**CHAPTER 6**

***Common but Differentiated Responsibilities and Justice: Broadening the Notion of Responsibility in International Law***

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1. ***Introduction***

In a strictly legal sense, the notion of responsibility in international law involves the failure by a legal person, traditionally a state, to fulfil an international commitment. It presupposes the violation of an international obligation for which that state can be held liable.[[1]](#footnote-1) For the state to be held internationally responsible in that specific sense, the internationally wrongful act must be attributable to this state and this violation must be the cause of loss or damage suffered by the legal person (i.e. another state) to whom the obligation was owed. The concept of common but differentiated responsibilities (CBDR)[[2]](#footnote-2) however does not squarely fit within that scenario of traditional international responsibility. Primarily based on the notions of equity and justice (Cullet 2015: 234; Shelton 2010: 67; Rajamani 2012: 623), and premised in particular upon the principle of intra-generational equity, CBDR, as a framework **(**Birnie, Boyle and Redgwell 2009: 135**)** or structuring principle (Bartenstein 2010: 199) of the international legal order, hinges upon responsibility not only in its causal, but also in its moral dimension. Its application involves the elaboration of differentiated legal standards and implementation mechanisms according to both responsibilities and capabilities of states. It further requires, crucially, the transfer of financial resources and relevant technology from those more capable (and responsible) to those less well endowed. Differentiated commitments also work as a condition *sine qua none* for the recognition of a common responsibility towards environmental protection. Without these, the mere adoption of global environmental protection regimes such as the climate change regime or the Convention on biological diversity would simply not have been possible (Deleuil 2012: 273; Arbour 2014: 60; Birnie, Boyle and Redgwell 2009: 135).

This chapter explores the meanings and interpretations in international law of the notion of responsibility stemming from its inclusion and use in the principle of CBDR, and it attempts to conceptualise the various frameworks of responsibility that the principle gives rise to. It contends that the competing conceptual groundings attributed to CBDR as well as the variety of its practical legal translations contribute to a broadening of the understanding of the notion of responsibility in international law which straddles along a mix of scenarios, ranging from moral to causal responsibility, with a number of stops in between. In order to capture the competing contentions relating to the meaning of responsibility in the CBDR principle, a conscious choice has been made to approach the notion from the broad perspective of international environmental law and across several sub-policy fields. It thus dips into the ozone depletion regime, biodiversity protection, the law of the sea, or the WTO, as well as climate change law wherever useful lessons may be learned for the framing of responsibility. It is suggested that this approach is more able to shed light not only on the practices of responsibility among various communities within a specific policy field such as climate governance, but also across policy fields. Hence the meanings of responsibility attached to CBDR may well differ between the actors of the climate change debate and those of the ozone depletion regime.

The chapter proceeds in four steps. It starts by reviewing the competing meanings attached to the notion of CBDR in the texts in which the notion has been initially negotiated and highlights the resulting dual conceptual grounding to which it gives rise. It then assesses the relationship of the principle to international law and details some of the ways in which it is used to influence legal content. The following section maps the various meanings of CBDR across environmental policy fields and specifically surveys the practical legal translations of the principle. The last section attempts to conceptualise the different responsibility frameworks deriving from the varying conceptual groundings and meanings of CBDR before drawing some general conclusions.

1. ***Negotiating the Meaning of CBDR and Competing Conceptual Groundings***

The most authoritative expression of the principle of CBDR is to be found at principle 7 of the Rio Declaration on Environment and Development of 1992 which has been endorsed by the international community as a whole. Principle 7 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 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 technology and financial resources they command.

Yet, this text reflects an extremely fragile compromise between the competing views of the drafters along a North-South divide. While conceptually it is undeniable that the foundations of the principle lie in the twin notions of partnership/commonality of interests, on the one hand, and equity/fairness, on the other, states’ views diverge substantially on the rationale for its equitable dimension.

* 1. *Common Responsibilities and Cooperation*

Environmental threats such as the depletion of the ozone layer, global warming, or the loss of biological diversity affect all states relatively indiscriminately.[[3]](#footnote-3) The realisationof these global environmental threats and interdependencies has logically given rise to a commonality of interest in tackling such dangers by the international community. From there stems a common responsibility of all states in actively participating in the design and implementation of international legal regimes aimed at addressing these threats. For some this translates in a shared obligation of all states towards protection of environmental resources (Sands and Peel 2012: 234), as well as an obligation of cooperation to that end (Matsui 2002: 153). The common responsibility dimension of the principle in this sense is a translation of the common interests that states share and the fact that they should collectively contribute to their realisation. This commonality of interests also reflects the solidarity by which the international community is bound in protecting the global environment. This has readily been accepted by states in the drafting process of principle 7 without much contestation. Tracing the negotiations of the principle, Cullet highlights that the cooperation and partnership dimension of CBDR appears in early drafts of the principle and, not surprisingly, in proposals from developed countries such as the United States (US), Japan or the European Economic Community (Cullet 2015: 232-233). But it can also be found in proposals emanating from the developing world, such as for example in a draft emanating from China and Pakistan which points to the common responsibility of all states for containing, reducing and eliminating global environmental damage.[[4]](#footnote-4)

Solidarity, however, will also necessarily imply a differentiation of responsibilities among international legal subjects (Cullet 2010: 168). Whereas all states are entitled or required to participate in international response measures to a threat, or in other words, whereas all states have a common responsibility in protecting the global environment, not all states will share the same responsibility to that effect. Responsibilities are hence differentiated, and it is with respect to this second dimension of the principle that the consensus on the meaning of CBDR is much shakier (Arbour 2014: 56-59).

* 1. *Contested Historical Liability*

By referring to the varying levels of contribution to existing global environmental problems, the principle seems to acknowledge that the “wealthy North” bears a heavier responsibility in the current levels of environmental degradation due to both historic contributions and ongoing patterns of production and consumption. This is also partly recognised in the preamble to the United Nations Framework Convention on Climate Change which notes that ‘the largest share of historical and current global emissions of greenhouse gases has originated in developed countries’.[[5]](#footnote-5) The high levels of economic development in industrialised countries have been achieved to a large extent at the expense of a healthy environment and this should readily translate into a heavier responsibility on the North to fix the problems they have created. However, while the South argues – with regard to equity and justice purposes – that historic contributions should form the basis for a legal responsibility (as in liability) to eliminate or compensate for the damage caused, as seen for example in the earlier draft of the principle proposed by China and Pakistan, this grounding of CBDR is firmly rejected by the North which argues notably that it cannot be held liable for the current consequences of past behaviour that was not illegal at the time it took place.

To take the example of global warming, this suggests that since the consequences of fossil fuel burning were unknown at the time the industrial revolution started until a few decades ago, the North should not be held legally responsible for damage caused by past emissions. The rejection of legal consequences stemming from historic contributions is particularly clearly expressed in the interpretative statement to principle 7 attached to the Rio Declaration by the US according to which principle 7 ‘highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities. The United States does 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.’[[6]](#footnote-6) At best, thus, any consensus on a differentiation of responsibilities grounded in historic contributions to environmental degradation is turned towards the future (Bartenstein 2010: 187)and in so far as any liability may be accepted by the North, it would only be liability for current and future behaviour.

* 1. *Equity and Justice*

At the same time however, high levels of economic development also mean that the “wealthy North” is in a much better position to tackle existing issues, adapt to evolving environmental conditions, or prevent future threats, than the less well endowed “South” in view of their financial capabilities and technological advances. Equity and justice thus also command that responsibilities be differentiated on the basis of varying capabilities, this constituting for the North the core grounding for the differentiation of responsibilities, as reflected in the USA’s interpretative statement. Although these common but differentiated responsibilities may not necessarily translate into differing liabilities (see however discussion in section 5 below), they will translate into differing legal standards imposed on states according to both contributions (at least current) and capabilities. The notion of “differentiated responsibilities” thus primarily gives rise to differentiated obligations (Bartenstein 2010: 197) and conditions for implementation (Maguire 2013: 261), and the crux of the CBDR principle lies on the differential legal treatment between states that it commands. From this point of view, the differentiation of responsibilities and commitments are an expression of equity and fairness. In legal parlance, ruling in accordance with equity, or *ex aequo et bono,* may either allow the application of legal rules to be displaced in favour of the application of general principles of justice (Lowe 1989: 54), or it may more modestly allow the strict application of a rule to be corrected by considerations of justice or equity to avoid any unjust outcome (*Georges Pinson (France) v United Mexican States* 1928).[[7]](#footnote-7) And justice, social and moral concerns are clearly the bases on which the differential treatment rests, since those in a more favourable position will be required to undertake more obligations towards environmental protection and assist states in a less favourable position through financial and technology transfers (see further infra 4). More specifically, CBDR can be seen as an expression of the principle of intra-generational equity, a key constitutive element of sustainable development, which requires a fair repartition of the fruits of development within one generation, i.e. a fair distribution of wealth between rich and poor (Barral 2012: 380-381).

Ultimately, the differentiation of responsibilities according to equity stems from a deeply contested dual grounding: historic contributions according to the South, capabilities according to the North. But beyond the controversies relating to its foundations, the principle of CBDR is thus intimately connected to the notion of justice both in its corrective (Shelton 2009: 67) and distributive dimensions (Cullet 2010: 167). CBDR hinges upon corrective justice by requiring developed states to take the lead in the fight against environmental degradation, in the adoption of mitigation and adaptation measures, and in assisting the developing states in achieving their own commitments, due at least to their current contributions (and possibly historic contributions too) to existing problems and threats. But CBDR also hinges upon distributive justice. The differential treatment that it commands is also grounded on states’ differing financial resources and capabilities: the better endowed, the heavier the commitment. In that sense, the differentiation of obligations according to present distribution of resources and powers aims to achieve substantive equality through the medium of distributive justice (see further section 5 below).

1. ***CBDR’s Influence on the Law***

CBDR’s contested conceptual grounding, this section shows, necessarily affects its relationship to international law, not only in so far as the principle struggles to be recognised as a binding legal norm, but also in so far as it struggles to influence the outcome of legal disputes before international judges, even where the parties’ claims rely on it. Despite these obstacles and the reluctance to accept claims based on CBDR, the principle is certainly not legally irrelevant. In fact, it is contended that CBDR is particularly effective in influencing the content of international law *at design*.

Despite its recognition as a legal principle[[8]](#footnote-8) (as testified by its inclusion at principle 7 of the Rio Declaration on Environment and Development), and the inclusion of the principle of CBDR itself in some multilateral environmental agreements such as the United Nations Convention on Climate Change (article 3(1)), international lawyers generally agree that it does not yet constitute a legally binding rule *per se* (see Stone 2004: 281 and 299; Rajamani 2006: 159; Birnie, Boyle and Redgwell 2009: 135; Bartenstein 2010: 199; Cullet 2010: 178). Bartenstein notes that even though CBDR may well be vested with fundamentally norm creating character, in that it could require states to promote equitable international relations (the objective) through the means of differential treatment (the technique), the principle remains too vague and uncertain to lend itself to sufficient state practice and *opinio juris*.[[9]](#footnote-9) The recognition that CBDR constitutes a legally binding principle for the international community as a whole is also hampered by the USA’s interpretative statement to principle 7 of the Rio Declaration,[[10]](#footnote-10) and by the general division between developed and developing countries as to its meaning and implications.

The fact that CBDR does not sit comfortably within traditional legal parameters is also reflected in the very little use that international judges make of it despite a number of (arguably limited) claims based on the principle. Because of its still uncertain legal status, judges will generally not appeal to the principle of CBDR *per se*. However, they may, on occasion, consider whether certain states or groupings of states should be accorded preferential or differential treatment. Such is the case in the WTO context. In this vein, a Panel acknowledged that article XVIII:B of the GATT allowing developing countries to temporarily maintain balance of payment restrictions reflected a recognition of the specific needs of developing countries and embodied special and differential treatment (*India - Quantitative Restrictions* 2011, para 5.155). The possibility of differential treatment was again accepted in a report involving the EC and the preferential tariff system that it grants developing countries (*European Communities – Conditions for the Granting of Tariff Preferences* (2004)). On occasion, some parties have directly invoked the principle of CBDR in order to found their claim for preferential treatment. Russia, who was facing difficulties with the implementation of its obligations under the Kyoto Protocol to the Climate Change Convention, activated its non-compliance procedure claiming that in view of the principle of CBDR, it should be granted financial help to assist in the compliance with its obligations. Though the Committee did not follow Russia’s claim relating to the legally binding nature of CBDR, it did grant it some form of financial relief in view of the difficulties faced by countries in transition (Compliance Committee of the Kyoto Protocol 1995, Decision VII/18, Doc. UN UNEP/OzL.Pro.7/12: 1995; Hellio 2014: 216).

Whereas in the cases so far mentioned CBDR, or more broadly the differentiation of responsibilities, is invoked to negotiate preferential treatment, CBDR or the claim for preferential treatment may be resorted to with a view to escape liability. In a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS), some developing countries sponsoring activities by private entities in the deep seabed area under the United Nations Convention on the Law of the Sea (UNCLOS) were claiming that in order for them to be able to develop such sponsoring activities, they should be granted preferential treatment in terms of their environmental liabilities, and in particular their due diligence and precautionary duties as well as their obligation to carry out environmental impact assessments. In essence their argument was that preferential treatment did not just concern technology transfer provisions or taking their special situation into account when establishing rules concerning the sharing of benefits. Rather preferential treatment should extend to preferential responsibilities and in particular liabilities. In other words, the specific needs of developing countries should mean that they could escape liability for environmental damage more easily than better endowed parties. According to ITLOS however, the preferential treatment accorded developing countries in terms of standards and commitments could not be extended to responsibilities or liabilities. The Seabed Dispute Chamber of ITLOS found that while UNCLOS did cater for the special needs of developing countries in terms of according preferences to this category of states in the design of their international obligations, ‘none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State “specifically provides” for according preferential treatment to sponsoring States that are developing States’ (*Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (2011) para 157-158; Arbour, 2014: 45). In other words, the principle cannot be extended to provisions that do not specifically provide for this possibility, and in this particular case, it could not be applied to reduce or modify the liability of the developing sponsoring state.

An occasion was also missed by the Inter-American Commission on Human Rights to engage with CBDR – this time in an attempt to use the principle to impart liability and claim compensation for damage suffered. In 2005, the Circumpolar Conference filed a petition before the Commission alleging that the USA’s failure to reduce greenhouse gas emissions and their particular contribution to global warming had a disproportionately detrimental impact on the Arctic region, which in turn affected the Inuits’ culture and way of life and hence violated their human rights. Unsurprisingly this petition was found inadmissible. Had it been entertained however, the responsibility of the USA for the breach of the Inuits’ human rights would have had to be assessed on the basis of the CBDR principle. According to Atapattu, ‘responsibility would have been for the portion of climate change that the United States was responsible for causing’ (Atapattu 2009: 13), that is on the basis of the USA’s differentiated responsibility. It is interesting to note that despite finding the petition inadmissible, the Commission did subsequently hold a hearing in 2007 where representatives of the Circumpolar Conference were given an opportunity to present their argument. This may be the timid opening of a path towards human rights bodies’ receptivity to CBDR claims.

Claims based on CBDR may thus be advanced to request preferential treatment, escape responsibility or impart liability.For now however, CBDR remains largely outside of the international judicial discourse. Yet, one notable exception can be found in the jurisprudence of the WTO dispute settlement body, where the only direct use by an international judge of the principle for the solution of the dispute at stake has happened. In the *Shrimp-turtle case*, Malaysia contested the compatibility with WTO rules of a US measure aimed at the protection of sea turtles which banned the import of shrimps caught without turtle excluder devices. While the legitimacy of measures aimed at the protection of exhaustible natural resources such as sea turtles had been previously recognised by the dispute settlement body, the Appellate Body had nevertheless ruled the measure in breach of WTO rules as the US had failed to negotiate with Malaysia on appropriate bilateral or multilateral means to protect sea turtles. Its unilateral measures were thus deemed unjustifiable discrimination (*United States – Import Prohibition of Certain Shrimps* 1998: 170 para 172). In a follow up to the original dispute, Malaysia brought the case again before the dispute settlement body arguing that the USA had failed to fully comply with the initial judgment. It is on this occasion that the WTO panel hearing the dispute resorted to CBDR. In its recommendations to the parties, it urged ‘Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment’ (*United States* - *Import Prohibition of Certain Shrimps* 2001: para 7.2, p. 107). Yet, in this instance, rather than being used to allocate responsibilities, the principle of CBDR is called upon by the judge to guide the parties in the design of an agreement. It is thus used to influence legal content, and this is where the principle’s relationship to the law is most significant.

Indeed, beyond whether CBDR already constitutes a customary principle of international law or not, its impact on the structure of international legal obligations and on international environmental law more broadly is certainly quite palpable. By calling for differential treatment according to both contributions (responsibility) to environmental damage and capabilities to address threats it directly impacts on the design of multilateral environmental agreements. Environmental protection regimes aimed at tackling global threats will now generally be structured around some form of differentiation of commitments and obligations in line with the particular situation of state parties. It is also recognised to have significant normative value in ‘setting parameters within which responsibilities are to be allocated between developed and developing states in the subsequent negotiation or in the interpretation of existing agreements’ (Birnie, Boyle, and Redgwell 2009: 133). From this point of view CBDR may be referred to as a framing or structuring principle in so far as it commands the elaboration of international legal regimes expressly endorsing differential treatment and differentiated standards and commitments of parties, thus creating sub-legal regimes within the broader legal framework.

This entrenchment of differential treatment within international environmental law, by application of the CBDR principle, allows for quite an extraordinary dent in the traditional structure of international law. At the basis of the international legal system are the founding principles of the sovereign equality of states and reciprocity. However the application of CBDR implies a necessary move away from reciprocity. Obligations are not reciprocal since they are differentiated. States may still be formally equal, but the legal regimes designed on the basis of CBDR incorporate differentiated commitments with a view to achieve substantive equality. Beyond this, differentiation is also meant to ensure the effectiveness of the system. It is only by setting realistic obligations on the parties according to their capabilities that full implementation may be ensured (Cullet 2010: 165). From the outset, without the recognition of CBDR and the incorporation of differentiated commitments, the adoption of global environmental treaties may not have been possible. For Birnie Boyle and Redgwell, ‘[a]cceptance of the principle of common but differentiated responsibility was one of the conditions for ensuring the widest possible participation by developing countries in the Rio instruments’ and ‘consensus on common higher standards would have been impossible to achieve; consensus based on common lower standards would (…) have meant failure to achieve any notable advance on the status quo’ (Birnie, Boyle, and Redgwell 2009: 135). CBDR and differentiated treatment are thus key to the success of global environmental management at several levels. To tackle a global threat, the widest participation and cooperation in addressing the threat is essential. CBDR offers sufficient leverage to developing countries to secure their participation in the system in the first place as they are able to condition this participation in return for financial and technological assistance from the North and more generally recognition of their special needs and situation. Without it, the South would have little incentive in agreeing to a regime that is in essence going to hamper their economic development, especially as historically their contribution to creating the problem would have been minimal. Once participation is secured, differential treatment allows for the lowest common denominator issue to be avoided as more stringent obligations may be imposed on those more able to cope. On the part of the North differential treatment is acceptable both because of the need to secure the widest possible participation and because of the recognition of the different levels of contributions to current environmental problems and the differing capabilities in addressing them. As French puts it ‘common responsibility may provide the basis for international action, but it is the concept of differentiation which will hopefully promote the efficacy of such action’ (French 2000: 46).

1. ***Practices of CBDR and Practical Legal Translations***

The differentiation that CBDR commands may be translated in a number of ways in regulatory regimes. This section examines how the practices of different communities - that is different communities of state parties to conventional regimes - in designing regulatory regimes across different environmental sub-policy fields have led to varying translations of CBDR. Contrasting practices thus emerge between the protection of the ozone layer regime, the protection of biodiversity regime and the climate change regime.

* 1. *Differentiated Obligations*

Surely, the most formal form of differentiation will be through the adoption of differentiated obligations. Referred to as ‘strictly differential norms’ by Cullet (Cullet 2010: 174), they introduce different commitments for different countries. One obvious but isolated example of this type of differentiation can be found in the climate change regime and in the Kyoto Protocol in particular whereby only Annex 1 countries (i.e. developed country parties and countries with an economy in transition) undertake greenhouse gas emissions reduction commitments. Translation of the principle of CBDR into strictly differentiated commitments according to categories of countries has been a bone of contention in the recent climate negotiations and has threatened their collapse on numerous occasions.[[11]](#footnote-11) Yet, in a ground-breaking accord, 196 countries finally agreed to softer forms of differentiation than those of the Kyoto Protocol. States have, at the Paris Conference, committed to a target applicable to all to hold the increase in temperature to below 2°C above pre-industrial levels.[[12]](#footnote-12) But individual commitments and mitigation efforts are to be enhanced progressively according to national circumstances and reflecting states’ differentiated responsibilities and capabilities.[[13]](#footnote-13)

* 1. *Differentiated Implementation Conditions*

A softer but no less effective form of differentiation may be expressed not via differentiated obligations but via differentiation at the implementation level (Maguire 2013: 261), such as via differentiated timeframes for compliance with commitments. In fact, the Montreal Protocol on Substances that deplete the Ozone Layer specifically catered for delayed implementation timeframes for developing countries. In particular, countries with low per capita emissions of ozone depleting substances could delay implementation of their phasing out obligations by ten years (article 5(1)). Differentiation may also intervene at the implementation level not by delaying timeframes, but by providing assistance towards implementation to a specific group of countries. This will be done through technology transfers, capacity building or financial aid for implementation purposes.

This form of differentiation will be especially strong when implementation of developing countries’ conventional commitments is made conditional upon financial and technology transfers from the North to assist the South in meeting the incremental costs incurred by such implementation. The Montreal Protocol is again a case in point of such differentiated responsibilities. Its article 5(5) underlines that the implementation of control measures by developing countries parties will depend upon effective implementation of financial cooperation and transfers of technology and a Multilateral Fund has been created to this end under article 10. This is a typical example of the leverage that developing states have been able to exercise in the negotiation of multilateral environmental agreements and that the North has been ready to concede on in order to secure near universal participation, which is obviously absolutely central to effectively tackling a problem such as depletion of the ozone layer. Birnie, Boyle and Redgwell note that the obligatory character of the financial and technology transfers is in this context irrelevant, if developed states want developing ones to actively participate in the regime, they must honour this engagement. This, according to these authors, exemplifies that solidarity is a key element of CBDR (Birnie, Boyle, and Redgwell 2009: 135). It is also confirmation that the structure of commitments within the ozone protection regime can be seen as a direct application of the principle of CBDR. This is so despite the fact that the Montreal Protocol was concluded before (1987) the formulation of the principle in the 1992 Rio Declaration as the negotiations under the Montreal Protocol have since often referred to CBDR as a guiding principle (Pauw et al. 2014: 42).

* 1. *Differentiation through Contextual Norms*

Another differentiation technique does not require the design of strictly different obligations according to the parties’ varying responsibilities/capabilities and does not subject the implementation of one’s commitment to the proper implementation of another’s. All parties will be subject to the same obligation, but the design of the rule incorporates some flexibility allowing for differentiation as to the extent of the required efforts towards implementation according to capabilities. Magraw refers to these type of norms as ‘contextual norms’ (Magraw 1990: 73) in that they are qualified according to context and circumstances. This will include a provision laying out the obligation whose implementation will only be required ‘as far as possible’ or according to the parties ‘particular conditions and capabilities’ as is the case in the Convention on Biological Diversity articles 6 and 7. For Cullet ‘contextualisation provides the necessary flexibility to allow all countries to sign up to the same commitments, while being aware that not all countries have the same capacity to implement the obligations undertaken. In this sense, contextualisation contributes to the realisation of a more equitable international law by recognising that not all countries face the law in the same way’ (Cullet 2010: 174). The new form of differentiation devised in the Paris Climate Agreement is arguably a hybrid between strictly differential norms and these softer contextual norms. Indeed, the parties’ mitigation commitments, devised through nationally determined contributions, are subject to self-differentiation in the light of different national circumstances. Parties may thus commit to strictly differential mitigation efforts, however, mitigation commitments are designed to regularly progress as national circumstances themselves evolve. This thus opens the door to an evolutionary and dynamic interpretation of the different national circumstances warranting differentiation (Maljean-Dubois 2016: 154; Rajamani 2016: 9). The duty to regularly – and ambitiously - revise commitments is also akin to a contextual norm as the level of mitigation effort expected will be dependent on national circumstances, but subject to a due diligence standard (Voigt and Ferreira 2016: 72).

1. ***CBDR and Multidimensional Responsibilities***

Depending on the basis for differentiation adhered to (historic contributions, capabilities, cooperation…) and the practices of CBDR, that is the modes of differentiation adopted, the principle straddles along a mix of “responsibility” scenarios.

* 1. *Corrective Justice*

When the rationale for differentiation of commitments and responsibilities is premised on historic contributions to the creation of a global environmental problem, the aims of differentiation are to put ‘into balance something that has come out of balance because of an injustice’ (Shelton 2009: 61). The example of climate change is a case in point. Industrialised countries have historically contributed most to the concentration of harmful gases in the atmosphere and are now responsible for ongoing global warming. For Shelton, in this context CBDR provides a ‘corrective justice basis for obliging the developed world to pay for past harms as well as present and future harms’ (Shelton 2009: 67). Clearly in this case, the criteria for distributing responsibility, the differentiation of commitments and obligations, is not based on states’ differing capabilities but on their differing responsibility, and corrective justice will justify demanding that developed countries pay for any reductions or modifications the developing world has to make since industrialisation has ‘unfairly circumscribed the ability of the developing world to pass off externalities on the environment’ (Shelton 2009: 67). In this light, financial and technology transfers commitments on the part of the North may be seen as corrective payments for past wrongs; so would the undertaking of more burdensome and financially expensive commitments. This is certainly the view adopted by many developing countries, and potentially even some developed states too. Mickelson notes for example that during the negotiations of the Montreal Protocol developing countries argued that their demands for transfer of resources were based on equity and not expediency. They also made clear that this was a demand for corrective rather than distributive justice as evidenced by the use of the language of ‘compensation’ for the incremental costs incurred (Mickelson 2009: 313). Despite this clear corrective element, when CBDR is premised on historic responsibilities, it does not necessarily imply that the notion of responsibility should be understood as liability, as in, engaging the legal responsibility of the state (though it may well do that too) since it impacts on the rule at design. Yet, for Erskine, whilst moral responsibility involves ‘being answerable for a particular act or outcome in accordance with what are understood as moral imperatives’, causal responsibility ‘focuses on how a particular outcome is generated and need to be tied to a purposive action’ involving ex post facto assessments of the nexus between an agent’s actions or inaction and a resulting set of circumstances (Erskine 2008: 700). In this context, the nature of responsibility here is thus clearly causal. However, the compensation takes place through the differentiation of commitments undertaken in the legal regime designed to tackle the global problem created, to which the historically not responsible parties also agree to participate in view of their common interest in averting the threat, rather than through liability. In addition, in so far as industrialised states accept their responsibility for historic contributions, responsibility here moves beyond accountability and flirts with the notion of obligation. In short, industrialised countries are the responsible actors, it is their past behaviour that has created current problems, and their responsibility to “compensate” is towards developing countries.

* 1. *Distributive Justice*

When the rationale for differentiation is not based on states’ historic or current contributions to an environmental problem but rather on their varying capabilities to tackle it, it is the distributive justice foundation of CBDR that is called into play. Through the imposition of unequal obligations, and the allocation of shared resources and environmental burdens according to access and capabilities, international law seeks to address existing inequalities and achieve distributive justice. According to Cullet, distributive justice goes beyond corrective justice since it is not limited to compensation for harm done but because it also ‘seeks to identify whether the existing distribution of entitlements and resources is appropriate to ensure substantive equality’ (Cullet 2010: 167). ‘Capabilities’ is readily accepted as a basis for differentiation by both developed and developing countries. Developing countries because they see in it a rationale for distributive justice and the recognition of their special needs by the law. Developed countries, because this basis is more acceptable to them than the recognition of responsibility on the basis of historic and current contribution, but also because they are ready to take on a leadership role in the fight against environmental degradation, as expressed in principle 7 of the Rio Declaration. The readiness to take on such a leadership role may well be the result of a sense of urgency combined with moral arguments and the prospect of some economic or financial gain (technology transfer for example may lead to the opening of new markets).

Either way, the source of responsibility is here clearly not causal anymore but moral. It is the imperative of justice (and necessity) that commands the differentiation of responsibilities and leads to the elaboration of differentiated duties. Responsibility is thus based on ethics (see Introduction and Vetterlein 2018). The commonality of interests dimension in the CBDR principle and the need for global cooperation in the fight against environmental degradation is further confirmation of the ethical dimension of the notion of responsibility that it embodies. By accepting to take the lead, developed countries take prime responsibility for fixing the problem. In this scenario the responsible actors are still the industrialised states, but they are this time responsible not only towards developing states but also towards themselves, the international community as a whole, and potentially even future generations.

* 1. *Responsibility as Liability*

The CBDR principle may well also give rise to responsibility in its more traditional legal dimension of liability. Arguably, the recognition of historic responsibility in the contribution to certain current global environmental problems could open the door to some liability claims since states are bound by a general due diligence obligation to prevent damage to the environment. This is precisely how the Circumpolar Conference framed its petition to the inter-American Commission on Human Rights when it claimed that the USA’s contribution to global warming had a detrimental impact on the Inuits’ way of life that breached their human rights. State responsibility in international law is fraught with difficult issues of causation and attribution, and one problem that the Circumpolar Conference would face in entertaining their claim would be to show that the damage caused to the Arctic by global warming was due specifically to the US’ emissions of greenhouse gases.

Atapattu however suggests that in this type of scenario, international courts could apply a market-share liability rule and allocate a percentage of liability according to the percentage, not of market share, but of global emissions for which individual states are responsible (Atapattu 2009: 17). It is however specifically to avert the possibility of such claims that the USA added an interpretative statement to principle 7 on CBDR of the Rio Declaration rejecting any interpretation of the principle that would imply a recognition or acceptance of any international obligations or liabilities.[[14]](#footnote-14) And this is also why although developed states recognise their historic contribution to global environmental problems, they do so on a moral rather than a legal basis, pointing out the lack of scientific knowledge as to the negative effects of industrialisation at the time and the lack of prohibition of their behaviour (Bartenstein 2010: 202).

Differentiation through contextual norms (as outlined in section 4 above) is probably a better contender for giving rise to responsibility in its liability dimension. Contextual norms that insert an element of flexibility subjecting the implementation of the obligation to the differing capacities of the states bound by it may still be breached. Even though less may be required from developing states than of developed states in the fulfilment of their obligation (because their special situation is taken into account), they may still fall foul of a certain level of effort that could reasonably be expected in line with their capabilities. Contextual norms derived from CBDR may thus lend themselves to the engagement of both developed and developing states’ liability, yet, since the level of effort required from developing states will be lower, the liability of developed states should, in principle, be easier to establish as they are expected to comply with higher standards of care.

Beyond the case of contextual norms, the principle of CBDR itself works as a standard against which states’ compliance with their obligations may be assessed. In particular it can be argued that states are under an obligation to promote sustainable development, and in order to do so must abide by a range of principles, CBDR being one of them. As such, disregard for the principle of CBDR may point to the lack of sufficient effort by a state to strive for sustainable development and may lead to the engagement of that state’s responsibility. Ultimately, CBDR and intra-generational equity on which it is premised, also require differentiated standards for assessing states’ compliance with their sustainable development obligations, particularly according to states’ respective capacities. In such circumstances the responsibility dimension of the CBDR principle could, in theory, give rise to liability in its purely legal dimension. In either of these last two scenarios, the responsible actor will be one specific state whose behaviour has fallen foul of the legal standard of care expected. That state could be held responsible towards another individual state, but it could also be held responsible towards the conventional community to which the obligation breached belongs. Should the responsible actor have breached a rule of general international law, its responsibility would be towards the international community as a whole.

In short, where responsibility is founded on historic contributions to the exclusion of the liability dimension, the scenario is mainly one of causal – or negative (see Introduction) – responsibility, the industrialised states are the responsible actors and the developing world the recipients. Where responsibility is founded on capabilities, the source of responsibility is to be found in ethics and justice, the responsible actors are again the industrialised states, but because they accept to take the lead in “fixing the problem”, they are not just responsible towards developing states, but also towards themselves, the international community and future generations. This is a form of positive responsibility (ibid.). In contrast, in scenarios where liability is at stake, the responsibility is that of one individual state towards another, or potentially a conventional community or the international community depending on the nature of the legal obligation (i.e. CBDR obligation) breached. In addition, when the focus is on the common responsibility to cooperate and avert environmental threats, the bearers of responsibility are all states towards themselves and their populations, the international community as a whole and also crucially towards future generations.

1. ***Conclusion***

CBDR is undeniably a deeply contested principle, the divergence on its conceptual grounding is such that it may even be said that it is founded on a misunderstanding between the developed and the developing world (Arbour 2014: 61). Crucially, the “misunderstanding” does not just relate to its conceptual foundations but is on-going and impinges on the role and impact that CBDR should have on the law. Yet, CBDR has the potential and does already significantly influence the structure of international legal obligations. There have been attempts to use this principle in legal disputes to either claim preferential treatment, impart responsibility on another actor, or escape liability. As it has done for the principle of sustainable development, in the future the judge may well use the principle of CBDR as an interpretative tool to determine the content of other obligations (Barral 2015: 247), therefore granting it a new legal dimension as an interstitial norm (Lowe 1999: 19). But it is through the practices of CBDR that its impact on the design of international regulatory regimes is most saliently felt and evidence shows that practices vary across policy fields. Ultimately, the contested conceptual grounding of CBDR and its varying practices combined impinge upon how the notion of responsibility can be framed in this context. In fact, depending on the conceptual grounding adhered to or the practice involved, the notion of responsibility underscores this inherent nexus between law and ethics (see Introduction). Based on historic responsibility, it will be negative and may appeal to the notions of accountability or that of liability. Based on differing capabilities, it will be positive. There is an element of self-judgement in this context in so far as the developed North takes it upon itself to take the lead in fixing the problem. The partnership dimension of CBDR from which a common responsibility to cooperate in tackling environmental threats derives can also be framed in terms of ethics and care. Since the practices of CBDR lead to the design of differential legal obligations, liability can also be claimed in case of breach of these rules. In addition, the actors involved will also vary according to the responsibility scenario involved, ranging from individual states through to mankind (including future generations), via the industrialised states, the developing world, conventional communities, or the international community as a whole. The notion of responsibility in the principle of CBDR is thus ultimately multidimensional.

1. Obligation is used here in its traditional legal sense of requiring a specific behaviour or abstention from a specific behaviour from the debtor of the obligation, failing which specific legal consequences will ensue (such as a duty to compensate any damage caused by the failure to act for example). The terminology is thus used to reflect the narrower sense of a legally binding obligation rather than the broader sense of obligation. For its part the notion of state responsibility in international law corresponds to the notion of accountability/liability spelled out in the Introduction to this book. [↑](#footnote-ref-1)
2. While the so-called Rio Declaration speaks of “common but differentiated responsibilities”, the UN Framework Convention on Climate Change extends the term to “common but differentiated responsibilities and respective capabilities”. We will use CBDR as an acronym for both. [↑](#footnote-ref-2)
3. Albeit not all states are affected in the same way or to the same extent and not all states have the same capacity to mitigate the effects of those threats. [↑](#footnote-ref-3)
4. Principles on General Rights and Obligations – China and Pakistan – Draft Decision, Prep Com IV, UN Doc. A/CONF.151/PC/WG.III/L.20/Rev.1, 1992. [↑](#footnote-ref-4)
5. United Nations Framework Convention on Climate Change, New York, 9 May 1992, UN, *Treaty Series*, Vol. 1771: 107, preamble para. 3. [↑](#footnote-ref-5)
6. Report of the United Nations Conference on Environment and Development, Doc A/CONF.151/26 (vol. IV) (1992), Ch IV, Report of the Main Committee and Action taken by the Conference, para 16. [↑](#footnote-ref-6)
7. This is relevant in so far as in such circumstances, the outcome of a legal decision may be influenced by extraneous (as is non legal) considerations of justice and equity. [↑](#footnote-ref-7)
8. A legal principle will be aimed at regulating behaviour, and is thus endowed with normative content, it may or may not however have been formalised into a binding norm of international law, the test being that it has formally transited through one of the recognised sources of international law. A legal principle may thus still be *lex ferenda*, i.e. law in the process of formation, rather than *lex lata*, i.e. a legal norm binding within a specific legal order. [↑](#footnote-ref-8)
9. The two necessary constitutive elements to ascertain the existence of an international custom. The *opinio juris* refers in particular to the conviction by states that they are bound by a legal obligation and that they must thus act accordingly. [↑](#footnote-ref-9)
10. See supra note 5. [↑](#footnote-ref-10)
11. On the one hand, developed countries argued that current economic realities needed to be taken into account and that more developing countries needed to undertake emissions reductions commitments, including in particular emerging economies, whereas on the other hand, emerging economies such as India insisted on maintaining a strict differentiation of commitments between developed and developing countries parties with no emission reduction commitments for the latter. [↑](#footnote-ref-11)
12. See Paris Agreement, 12 December 2015, UN Doc. FCCC/CP/2015/L.9, article 2(1)(a). [↑](#footnote-ref-12)
13. See ibid, articles 4(3) and 4(4). [↑](#footnote-ref-13)
14. See footnote 6. [↑](#footnote-ref-14)