, and should have equal access to its resources. Several scholars have examined similar or slightly varied arguments based on common heritage, interest or good.[18] This justification is the foundation of common responsibility.

The second justification, usually subsumed under the first, is that due to the first justification, developed countries should have more environmental protection responsibilities.[19] This justification is in line with the principle of legal liability. Some scholars have associated it with contributive, retributive or environmental justice, explaining that the right of developing countries to compensation emanates from the right to be rewarded for the environmental harms that developed countries have caused in the past which have affected the interests of developing countries. [20] It also relates to the "polluter pays" principle by advocating assigning the cost of pollution to polluters. [21] There is also a further explanation now emerging in the literature based not on historical emissions but on future or projected emissions.[22] In any case, the second justification, notwithstanding the explanation that might be behind it, remains the most controversial because it assigns far-fetched and far-reaching responsibilities. It forms the foundation of differentiated responsibility.

[17] See also Rajamani 'The principle' supra note 11; Bortscheller M.J., 'Equitable but ineffective: How the principle of common but differentiated responsibilities hobbles the global fight against climate change' 10(2) (2010) *Sustainable Development Law and Policy*, 49, 65; Weiss E.B., 'Common but differentiated responsibilities in perspective' 96 (2002) *American Society of International Law Journal Proceedings*, 366.
[18] See, for example, De Lucia supra note 1; Epstein supra note 2; De Larragán supra note 8; Rajamani 'The principle' supra note 11; Deleuil supra note 11 at 121; Segger et al supra note 9.
[19] Epstein supra note 2; Rajamani 'The principle' ibid; Deleuil supra note 11; Joyner et al supra note 11; Weiss supra note 17.
[20] De Larragán supra note 8; Rajamani 'The principle' ibid.
[21] See also Rajamani 'The principle' ibid.
[22] Winkler H. and Rajamani, L., 'CBDR&RC in a regime applicable to all' 14(1) (2014) *Climate Policy*, 102.

While the historical responsibility justifications are the oldest and most popular in the IEL literature, other justifications have come with the rise of climate policy and law.[23] The most popular among them is that because developed countries have more technological and financial capacities to deal with climate change more than developing countries, they should bear more responsibilities for environmental protection.[24] This justification, based on capacity, seems to be, treaty-wise, best represented by the introduction of "respective capabilities" under Article 3 of the UNFCCC. At the moment, it is gaining popularity and acceptance among many stakeholders and commentators. Developed countries seem to prefer this justification to the other two. It constitutes the foundation of respective capabilities.

The capacity justification forms the major pillar of CBDR-RC. It is what basically distinguishes it from CBDR. This suggests that the historical responsibility rationales associated with CBDR are also a part of CBDR-RC. They form the two other pillars. The implication is that while CBDR only emphasizes common responsibility and differentiated responsibilities, CBDR-RC now emphasizes common responsibilities, differentiated responsibilities and capacities.

2.2.Overview of issues

Parties have general obligations for environmental protection under the idea of common responsibilities, non-uniform obligations in their commitments under the idea of differentiated responsibilities, and different levels of capacity that should drive their responsibilities, particularly the direction of the flow of finance and technology, under the notion of respective capabilities. As such, both CBDR and CBDR-RC appear to be nothing more than a representation of these rationales behind them.

While disagreeing on specific justifications, stakeholders and commentators agree on a number of underlying guidelines to either of CBDR and CBDR-RC. They agree that the environment is a common heritage needing cooperative attention. There is also the understanding that CBDR and CBDR-RC result from an attempt to strike a balance between the need to protect

[23] See also French supra note 5.
[24] De Lucia supra note 1; De Larragán supra note 8; French supra note 5; Cullet supra note 10; Rajamani 'The principle' supra note 11; Deleuil supra note 11; Joyner et al supra note 11; Segger et al supra note 9; Bortscheller supra note 17.

the environment and the liabilities arising from it. Further, to a large extent, the majority view is that CBDR and, arguably, CBDR-RC are based on fairness, equity and common good.

What remain contentious are the specific interpretations and application of these notions which might vary across regimes.[25] These have varied across instruments.

2.3.Relevant provisions

Principle 23 of the Stockholm Declaration, principle 7 of the RD, Articles 3 and 4 of the UNFCCC and Article 10 of the KP are leading provisions embodying differential treatment. These provisions word the principle differently and have different scopes.

Principle 23 of the Stockholm Declaration appears to be the first IEL soft law providing for differential treatment, although technically, this is neither CBDR nor CBDR-RC; similar provisions appeared in subsequent IEL agreements before the UNCED. The provision subjects differential treatment to the values of domestic jurisdictions. While this allows flexibility, it might create ambiguities and uncertainties about the operation of the principle. Also, although the provision creates differential treatment in the environmental protection standards of developed and developing countries, it words differential treatment as a goal rather than a principle. This detracts from it any intention that differential treatment should operate as a principle of customary international law. In any case, the provision acknowledges freedom of contract, as it subjects differential treatment to agreements made by parties.

The equality clause in principle 24 of the Stockholm Declaration seems to create a conflict with differential treatment in principle 23. It provides that "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing." It therefore contemplates a global partnership based on the equality of all states. How then could one reconcile principle 23 with principle 24? Latter international treaties and agreements seem to have settled this.

The UNCED introduced a provision similar to principle 23 of the Stockholm Declaration into RD, calling it CBDR for the first time. It is clearer than principle 23 of the Stockholm

[25] See also Brunnée J. and Streck C., 'The UNFCCC as a negotiation forum: Towards common but more differentiated responsibilities' 13(5) (2013) *Clim/rate Policy,* 589 at 592.

Declaration. Principle 6 of the RD lays the foundation for principle 7 by providing for the special interests of developing countries. Principle 7 then opens with the idea of global partnership in environmental governance, which UNCHE and the WCED had already introduced. It identifies the two aspects of the CBDR principle— "differentiated responsibilities" and "common responsibilities."[26] Although not stating capabilities as part of the doctrine, it concludes with the idea that developed countries should have higher responsibilities in view of their historical responsibilities and technological and financial capacities,[27] which clearly varies from the two other aspects of CBDR.[28] This is arguably the point that the concept of "respective capabilities" starts becoming glaring in the principle of differential treatment.

Unlike principle 23 of the Stockholm declaration, Principle 7 of the RD does not subject differential treatment, now known as CBDR in IEL, to domestic values and agreements made by parties. This provision seems to support the claims of developing countries more than the Stockholm Declaration, and appears successful in diverting global attention from environmental protection to development. It does this by emphasizing mostly the economic growth ambition of developing countries as against the environmental protection ambition of developed countries. In effect, this illuminates the lower responsibilities of developing countries as against any form of equality in responsibilities across the board.

Principle 7 of the RD is not flawless. In fact, French describes it as controversial[29]and Stone describes it as problematic.[30] This is because it presents an unclear CBDR pregnant with confusion. The provision only states but does not explain how responsibilities are common, and the nature of the responsibilities developing countries should have. A careful reading shows that it focuses on the higher responsibilities of developed countries, making it seem biased against them; perhaps, it presumes that stating that the responsibilities of developed countries should be higher presupposes that those of developing countries should be lower? This seem to be the major problem that developed countries have with it. Developing countries also have reservations about it, claiming

[26] Sands P., *Principles of international environmental law* (Manchester: Manchester University Press, 1994); Matsui supra note 10; Segger et al supra note 9.
[27] Weiss supra note 17 at 366.
[28] Joyner et al supra note 11 at 362.
[29] French supra note 5 at 36.
[30] Stone supra note 6 at 277.

that it fails to clearly incorporate the historical justification in the CBDR principle.[31] For example, it does not clarify how developed countries have put pressure on the environment and why this should create higher obligations for them. Latter attempts to redefine the principle have introduced a different notion of differential treatment and somewhat narrowed its application under the climate regime, hence creating a shift in its interpretation and, perhaps, application. This shift has received little or no attention in policy and the literature.

The UNFCCC applied CBDR to the climate regime in 1992. Bushey and Jinnah claim one could understand the negotiations of the UNFCCC as a series of attempts to operationalize CBDR.[32] However, the result was beyond a mere attempt at operationalizing CBDR, as it amounted to a sort of alteration. Article 3(1) of UNFCCC provides for CBDR "and respective capabilities." The explicit addition of "respective capabilities" was unique to the UNFCCC at that time. This phrase distinguishes the intendment of UNFCCC from the Stockholm Declaration and, arguably, the RD. This distinction officially marks the transition from the broader CBDR under IEL to the restrictive CBDR-RC under the climate regime. While CBDR is undoubtedly the "real" or "original" IEL principle, it appears that CBDR-RC currently operates in the climate regime, not CBDR.

The UNFCCC clarifies the climate control responsibility status of parties. Like Principle 6 of the RD, Article 3(2) of the UNFCCC provides for the special status of developing countries. Article 3(1) then provides for commitment by all parties, and the leading role of developed countries. The provision of Article 4(1) seems to be similar to the first clause of principle 23 in the Stockholm Declaration, subjecting differential treatment to national objectives and circumstances. Article 4(3) provides for further commitments of developed countries to developing countries for the provision of new and additional finance for communicating information, and for incremental cost for complying with CBDR-RC. Article 4(4) provides for a similar additional commitment of developed countries to provide financial resources to developing countries so that the latter could meet the cost of climate adaptation. Article 4(5) provides for developed countries' commitment to the promotion, facilitation and finance of environmentally-sound technologies needed by

[31] French supra note 5 at 36.
[32] Bushey D. and Jinnah S., 'Evolving responsibility? The principle of common but differentiated responsibility in the UNFCCC' 6 (2010) *Berkeley Journal of International Law Publicist,* 1.

developing countries. While giving developed countries in transition to a market economy some flexibility in Article 4(6), Article 4(7) subjects the implementation of developing countries' commitments to the effective implementation of developed countries' financial and technical support commitments.[33]

The UNFCCC also addresses the uncertainty about the commitments under principle 7 of the RD. Articles 3(8) and 3(9) provide for some specific adaptation commitments of various categories of countries.[34] Countries' commitments depend on their classification as Annexe 1 or non-Annexe 1 parties to the UNFCCC. Annexe 1 parties are considered to be developed, while non-Annexe 1 parties are considered to be developing. Without Article 3, CBDR-RC would have been subject to unimaginable interpretation ambiguities and national discretions.

But then, this is not to say that the UNFCCC is not ambiguous. Article 3(1) introduces the term "equity." One could construe this, as developing countries often do based on previous discussions at Stockholm and Rio and their outcome documents, to be the inclusion of the historical justification. However, the term is capable of plural interpretations based on different notions of equity, some of which this article discusses under its subsection entitled "reflections on equity."

This problem of ambiguity is compounded by the fact that while the RD provides historical justifications for the higher responsibilities of developed countries in the main text of the document, the UNFCCC provides for the same in the preamble.[35] With the exclusion of a clear clause on historical justification in the operative part of the UNFCCC, it is open to other interpretations. Even in the preamble, the UNFCCC does not connect the recitals on historical emissions to the recital on CBDR-RC.[36] This opens the provision up for further speculations about its true intention. One such speculation is that the higher responsibilities of developed countries is based on their obligations arising from their technological and financial capabilities than historical emissions.[37]

[33] Rajamani 'The changing fortunes' supra note 8; Brunnée and Streck supra note 25.
[34] Winkler and Rajamani supra note 22.
[35] Deleuil supra note 11; Brunnée and Streck supra note 25 at 593.
[36] Brunnée and Streck supra note 25.
[37] Deleuil supra note 11 at 272; Brunnée and Streck supra note 25 at 590.

Developed countries originally opposed the inclusion of Article 3 in the UNFCCC, claiming that it could create uncertainties about the obligations under the convention and conflicts with specific obligations of parties under Article 4.[38] As such, there is the suggestion that the addition of respective capabilities beside differentiated responsibilities is due to the objections developed countries have to the historical justification.[39] These objections revolve around the rich debate on whether it is right or wrong to subject developed countries to more commitments.[40] An illustration of this debate is that while Winkler and Rajamani contend that the RD and UNFCCC emphasize common responsibilities in the interest of environmental goals,[41] Brunnée and Streck[42] as well as Deleuil[43] contend that developing countries have focused more on the "respective capabilities" clause of the UNFCCC.

The KP attempts to make the provisions of the RD and the UNFCCC clearer. It makes an attempt to convert CBDR-RC from a mere legal principle to a policy instrument.[44] This seems to be the reason scholars have called it "the high-water mark" of differential treatment.[45] While the protocol provides for CBDR-RC in Article 10, the entire document expands on the practice of differential treatment, hence a blueprint for differential partnership, providing for the targets of developed and developing countries.

In any case, the uncertainty and vagueness associated with differential treatment have undergone dramatic changes since 2007 when the KP was agreed. The core of this transformation has been the differentiated responsibilities of parties.

3. The north-south differential treatment politics and policy in the climate regime

[38] Rajamani 'The principle' supra note 11 at 124.
[39] Deleuil supra note 11 at 272.
[40] See Stone supra note 6; Cullet supra note 10; Rajamani 'Differential treatment' Supra note 10; Rajamani 'The principle' supra note 11; Joyner et al supra note 11; Smith K.R., 'The natural debt: North and south' in Giambelluca T. and Henderson-Sellers A. (Eds.), *Climate Change: Developing Southern Hemisphere Perspectives* (Chichester: J. Wiley & Sons, 1996) 423.
[41] Winkler and Rajamani supra note 22.
[42] Brunnée and Streck supra note 25.
[43] Deleuil supra note 11.
[44] Joyner et al supra note 11 at 358.
[45] Rajamani 'The changing fortunes' supra note 10; French D. and Rajamani L., 'Global responsibility, differentiation, and an environmental rule of law?' (2014) [Oxford University Press blog]. Retrieved on 24 December 2015 from http://blog.oup.com/2014/04/global-responsibility-differentiation-environmental-rule-of-law-pil/.

Since the inception of the UNFCCC, stakeholders and commentators have been giving more attention to determining the difference in responsibilities under CBDR-RC. The first COP at Berlin in 1995 debated the standard of developed countries' responsibilities, concluding that it was insufficient and proposing strengthening their commitments through a protocol or legal instruments guided by CBDR-RC, resulting in the KP.[46] As such, the KP originally came about in an effort to increase the obligations of developed countries. Parties to the UNFCCC adopted the KP at the third COP at Kyoto in 1997, and the preamble to the KP pledged to adopt CBDR-RC and the Berlin Mandate.[47]

The differentiation of responsibilities as provided by the UNFCCC and the KP has since been the primary reason for the disagreement between developed and developing countries in the climate regime.[48] While the standard of responsibilities of developed countries has been fairly stable, that of developing countries has transformed over the years.

3.1.Perceptions and interpretations

The divergence in the perception of CBDR-RC under UNFCCC and KP has resulted in two main views about the obligations of parties.[49] This represents the famous north-south polarization.

A group of developed countries led by the US has held one of these views, emphasising the commonness of responsibilities while acknowledging differential treatment based on capacity and contribution to climate change.[50] The US rejected KP in 2001[51] and argued that it would not take on binding obligations except key developing nations meaningfully participated. The term "key developing nations" here seems to mean developing countries with fast emerging economies such as China, India and Brazil. By "meaningful participation," the US appears to mean that these countries should be bound by targets in the KP.[52]

[46] Rajamani 'The principle' supra note 11 at 126.
[47] Ibid at 127.
[48] See also Rajamani 'Differential treatment' supra note 10.
[49] Rajamani 'The principle' supra note 11 at 128; Deleuil supra note 11 at 272; Brunnée & Streck supra note 25 at 590.
[50] Deleuil supra note 11 at 272; Brunnée and Streck supra note 25 at 590.
[51] Peters G. and Wooley J.T., 'Letter to the members of the Senate on the Kyoto protocol on climate change' (2001). Retrieved on 5 January 2016 from http://www.presidency.ucsb.edu/ws/?pid=45811.
[52] Rajamani 'The principle' supra note 11 at 128.

The second view that has been mostly championed by China together with other developing countries under the aegis of the Group of 77 (G77) is that the responsibilities of developing countries are limited, mainly focusing on adaptation[53] and subject to the provision of capacity[54] as well as their overwhelming interests in sustainable development.[55] This shows that developing countries might mostly be interested in adaptation measures subject to support from developed countries, but not mitigation. This point finds corroboration in some of their contributions in the twentieth COP at Lima in 2014.[56]

In all, it appears that developed countries have mostly emphasized mitigation while developing countries have mostly emphasized adaptation. Meanwhile, mitigation costs are largely perceived to be high in the developed countries while adaptation costs are somewhat considered high in developing countries.[57] In any case, until recently, adaption has not been explored like mitigation.[58] This is perhaps because, given their interests in mitigation, many developed countries have more resources to stimulate mitigation research and development, for example on renewable energy and energy efficiency as well as carbon capture and storage, but many developing countries lack sufficient resources to conduct impactful research on and develop adaptation techniques, for example drought and water management protocols.

3.2.Debate on differentiation

[53] G77 & China, 'Statement by Mr. Jamil Ahmad of Pakistan on behalf of G77 & China at the opening session of subsidiary body on implementation (SBI 27)' (2007). Retrieved on 5 February 2016 from http://www.g77.org/statement/getstatement.php?id=071203b.

[54] G77 & China, 'Statement on behalf of the group of 77 and China by Ruleta Camacho, Antigua and Barbuda, at the opening plenary of the subsidiary body for scientific and technological advice (SBSTA)' (2008). Retrieved on 24 February 2016 from http://www.g77.org/statement/getstatement.php?id=081201b.

[55] G77 & China, 'Statement on behalf of the group of 77 and China by Mr. Farukh Amil, deputy permanent representative of Pakistan to the United Nations (In the General Assembly Under Item 116)' (2007). Retrieved on 4 January 2016 from http://www.g77.org/statement/getstatement.php?id=071206.

[56] UNFCCC, 'Decision 1/CP.20: Lima call for climate action. Report of the conference of the parties on its twentieth session, held in Lima from 1 to 14 December 2014 (Report No. FCCC/CP/2014/10/Add.1)' (2014). Retrieved on 3 January 2016 from http://unfccc.int/resource/docs/2014/cop20/eng/10a01.pdf. See also Khor M., 'Understanding the Lima: Climate conference a proxy battle for the 2015 Paris agreement' (2015) *Economic & Political Weekly*. Retrieved on 4 December 2015 from http://www.lexisnexis.com/hottopics/lnacademic/?verb=sr&csi=365197&sr=HLEAD(Understanding%20the%20Lima%20Climate%20Conference%20A%20Proxy%20Battle%20for%20the%202015%20Paris%20Agreement)%20and%20date%20is%202015.

[57] See also Rajamani 'The principle' supra note 11 at 125.

[58] Rajamani 'The principle' ibid at 125; Haites E., Yamin F. & Höhne N., 'Possible elements of a 2015 agreement to address climate change' (2014) *Carbon & Climate Law Review,* 2014 (1), 3 at 6.

The current debate on differential treatment seems to have emerged during the negotiations of the UNFCCC, which was then carried into the KP. It has increased recently mainly because of the rising levels of emission from leading industries in fast developing countries such as China, India and Brazil that have made it into the top 20 emitters in the world.[59]

Although similar, it seems the UNFCCC and the KP provide for different types of differential treatment.[60] The disparities are in the details of the differentiation. Driven by the political persuasion of developing countries, the UNFCCC provides that developed countries' emission reduction commitments should increase. This translated into the drafting of the KP. As a result, the KP appears to provide for a greater burden of commitments for developed countries than the UNFCCC. Also while UNFCCC provides for more principles than practice, the KP provides for more implementation steps than principles. It is easier to feel the pressure of implementation provisions than principles, hence developed countries seem to feel the pressure of implementation directives under the KP more than those of principles under the UNFCCC.

The tension existing on differentiation appears to have increased since the KP was agreed. The increase in the emission levels and capacities of fast developing countries such as China, India and Brazil, and the disunity in the G77 appear to have contributed to this.[61] These seem to have allowed the current argument of developed countries that differentiation of responsibilities in the climate regime should depend on emission realities and capabilities as well as how countries have evolved.[62] As a result, the trend of climate law and policy at the moment is towards basing differential treatment on countries' emission realities and circumstances.

Notwithstanding the foregoing, there are some agreements on specific differentiation responsibilities. One example could be found in climate control finance. The Durban COP launched the Green Climate Fund as an operation entity of the financial mechanism of the UNFCCC. The fund's financial inputs come mainly from developed countries but both developed

[59] For data, see Moorhead J. and Nixon T., 'Global 500 greenhouse gases performance 2010-2013: 2014 report on trends' (2014). Retrieved on 2 September 2015 from http://site.thomsonreuters.com/corporate/pdf/global-500-greenhouse-gases-performance-trends-2010-2013.pdf.
[60] Brunnée and Streck supra note 25 at 593.
[61] Rajamani 'Differential treatment' Supra note 10; Rajamani 'The changing fortunes' supra note 10; Bortscheller supra note 17; Bushey and Jinnah supra note 32; French and Rajamani supra note 45.
[62] Winkler and Rajamani supra note 22.

and developing countries have equal membership rights in the board that governs it. This illustrates a level of consensus in the midst of the developed-developing country divide.

4. Reconceptualizing differential treatment in the new climate regime

Based on the outcome of the Paris COP, a new climate agreement has emerged. In essence, the Paris agreement is designed to drive the obligations of parties based on nationally determined variables:

> Parties agreed to hold the increase in global average temperature to "well below 2 °C above pre-industrial levels" and to "pursue efforts" for a 1.5 degrees Celsius limit. The aim is to peak global emissions "as soon as possible" and to achieve net-zero emissions in the second half of the century. In order to do so, the deal requires parties to submit so-called "nationally determined contributions" (NDCs) every five years, which should at the minimum outline best-effort mitigation pledges, with increasing ambition over time.[63]

The highlight of the Paris agreement is therefore the so-called intended nationally determined contributions (INDCs) aimed at creating and actuating climate mitigation obligation for all. Given its emphasis on national decisions, this has the effect of reverting most of the powers in climate policy to national jurisdictions as opposed to the global governance architecture. This makes sense, at least, because national law has more enforcement capabilities which could drive the setting of climate commitments than international law. However, whether it will successfully do so is another issue.

The idea behind the INDCs could be traced to at least the Copenhagen COP which set the foundation for the "pledge and review" approach to commitments, mostly supported by developed countries.[64] Unlike previously, this approach is bottom-up, requiring parties to pledge what they call nationally appropriate mitigation actions (NAMA) commitments based on their national circumstances. The idea of NAMA itself emerged from the decision at the Bali COP, powerfully

[63] Jegou I., Hawkins S., Botwright K., 'What Role for Trade and Investment in the New Climate Regime' (2016) International Centre for Trade and Sustainable Development. Retrieved on 27 April 2016 from http://www.ictsd.org/bridges-news/biores/news/what-role-for-trade-and-investment-in-the-new-climate-regime.
[64] Khor supra note 56.

stirred by developed countries, to build a process to determine the actions of both developed and developing countries, agreeing on a long-term cooperative action up to and beyond 2012.[65] This history shows that the idea of INDCs is mostly a brainchild of developed countries post-KP. One could conclude that the pro-developing countries' climate policy peaked with the agreement of the KP, following which developed countries began to have their way.

Against this background and given the sort of "reversion of power" back to national jurisdictions, there is no agreement on whether or not the new climate regime will be successful. First, in some quarters, it is seen as relegating developing countries. Second, it has the effect of officially and unanimously subjecting climate control decisions to national discretions. Thus, given its emphasis on national discretion, the differential treatment principle in the Paris Agreement seems to toe the line of Principle 23 of the Stockholm Declaration except that the latter emphasizes the interests of developing countries, does not deal exclusively with climate change, and might be seen as more discretionary.

Thus, while some commentators are optimistic about the new climate regime, [66] others are not. [67] The position of developing countries in recent post-2015 development agenda negotiations on the platform of the UNGA shows that they might not be ready to give up on the favourable classic principle of differential treatment and broader principle of equity any time soon,[68] and the Zero draft on post-2015 development agenda also suggests this.[69] Hence, it might be unlikely that developing countries would ultimately support a climate regime that would compromise the principle of differential treatment and the notion of equity as they have known it.

4.1.Emerging issues

[65] UNFCCC, 'Decision 1/ CP.13: Bali action plan. Report of the conference of the parties on its thirteenth session, held in Bali from 3 to 15 December 2013 (Report No. FCCC/CP/2007/6/Add.1)' (2007). Retrieved on 2 November 2015 from http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3.

[66] See Xue-Du L., 'Assessment of achievements of the Lima climate change conference and perspectives on the future' xx (2015) *Advances in Climate Change Research,* 1.

[67] See, for example, Khor supra note 56.

[68] See Muchhala B., 'First UN post-2015 development agenda session: Southern perspectives on broad contours, principles and imperatives' (2015) *Global Policy Watch*. Retrieved on 22 February 2016 from https://www.globalpolicywatch.org/blog/2015/02/26/first-un-post-2015-development-agenda-session-southern-perspectives-on-broad-contours-principles-and-imperatives/.

[69] UN, 'Zero draft: Outcome document to adopt post-2015 development agenda [Office of the Secretary General's Envoy on Youth blog]' (2015). Retrieved on 2 December 2015 from http://www.un.org/youthenvoy/2015/06/zero-draft-outcome-document-adopt-post-2015-development-agenda/.

The consensus on differential treatment has been waning recently. This is largely as a result of the advocacy and political influence of developed countries. These countries have emphasized the idea of respective capabilities and national circumstances that should drive climate commitments, leading to a shift towards the idea of mitigation responsibilities for all. More subtly, some developing countries such as China and Brazil have been initiating differential domestic climate policies, assuming voluntary responsibilities, and taking active roles for climate change mitigation.[70] These seem to partly arise from the variance in the capabilities of developing countries in that some now have more resources than the others, and partly from the increased political alliances of some developing countries which might be driving their decisions. These developments bring with them certain implications.

Generally, while the increase in the attention given to the ideas behind determining climate control responsibilities based on the consideration of respective capabilities and national circumstances appears to be easing the pressure on developed countries, it seems to be increasing the tension of most developing countries.[71] Evidence showing this could be found in their contentions at the Lima COP.

Specifically, although the climate regime appears to be incorporating bottom-up approaches, the mitigation intentions of developed countries driving it have a top-down character as these countries have unwavering climate control ambitions determined to drive other stakeholders.[72] Perhaps, this is one of the reasons most developed countries have continued to insist on mitigation commitment for all parties. While insistence on mitigation target for all parties is reasonable for achieving the global temperature rise target of 2ºC or less above the pre-industrial level, it faces two main problems.

The first problem is that if parties depend on the INDCs for this "mitigation for all" ambition, actual commitments might not be adequate to address the challenges of climate change or to reach the 2ºC ambition[73] or any other reasonable ambition. This is because it is discretionary. One might therefore be disappointed by the INDCs parties announce in the coming years.

[70] Rajamani 'The changing fortunes' supra note 10; Brunnée and Streck supra note 25.
[71] Khor supra note 56.
[72] See generally Grubb M., 'From Lima to Paris, part 1: The Lima hangover' 15(3) (2015), *Climate Policy*, 299.
[73] Grubb ibid at 301.

The second problem is that excluding or making adaptation, financial support and the transfer of technology discretionary under the INDCs might reduce the ability of developing countries to pledge and implement reasonable targets. While this gives them a flexibility, it also undermines potential support that they could get. Hence, without sufficient support, many developing countries might not have the capabilities to pledge or achieve any substantial mitigation goals that they might wish to set for themselves. As such, these countries might end up setting goals that might not adequately contribute to climate control.

4.2.Reflections on equity

Already, scholars are pondering on whether many developing countries would support or participate in the new climate regime.[74] These scholars share the view that equity is a component that would make the climate regime garner support and succeed.

Equity is often cited as underlining the historical responsibility justifications. However, the interpretation of equity is not restricted to historical responsibility. This is because the concept is capable of other usages.

To clarify the concept of equity, Ngwadla identifies its two aspects as form and magnitude, and provides three dimensions.[75] By form he means the process, and by magnitude the liabilities and their extent for mitigation, adaptation or support.[76] The climate regime is not yet clear on both the form and the magnitude.

Beyond this, Ngwadla also provides dimensions that seem to explain the concept of equity better.[77] The first dimension is the transformation of the climate control obligations of the UNFCCC into a temperature goal, providing the platform for the division of responsibilities among parties; the second dimension is deciding the global efforts required for mitigation, adaptation, finance and technology; and the third dimension is the determination of what constitutes fair contribution of each party. However, these three dimensions are still contested in climate policy.

[74] Rajamani 'The changing fortunes' supra note 10. Khor supra note 56; Haites et al supra note 58.
[75] Ngwadla X., 'An operational framework for equity in the 2015 Agreement' 14(1) (2014) *Climate Policy*, 8.
[76] Klinsky S. and Winkler H., 'Equity, sustainable development and climate policy' 14(1) (2014) *Climate Policy*, 1; Winkler & Rajamani supra note 22; Morgan J. and Waskow D., 'A new look at climate equity in the UNFCCC' 14(1) (2014) *Climate Policy*, 17; Ngwadla supra note 75.
[77] See Ngwadla supra note 75.

Parties have been divided over the roles developed and developing countries should play and the extent of their contributions.

De Larragán provides a further clarification that seems to be the most helpful.[78] He alludes to two notions of equity that could help stakeholders reach a consensus. The first is based on unfair advantage arising from the imposition of liabilities on a party without consent, wherein the disadvantaged party could demand that the offending party bears the costs of such liabilities. Because this is based on legal liability, it could be seen as resorting to the historical justification which remains contentious, and might lead to further disagreements. The second notion aims at balancing the interests of parties, filling a gap in the law, or softening the outcome of the law, rather than a right-wrong approach. This second notion could justify differential treatment on the basis of difference in capabilities and the need for mutual dependence; it is less contentious, and might guide the climate regime better. Rather than laying emphasis on who is right or wrong, it might be more beneficial to emphasize common interests and mutual dependence warranting a differential partnership.

In all, Brunnée and Streck,[79] Haites et al.,[80] Grubb,[81] Khor,[82] Morgan and Waskow,[83] Rajamani[84] and many other scholars have concluded that equity continues to remain a central theme driving the debate on the new climate regime. The weight of arguments and evidence seems to indicate that the regime might not succeed if it does not provide for it. To create agreements, enhance participation, facilitate support, and enhance success and implementation, the regime should be perceived as equitable.[85] As such, many scholars have either submitted or implied that equity should remain in the climate regime. [86] Otherwise, the regime might fail.

[78] De Larragán supra note 8.
[79] Brunnée and Streck supra note 25.
[80] Haites et al. supra note 58.
[81] Grubb supra note 72.
[82] Khor supra note 56.
[83] Morgan and Waskow supra note 76.
[84] Rajamani 'The changing fortunes' supra note 10.
[85] See also Winkler and Rajamani supra note 22.
[86] See, for example, Winkler and Rajamani supra note 22; French and Rajamani supra note 45; Haites et al. supra note 58; Morgan and Waskow supra note 76; Ngwadla supra note 75.

Some scholars provide clues on how the climate regime should incorporate equity[87] while others have proposed specific approaches. [88] Although extreme differentiation such as the one under KP has lost political favour, other forms of differentiation might be helpful.[89] The ones Haites et al.[90] and Winkler and Rajamani recently developed are insightful.[91] Nonetheless, specific approaches are largely driven by national, stakeholders' and commentators' differences and biases, and have remained vague and contentious.[92] Rather than focus on specific approaches, general guidelines might be more insightful. These could result from redefining how differential treatment applies, that is how differential partnership works, in climate policy.

Hence, to reach a consensus on a workable idea of equity, there is the need to redefine differential treatment in the climate regime. This addresses how actual commitments are measured, in terms of general ideas about the amount of responsibilities parties should have across the board, including mitigation and adaptation, along with the direction of these commitments, that is who should do what.

4.3.A renewed sense of differential partnership

Redefining differential treatment in the climate regime could lead to a renewed sense of differential partnership. This could endorse agreeable differences in the commitment of parties.

Parties take part in environmental negotiations because of the common or collective interests binding them.[93] To protect these interests, they need to cooperate as global partners. They are mutually dependent on one another because of their collective interests stemming from environmental interconnectivity. Whether they like it or not, they are bound together in a global partnership out of necessity arising from this interconnectivity.

As partners, parties need to take their differences into account.[94] The climate regime needs to acknowledge differences and capabilities in assigning commitments.[95] Hence, circumstances of

[87] De Larragán supra note 8; Morgan and Waskow supra note 76; Ngwadla supra note 75.
[88] Haites et al. supra note 58.
[89] Rajamani 'The changing fortunes' supra note 10 at 623.
[90] Haites et al. supra note 58.
[91] Winkler and Rajamani supra note 22.
[92] See also Brunnée and Streck supra note 25; Grubb supra note 72.
[93] See also French and Rajamani supra note 45.
[94] See Cullet supra note 10; Rajamani 'Differential treatment' Supra note 10.
[95] Winkler and Rajamani supra note 22.

parties could determine the manner and extent of their commitments.[96] This might imply that differential treatment, whether in the form of CBDR, CBDR-RC or other variants, and the broader notion of equity do not have to be on the basis of historical justification or the inconsiderate interests of parties: It could also arise from the acknowledgement of parties' inequalities and differences.[97] Accommodating differences is one form of equity[98] that could drive differential treatment. Thinking about equity this way redefines differential treatment. This type of thinking is congruent with De Larragán's second notion.

At the moment, many developing countries might be in circumstances that make them incapable of attaining reasonable commitments without guaranteed financial and technical support. Nigeria is one such example, given its reliance on the oil and gas sector which is currently in a bad shape, resulting in extreme financial challenges. Similarly, some developed countries might not be capable of providing reasonable support to developing countries because they have insufficient capacity. A classic example is Greece, given its recent financial situation. Still in this line of thinking, some developing countries now have the capacity to support other countries, especially the ones that they mostly identify with. China tops the list of countries in this category in view of its booming wealth and advancing technology. Therefore, since the circumstances of parties vary, obligations under differential partnership should be based on peculiarities, and this may change from time to time based on the circumstances of parties. This shows that differential treatment might not be perpetual as it could change as parties' circumstances change.[99]

Differential treatment arguably remains the most effective means of inducing and integrating developing countries into IEL regimes without compromising their abilities to cope.[100] In view of this, embracing a sort of partnership arising from mutual dependence and reflecting the circumstances of parties might foster climate control. The obligations of the partnership arrangement should not be based on unqualified equality, but rather on the understanding of the vulnerability arising from environmental interconnectivity, and the circumstances of parties which might change from time to time.

[96] Bukovansky et al. supra note 4.
[97] See also Cullet supra note 10.
[98] Morgan and Waskow supra note 76.
[99] See also Winkler and Rajamani supra note 22.
[100] See also French supra note 5; Rajamani 'Differential treatment' supra note 10.

5. Conclusion

The article has examined CBDR and CBDR-RC to argue for the redefinition of differential treatment in IEL and the climate regime. Its goal is not to recommend strategies for or models of differential treatment, but rather to provide the context and generate ideas for its redefinition. This might be insightful for guiding and evaluating environmental policies.

While CBDR still seems to exist under the broader IEL umbrella, it has transformed into CBDR-RC under the climate regime. CBDR focuses on the broader need for differential global partnership in order to achieve environmental protection while CBDR-RC emphasizes the capabilities of parties in the determination of their responsibilities for climate control. CBDR under IEL is thus broader than CBDR-RC under the climate regime.

In driving the overriding goal of environmental protection, the operation and implications of CBDR might be different from CBDR-RC, given the variation of the notions. While an explanation of this variation could be that parties are free to alter their agreements, say from what might have been intended under CBDR to what is now emphasized under CBDR-RC, a further analysis of the differences might reveal crucial potential or actual policy implications in the environmental protection discourse.

But then, to foster environmental protection at the moment based on the dominant notion of CBDR-RC, and since equity is flexible enough to allow multifarious interpretations, the necessity for climate control and the circumstances of parties should be the hallmark of differential partnership in climate policy, not historical justification. This might imply that, to achieve the goals of the climate regime, all parties should have mitigation responsibilities.

However, because many developing countries might not be capable of meeting substantial mitigation commitments without financial and technical support, it seems fair that some developed countries and other capable stakeholders should continue to support them. Similarly, it seems equitable to accommodate the differences existing among developed countries in determining their responsibilities. The fairness or equity here rests in accommodating differences based on circumstances.

In any case, while the idea of INDCs seems promising as it allows for flexibility, it needs a careful re-evaluation. An unqualified discretionary approach to INDCs might lead to uncertain

responsibilities and be detrimental to the climate regime. It might be better for the climate regime to set baselines for determining INDCs. Without this, parties might make inadequate commitments.

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