Research Proposal

Name: Benjamin Basson Geldenhuys

Student no: 3783061

Proposed degree: Mini Thesis in the fulfilment of the requirements for the Degree of Master of Law

Department: Public Law and Jurisprudence

Title: The North –South divide in International Environmental Law after the Paris Agreement

Supervisor: Professor Werner Scholtz

PLAGIARISM DECLARATION

I declare that this thesis is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Benjamin Basson Geldenhuys Professor Werner Scholtz

ACKNOWLEDGEMENTS

I would like to thank the following people for their contributions in making this thesis a success:

The Lord for the strength to be able to complete the thesis,

My wife Hettie for her patience, assistance, coffees and support and

Professor Werner Scholtz my supervisor for his guidance and patience.

David Blackmore for his assistance with the editing.

Table of Contents

ABSTRACT

Global climate change is a serious, severe, and potentially irreversible problem. If no actions are taken to curb greenhouse gas emissions, global temperatures and sea levels will rise, wreaking havoc on earth, particularly in developing countries. The Stockholm Declaration of 1972 facilitated the first international consensus concerning the application of CBDR to international environmental problems. This was in reaction to the developing countries refusal to adhere to the same standards as the developed countries as they perceived this as a burden to their economic growth, which is unjust due to the developed countries historical culpability.

This thesis seeks to establish what the implications are of the dynamic new form of differentiation in terms of the Paris Agreement for the North-South divide in International Environmental Law?

The Southern countries have demanded that the North assume responsibility for its immense contribution to major environmental problems (such as climate change), but the North has only grudgingly accepted the principle of common, but differentiated, responsibility on the basis of its superior technical and financial resources while disavowing responsibility on the basis of its historic contributions to these crises.

In 1974, through a series of General Assembly resolutions, developing countries sought to overhaul the international legal and economic system and challenge the basic traditions of international law based on the principles of the legal equality and reciprocity to adopt a Declaration on the Establishment of a New International Economic Order (NIEO) and two of the basic tools of the NIEO strategy were the principle of preferential treatment to the benefit of developing countries, and the principle of permanent sovereignty.

One of the fundamental premises of the United Nations Framework Convention on Climate Change (UNFCCC) of 1992 and of its Kyoto Protocol of 1997, is that leadership from developed countries in combination with differential treatment in favour of developing countries is the equitable basis on which the international response to climate change was structured. The principle of common but differentiated responsibilities and respective capabilities, the CBDRRC principle finds expression in the Framework Convention on Climate Change (FCCC), and is the basis of the burden

sharing arrangements crafted under the FCCC and its Kyoto Protocol. Scholars argued that the Kyoto Protocol represents the most extreme example of differential treatment between North-South countries and which ultimately resulted in the withdrawal of the United States from the Kyoto Protocol.

The Paris Agreement is anchored in equity and also the first to decisively break with the North-South dichotomy by providing for the principle of “common but differentiated responsibilities and respective capabilities, in light of different national circumstances” (CBDRRC-NC). The Paris Agreement is 'nationally determined contributions' (NDCs) that each country intends to achieve. The Paris Agreement operationalises this principle through differentiation tailored to the demands of each issue area in terms of mitigation, adaptation, finance, capacity building, technology, and transparency. The nature and extent of differentiation in the Paris Agreement, however, is distinct from that in the 1992 Framework Convention on Climate Change (FCCC) and its 1997 Kyoto Protocol. There is in the Paris Agreement a move away from the rigid binary differential obligations to a more dynamic subtle form of differentiation.

LIST OF ABBREVIATIONS

CBDR-RC	The Common but Differentiated Responsibilities and Respective Capabilities principle
COP	Conference of the Parties
GHG	Greenhouse Gas
INDC	Intended Nationally Determined Contribution
IPCC	Intergovernmental Panel on Climate Change
LDC	Less developed Countries
MEA	Multilateral Environmental Agreement
NDC	National Determined Contributions
NIEO	New International Economic Order
UNCED	United Nations Conference on the Environment and Development
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change.
US/USA	The United States of America

CHAPTER 1

1. TITLE

The North –South divide in International Environmental Law after the Paris Agreement.

Key words – North-South Divide, relevance, autonomously, Paris Agreement, differentiation, Common but Differential Responsibility Principle (CBDR) and Climate Change.

1.2 INTRODUCTION

During his opening statement at the Rio Summit in 1992 Maurice Strong said that "Sustainable development - development that does not destroy or undermine the ecological, economic, or social basis on which continued development depends - is the only viable pathway to a more secure and hopeful future for rich and poor alike".[1]

Gonzalez opines that the existence of the North-South Divide in International Environmental Law has its origins in colonialism. Colonialism had a devastating effect on the native inhabitants living in Africa, Asia and the Americas which in turn allowed Europeans to exploit and take their land, labour and natural resources.[2] The uneven situation that exists in international law displays a link between the usages of sovereignty in an attempt to exclude "uncivilized nations".[3] One of the most important social challenges facing the world is the divide between the affluent/prosperous countries in the North and the poor nations of the global South.[4]

While international lawyers have challenged perceptions of Western Countries on the history and content of international law and pointed to the inequitable nature of the body of rules bestowed from the past with regards to the Third World, they have been

[1] Strong S https://www.epa.gov/history/quotations-about-environment. (accessed 18 June 2018)
[2] Gonzalez.CG 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32 *Pace Envtl. L* 411.
[3] Scholtz W 'Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism' (2008) 55(3) *Netherlands International Law Review* 324.
[4] Reuven S & Avi-Yonah 'Bridging the North/South Divide: International Redistribution and Tax Competition' (2004) 26 *Mich. J. Int'l L* 388.

unable to define and to put in place alternative approaches which are inclusive. The effects of colonialism caused injustices and unequal opportunities between the North and South States.[5]

The resistance of the Southern countries in relation to environment law to adhere to the view that the South is a 'grudging participant' in international environmental relations. By labelling the Southern countries with regards to the afore-mentioned matter, the socio-political context in which international environmental law operates are conveniently being ignored.[6]

Mickelson is also of the view that the South is portrayed "*as a grudging participant in environmental regimes rather than as an active partner in an ongoing discussion regarding what the fundamental nature of environmental problems is and what the appropriate responses should be*". Mickelson has pleaded for a more "'integrationist' approach – that will highlight the concerns of the South".[7]

"However, all states share a common goal to protect the environment for future generations. Despite the conflict evident amongst the North-South Divide the environment presents an exciting opportunity for global co-operation protecting of the environment". [8]

The developing countries feel disadvantaged due to the restrictive environmental measures such as the biosphere that have been proposed by the developed countries which are seen to hamper economic growth and development. The developed Northern countries argue that it should be a collective effort between the North and South to protect the environment. However, the Southern countries on the other hand have seen these demands as insincere due to the devastating ecological footprints left behind by developed countries, and insisted that the Northern countries should take the lead in addressing environmental degradation due to the historically

[5] Cullet P 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' (1999) 10 (3) *European Journal of International Law* 551.
[6] Scholtz W 'Collective (Environmental) Security: The Yeast for the Refinement of International Law' (2009) *Yearbook of International Environmental Law* 156.
[7] Michelson K 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 *Ybk Intl Envtl L* 54.
[8] Michelson K (2000) 54.

degradation that was caused by the Northern countries developing in Southern countries.[9]

Mickelson argues the fact that many people live in misery, which does not mean that environmental concerns should be compromised. The appalling circumstances in which large numbers of citizens from developing countries live is inextricably connected with environmental degradation caused by developed countries of the North.[10]

There was a general expectation that the states which were the most affected by these environmental problems and concerns would have been keen to partake in all the efforts that were taking place to resolve these challenges on an international level. Unfortunately this did not materialise and is very seldom the case.[11]

The notion of the Third World is still very much alive and clearly evident between developed and developing countries. This originated from the decolonisation era, a process which was initiated after the Second World War and still is very much alive and a process which was supposed to end thirty years ago.[12] Mickelson is of the opinion that International Environmental Law has failed as a discipline to respond to the concerns of the Third World in a meaningful approach. According to Michelson the South is unfairly portrayed as an unwilling participant in the environmental system rather than accepted as an active participant in a continuing effort to identify the essential nature of environmental problems and to find suitable responses thereto.[13]

The classification of countries has major consequences when development assistance must be determined. Classifying a country as developed or developing, will determine the assistance provided in terms of climate change commitments, trade preferences and a number of other responsibilities and privileges under domestic legislation and international treaties. The equality of States is contained in the UN Charter as a basic principle[14] in terms of international law. Therefore the argument that is expressed by

[9] Kwarteng AH & Botchway TP 'The North and South Divide in the Practice and Application of International Law: A Humanitarian and Human Right Law Perspective' (2018) 11 *Journal of Politics and Law* 80.
[10] Michelson (2000) 53.
[11] Beyerlin U 'Bridging the North-South Divide in International Environmental Law' (2006) *http://www.zaoerv.de/ Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 264.
[12] De Jonge A 'From Unequal Treaties to Differential Treatment: Is There a Role for Equality in Treaty Relations?' (2013) 4 *AsianJIL* 126.
[13] Michelson K (2000) 54.
[14] Cullet P (1999) 551.

Anatole France is very relevant with regards to the afore-mentioned: '*In its majestic equality… of the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread'*.[15] Unfortunately, major differences exists between states and will in future continue to exist in terms of population, natural resources environmental conditions, history etc. to name a few.[16]

The countries from the South have attempted to convey the message to the international community that the miserable circumstances in which the people of the south live are closely connected with environmental degradation. Although countries from the South acknowledged the importance of the environmental problems, the environmental challenges cannot be separated from a host of other factors such as the broader economic, social, cultural, and historic context.[17] These issues are and will in the future continue to destabilise and threaten the earth's ecosystems due to a number of challenges faced by the different states globally.[18]

1.3 THE NEW INTERNATIONAL ECONOMIC ORDER (NIEO)

The developing countries through a collective effort started to influence the international economic agenda which would not have been possible individually. In order to restore the injustices of amongst others, the exploitation of the environment for centuries the aim of the group was the achievement of political and economic independence and therefore the pursuit and the establishment of the New International Economic Order (NIEO) to support and promote development.[19]

As a result of the NIEO process several resolutions were adopted of which the most notables are the UN Declaration on Permanent Sovereignty over Natural Resources, the Declaration on the Establishment of a New International Economic Order, along with a Programme of Action and the Charter of Economic Rights and Duties of States.[20]

---

[15] France A https://www.azquotes.com/quote/101029 (Accessed 6 November 2018)
[16] Pauwelyn J 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes' (2013) 22(1) *Review of European Community & International Environmental Law (RECIEL)* 29.
[17] Michelson K (2000) 53.
[18] Atapattu S & Gonzalez C 'The North–South Divide in International Environmental Law: Framing the Issues' (2012) *International Environmental Law and the Global South. Cambridge University Press* 1.
[19] Gupta J 'International Law and Climate Change: The Challenges Facing Developing Countries' (2006) 16 1 *Yearbook of International Environmental Law 123.*
[20] Salomon MC 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) *62 Int'l & Comp. L.Q.* 37.

The pursuit of NIEO was based on equity, sovereign equality, common interests and cooperation among all states in an effort to redress existing injustices and to correct inequalities. The purpose of the afore-mentioned was an attempt to eliminate the widening gap between the developed and developing countries and to steadily accelerate economic and social development.[21] The pursuit of NIEO and the program of action were some of the first collective attempts to establish a new partnership between the North and South.[22] Major differences at the time arose between the North-South divide on issues such as sovereignty over natural resources, equitable burden sharing, transfer of technology and economic costs etc.[23]

The preamble of the declaration on NIEO states that the establishment of a new international order must be: '*based on equity, sovereign equality, interdependence, common interest and co-operation amongst all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between developed and developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations'*.[24]

It is important to note that the pursuit of the NIEO movement was to seek change and the redistribution of wealth and power. The principle of preferential treatment is contained and reflected in nineteen articles in the charter of Economic Rights and Duties of States (see Articles 5,6,8,9,11,12,13,14,15,17,18,19,22,24,25,26,27,29 and 30).[25] In the preamble of the Declaration on the Progressive Development of the Principles of Public International Law relating to a New Economic Order that was adopted in 1986 a list of principles was incorporated that was generally recognised as legal principles. The principle of equity and solidarity and the entitlement to development assistance. The Declaration notes that 'without ensuring the principle of equity there is no true equality of nations and states in the world consisting of countries of different levels of development'. In relation to solidarity, the declaration notes that the principle 'reflects the growing interdependence of economic development'. The list

[21] Ward M D 'Changing Patterns of Inequality in a Changing Global Order' (1982) *35 KYKLOS* 117-8.
[22] Amuzegar J 'The North-South Dialogue: From Conflict to Compromise' (1976) *54 Foreign Aff* 550.
[23] Birnie P & Boyle A et al *'International Law & the Environment'* 3 (2009) ch 2 51.
[24] Declaration on the Establishment of a New International Economic Order Resolution 3201 (1974) 798.
[25] Charter of Economic Rights and Duties of States GA Resolution 3281 (1974) (Articles 5-15, 17-19, 22, 24-27, 29).

also includes the duty to cooperate and the international protection of the environment.[26]

1.4 SUSTAINABLE DEVELOPMENT

The concept of Sustainable Development was formulated to reconcile the conflict between economic growth and environmental protection. The understanding of sustainable development is that the environment is not sacrificed for economic growth and vice versa. Norton argues that the challenge to 'live sustainably' and or to 'development sustainably' can be recognised as a principle obligation to being fair and reasonable to future generations.[27]

Sustainable development emerged as a new approach to ensuring economic growth while protecting the environment with the publication in 1987 of the report of the Brundtland Commission titled 'Our Common Future'.[28] In 1992, the United Nations Conference on Environment and Development (UNCED), also called the Earth Summit or the Rio Conference, outlined the profile of sustainable development in a set of principles that sought to balance the priorities of developed and developing countries.[29]

The current direction of international environmental law owes much to the definition of sustainable development presented in the Brundtland Report: *'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'*. [30] The goal of the Rio Declaration on Sustainable Development is *the establishment of a new and equitable partnership through the creation of new levels of co-operation among States, key sectors of societies and people and working towards international agreements which respect the interests of all and protect the integrity of the global environmental and development system*….[31]

[26] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) *'*Environmental Law and Sustainability after Rio' (2011) ch 8 121-23.
[27] Norton BG 'Intergenerational Equity' in Bosselmann K, Fogel DS & Ruhl JB '*The Law of Politics of Sustainability'* (2011) 3 *Berkshire Encyclopedia of Sustainability* 326.
[28] Beyerlin U & Holzer V 'Conservation of Natural Resources' (2009) *Max Planck Encyclopedia of Public International Law Oxford University Press* 2.
[29] Sanwal M 'Sustainable Development, the Rio Declaration and Multilateral Cooperation' (1993) 4 *Colo. J. Int'l Envtl. L. & Pol'y* 45.
[30] Gonzalez CG (2015) 418.
[31] The Rio Declaration on Environment and Development [1992] A/CONF.151/26 (Vol. I) 1.

Examples of some of the following principles are contained in the Rio Declaration on Sustainable Development i.e. (Principle 3) development and environmental needs of present and future generations; (Principle 4) the environment and sustainable development comprises intergenerational equity; (Principle 5) intra-generational equity and the alleviation of poverty; (Principle 6) consideration of countries' special development and environmental needs; (Principle 8) reduction of unsustainable production, consumption and reductions in population; (Principle 11) and effective environmental legislation.[32]

Twenty years after the UN Conference on Environment and Development in Rio de Janeiro, the concept of sustainable development that expresses the inter-dependencies (between the environment and development) the leitmotif of international environmental policy.[33]

During the years after the Earth Summit, the concept of sustainable development was refined in the major UN summits.

1.5 DIFFERENTIAL TREATMENT AND CLIMATE CHANGE

According to Principle 7 of the Rio Declaration[34] on Common but Differentiated Responsibilities (CBDR) all states have common environmental responsibilities and obligations and differ in accordance with their specific requirements in terms of their historical, economic, social and ecological variables.[35]

Interestingly Principle 7 of the Rio Declaration[36] did not originate in the contexts of climate change, but as a result of climate change it has achieved its controversial and well known formulation. The United Nations Framework Convention on Climate Change of 1992 states in article 3:[37] that *"Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective*

[32] Djoghlaf A 'The Concept of Sustainable Development' (2006) 36 *Envtl. Pol'y & L.* 214.
[33] Brown Weiss E 'The Evolution of International Environmental Law' (2011) 54 *Japanese Y.B. Int'l L*. 10.
[34] The Rio Declaration on Environment and Development [1992] A/CONF.151/26 (Vol. I) (Principle 7).
[35] Huggins A & Saiful Karim MD 'Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime' (2016) 5:2 *Transnational Environmental Law* 427-28.
[36] The Rio Declaration on Environment and Development [1992] A/CONF.151/26 (Vol. I) (Principle 7).
[37] Mickelson K 'Beyond a Politics of the Possible? South-North Relations and Climate Justice' (2009) 10 *Melb. J. Int'l L* 414.

capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."[38]

However, in the Kyoto Protocol both of these concepts (asymmetric substantive environmental obligations of states and the mechanism for assistance with compliance) are unilaterally benefiting the developing countries and can be interpreted as *positive* and *gentle* discrimination in relation to the third world. The most extreme example with regards to the differential treatment between North-South is the categorisation of parties into (3) groups (i.e. those as Annex I countries, those listed in Annex II [which is a subset of Annex I] and those not listed in either [the non-Annex I countries]) of countries.[39]

The division of developed countries (Annex I) and developing (Non-Annex 1) countries in the Kyoto Protocol has been severely criticised by virtue of the fact that it no longer reflects the geo-political, economic and or environmental realities. The afore-mentioned has lead towards a more conceptual approach in which the circumstances of countries with regards to their relative capacity and vulnerability were highlighted that would in practice result in an increase of more dynamic differentiation.[40]

In 2009 during the Copenhagen Conference the real paradigm shift occurred. In Copenhagen the states moved away from the Kyoto Protocol's binary framework to accept a more flexible approach away from the rigidly differentiated approach towards a more bottom-up, global approach.[41] The aforementioned was solidified in Paris.

The Paris Agreement has struck a careful balance between the need for ambitious and effective climate action and for fair effort sharing among parties based on differentiation. While being set against the normative background of the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement adopts a more diversified way of differential treatment among parties, approaching it in three complementary ways: firstly, on a principled basis, reflecting common but differentiated responsibilities and respective capabilities (CBDR-RC), in the light of

[38] United Nations Framework Convention on Climate Change (1992) 1771 UNTS 107 (Article 3).
[39] Castro P 'Common but Differentiated Responsibilities beyond the Nation State: How is Differential Treatment Addressed in transnational Climate Governance Initiatives?' (2016) 5(2) *Transnational Environmental Law* 380.
[40] Scott S 'The Securitization of Climate Change in World Politics: How close have we come and would Full Securitization Enhance the Efficacy of Global Climate Change Policy?' (2012) 21 (3) *RECIEL* 220.
[41] Bodansky D 'The Paris Climate Change Agreement: A New Hope?' (2016) *American Journal of International Law 7*.

different national circumstances; secondly, in the content of its articles, in particular on mitigation, finance and transparency; and thirdly, on the basis of the principles of progression and highest possible ambition, which represent new and dynamic aspects of differentiation.[42]

1.6 PROBLEM STATEMENT

1.6.1 Research Question:

What are the implications of the dynamic new form of differentiation in terms of the Paris Agreement for the North-South divide in International Environmental Law?

1.6.2 Hypothesis

The North-South divide in International Environmental Law necessitates differential treatment in pursuit of equity. The CBDRC is an expression of differential treatment in climate change regime as it allows for binary obligations between developed and developing states in relation to mitigation commitments. The Paris Agreement clearly departed from this dichotomy as it now provides for mitigation commitments and obligations for all states in terms of national circumstances.

1.7 LITERATURE REVIEW

Rajamani has conducted extensive research in amongst others on the dialogue that has been established globally between developed and developing countries on the use of differential treatment and climate change. Also on how International Environmental Law has evolved in the four decades from the United Nations Conference on the Human Environment held in Stockholm in 1972 to Rio+20 in 2012. The focus of the afore-mentioned was on the changing dynamics of the debate between North-South States with the corresponding interpretational changes in the use of differential treatment in International Environmental Law.[43]

Viñuales argued that efforts toward sustainable development are inadequate. The concept of sustainable development do not cater for the implementation of the major

[42] Voight C and Ferreira F 'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) *5:2 Transnational Environmental Law Cambridge University Press* 285.

[43] Rajamani L 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 3 *International Affairs* 605.

challenges faced by the global environmental governance i.e. to provide transnational common goods (relating to the protection of the environment). Viñuales further argues that the strong points of the said concept are becoming its own fatal weaknesses. The concept of sustainable development was very successfully used throughout the 1980s and the 1990s to manage the political influence between 'development' and 'environment'. In order for the concept of sustainable development to be effective it had, inevitable, to have very limited content. 'Who would disagree with meeting the needs of the present without compromising those of future generations?' [44]

French et al stated that the result of the changes that have occurred in international environmental law was due to the greater geo-political changes in the two decades since the climate management has been implemented. The dichotomies between the traditional North-South States have fragmented due to a number of reasons such as economic growth and the shrinking of the economies in some developing and third world countries. French also argues that differential treatment favouring developing countries, particularly the middle income or higher income brackets, is as a result of a historical left over, and therefore should the move towards evenness be a natural process.[45]

Scholtz states on equity that huge differences exists in the world between developing and developed states. The present inequalities in the distribution of the desired goods between states has resulted in demands by developing states that formal sovereign equality of states must be extended to include material equality through recourse to equitable measures.[46]

Voigt and Ferreira stated on differentiation in the Paris Agreement that differentiation between parties in the Paris Agreement is nuanced by balancing different considerations for each of the Agreement's elements. Rather than taking a non-differentiated or purely self-differentiated approach, as expected by some, the Paris Agreement sets out the opposite: it allows for differentiation along a much wider set of

[44] Viñuales JE '*The Rise and fall of Sustainable Development*' (2013) 22 *RECIEL* 4.
[45] French D and Rajamani L 'Climate change and international environmental law: Musings on a Journey to Somewhere' (2013) 25:3 *Journal of Environmental Law* 440-1.
[46] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) *'Environmental Law and Sustainability after Rio'* (2011) ch 8 121.

parameters, in a way that allows for more variety and dynamism, while building on the normative legacy of the Convention.[47]

1.8 CHAPTER OUTLINE

1.8.1 Chapter 1:

This chapter will contain the introduction, research question, significance of the problem, argument and research methodology.

1.8.2 Chapter 2:

Chapter 2 will deal with the North-South divide in International Environmental Law and Sustainable Development.

1.8.3 Chapter 3:

This chapter will discuss differential treatment and CBDRRC in the context of the North- South in International Environmental Law and Climate Change.

1.8.4 Chapter 4:

This chapter will analyse Differential Treatment, CBDRRC the Paris Agreement and Climate Change.

1.8.5 Chapter 5:

Chapter 5 will consist of a conclusion and appraisal in which the relevance will be discussed of whether the differentiation between the North-South Divide in International Environmental Law still exists post the Paris Agreement.

1.9 RESEARCH METHODOLOGY

The nature of this Thesis research is a desktop study. The study will provide an overview of scholarship with regards to differential treatment between the North-South conflicts in international environmental law. The research will be conducted in the form of a desktop research by utilising online legal resources as well as library and inter-library resources.

[47] Voigt C and Ferreira F 'Differentiation in the Paris Agreement' (2016) 6 *Climate law* 58.

CHAPTER 2

The emergence and consequences of the North-South Divide in International Environmental Law

2. INTRODUCTION

At the Stockholm Conference in 1972, the then acting Indian Prime Minister Indira Gandhi stated that: *"… We do not want to impoverish environment any further, (but) we cannot forget the grim poverty of large numbers of people. When they themselves feel deprived how can we urge the preservation of animals? How can we speak to those who live … in slums about keeping our oceans, rivers and the air clean when their own lives are contaminated at the source? Environment cannot be improved in conditions of poverty …"*[48]

Having a look at the current attitude of developing countries towards environmental protection, it appears that it does not essentially differ from this statement of the early 1970s.

One might assume that states most seriously affected by environmental problems would be the most willing to participate in all efforts to solve these problems at the international level. However, current practice shows that there is no such correlation. Taking climate change and loss of biological diversity as examples, it is clear enough that the number of North and South in causing these environmental threats and likewise the responsibility for managing these threats differ considerably.[49]

Worldwide processes of degradation of nature, over-exploitation of natural resources and climate change continue to destabilise the Earth's ecosystems. The need to ward off these threats is a challenge which can only be met by the international state society as a whole. However, people living on Earth are still organised in political, cultural and (in particular) social entities which differ from each other to such a degree that they are far from making up "one world". Humankind is still divided into prosperous societies

[48] http://lasulawenvironmental.blogspot.co.za/2012/07/indira-gandhis-speech-at-stockholm.html.2016/07/12.
[49] Beyerlin (2006) 264.

in the Western hemisphere, on one side, and under developed and marginalised societies in Asia, Africa and Latin America, on the other. Thus, our world continues to severely suffer from what is called the North-South divide.[50]

Prior to the UN Stockholm Conference in 1972 international environmental treaty-making had been clearly dominated by the industrialised states. At that time, the Third World had not been able to considerably influence international environmental treaty-making. Accordingly, most of the treaties concluded in that period show traces of the close inter-connection between natural conservationism and colonialism; almost none of them really addressed the economic and social needs of underdeveloped countries and their societies. In the late 1960s, the international state society began to become aware of the fact that there is a close interdependence between development and environmental protection.[51]

This change in states' attitude is clearly reflected in two important documents of the early 1970s. First, the so-called Founex Report on Development and Environment of 1971 emphasised the need to incorporate environmental concerns into an expanded understanding of development. Second, the UN Conference on the Human Environment in Stockholm of 1972, in Principle 11 of its Declaration, acknowledged that "*the environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by states and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures*".[52]

However, it should be stressed that on the part of many Third World countries there was considerable resistance to this new conceptual approach of the Stockholm Conference. In their view, pollution of the environment was the result of industrialisation and did therefore not represent an immediate concern for them. Consequently, in the post-Stockholm era the economic and social concerns of developing countries became the predominant theme in inter-state relations. In the

[50] Beyerlin (2006) 260.
[51] Beyerlin (2006) 260.
[52] Stockholm Conference (1972) United Nations A/CONF.48/14/Rev1 (Principle 11).

mid-1970s the North-South conflict considerably intensified. In 1974 the developing states, organised in the Group of 77, succeeded in their efforts to make the UN General Assembly adopt the Declaration on the Establishment of a New International Economic Order, as well as the Charter of Economic Rights and Duties of States.[53]

Although all these efforts admittedly produced little consensus, for many years the metaphor of a world divided by a `poverty curtain' informed the analysis of the international political economy. The North-South divide though does continue to be an area of reflection in international relations. Thérien, for example, points out that `the North-South gap continues to widen in all but a dozen Third World countries'.[54]

For most observers, however, the parameters of the North-South debate have changed radically. Explanations for this evolution vary enormously. For some, new attitudes have formed, such that `the traditional North-South divide is giving way to a more mature partnership'. Others maintain that the South or the Third World` 'no longer exists as a meaningful single entity', or that it has ceased to be a political force' in world affairs. Still others suggest that the North is generating its own internal South, and that the South has formed a thin layer of society that is fully integrated into the economic North.[55]

Today, the developing states continue to insist on making the industrialised states primarily responsible for solving the most crucial global environmental problems, particularly in respect to two issues. The first subject is climate change for which, at least in the past, the industrialised states are mainly responsible. Furthermore, developing states still blame the North for pursuing a policy of eco- imperialism by restraining their sovereignty over natural resources, preventing them from becoming industrialised, and keeping their products away from the world markets.

Taking climate change and loss of biological diversity as examples, it is clear enough that the number of North and South countries responsible for causing these environmental threats and likewise the responsibility for managing these threats differ considerably. There is sufficient evidence for arguing that, at least in the past, the

[53] Beyerlin (2006) 260.
[54] Thérien JP 'Beyond the North-South divide: The Two Tales of World Poverty' (1999) 20(4) *Third World Quarterly* 724.
[55] Thérien JP (1999) 723.

industrialised states contributed primarily to the process of global warming with its seriously detrimental impacts on the ecosystem as a whole. It is also clear that the South suffers from climate change much more directly than the North. Most telling in this respect is the undisputed prediction that, at least in the long run, the low-lying Pacific Island States will vanish if the sea levels continue to rise.[56]

The objective of this chapter is to investigate the existence of the North-South Divide, the formation of the New International Economic Order by the Southern States which is consisting of a contradiction between rich and poor countries i.e. between the South and the North and the impact of sustainable development on the North-South Divide in International Environmental Law.

2.1 THE NORTH SOUTH DIVIDE

The North and South divide in a general sense is viewed as a socio-economic and political divide. In a broader sense, the Global North (First World) generally refers to the richer and more developed countries such as the United States, France, United Kingdom, Canada, New Zealand, and Australia among others. The term Global South, on the other hand, refers to developing countries such as African Countries, Latin America, Russia and The People's Republic of China.[57]

Conflicts between affluent and poor countries (the North-South divide) over environmental priorities, the allocation of responsibility for environmental harm, and the relationship between environmental protection and economic development have generated gridlock in environmental treaty negotiations, as well as inadequate compliance with existing agreements. For example, the North has historically emphasised environmental problems of global concern (such as ozone depletion and species extinction), whereas the South has generally prioritised poverty alleviation and environmental problems with more direct impacts on vulnerable local populations (such as desertification, food security, the hazardous waste trade, and access to safe drinking water, sanitation, and energy). Southern countries have demanded that the North assume responsibility for its immense contribution to major environmental problems (such as climate change), but the North has only grudgingly accepted the

[56] Beyerlin (2006) 264.
[57] Kwarteng AH Botchway TP (2018) 79.

principle of common, but differentiated, responsibility on the basis of its superior technical and financial resources while disavowing responsibility on the basis of its historic contributions to these crises. In almost every area of environmental concern, North- South negotiations have featured a deep and growing chasm between the call by some Northern states for collective action to protect the environment and the South's demand for social and economic justice.[58]

Although both Scholtz and Rajamani argued that there is no single definition for developing countries, Mickelson, on the other hand provided a definition for Third World countries which states as follows: *"[T]here is an important sense in which a country has to decide for itself that it is a member of the Third World? For some Third World countries are richer, or more industrialised, than others; and in segregated societies a man who is trying to 'pass' into the dominant community distances himself as much as possible from his relatives and traditional friends."* [59] Michelson also stated that the term 'Third World' has been frequently used as an alternative with other terms associated with the South such as underdeveloped, developing and less developing countries.[60]

Mickelson further states that it is essential to note that the nature of the dialogue with regards to the Third World approach to international environment law is two folded. The first discourse is of traditional environmental law and the nature of legal scholarship whilst the other dialogue is that of decolonisation. The colonial era covers a broad history of oppression and transformation.[61] Therefore North-South tensions were already evident leading up to the Stockholm Conference on Human Environment of 1972. It was widely accepted that environment concerns was as a result of pollution that was caused by industrialisation.[62] Despite the evolution and growth that was taking place in international environmental law, countries globally continued to threaten and jeopardised the integrity of the biodiversity of the earth. States differed in terms of their contributions to global ecological destruction, on how environmental problems should be addressed, their exposure to environmental damage and the way

[58] Gonzalez CG (2015) 409.
[59] Michelson K 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997) 16 *Wis. Int'l L.J* 355-56.
[60] Michelson K (1997) 355-56.
[61] Michelson K (1997) 361.
[62] Michelson K (1997) 388.

how they use and handled their economic and political power during multilateral environmental negotiations.[63]

Mickelson argues that a great deal of attention has been directed at the South. However as she indicated there is a significant difference between paying attention and paying careful attention. In other words the South is portrayed as an unwilling participant rather than an active partner to address the fundamental environmental problems and what the most suitable responses should be.[64] States that are battling economically are prepared to lower environmental and health standards to attract investments.[65]

However due to a number of debilitating differences it has not been possible to establish a sound environmental and developmental partnership between the North and South. The different approaches towards development and the environment, the ability of countries to protect the environment and the obligation (indebtedness) of the South to the North and the latter's superiority in treaty negotiations are examples of some of the gaps that exists between the North and Southern states. Therefore it is a prerequisite that the division between the Northern and Southern states are secured to ensure successful international environmental co-operation.[66]

When the conflict between the East and West developed into the Cold War the major issue on the agenda for the South was decolonisation. During this period it was not easy for leaders of newly independent nations of the southern hemisphere to manoeuvre between the US and Soviet Union.[67] Therefore most of the prominent leaders of the South opted to develop a policy of non-alignment acting as independent states in a differentiated world. In 1962 a landmark resolution was adopted by the UN Assembly, the aim of this resolution was to resolve the rights of people and nations to achieve permanent sovereignty over their natural wealth and resources and to ensure that it is exercised in the interest of their national development and the well-being of the people of the nation concerned.[68]

[63] Atapattu S & Gonzalez CG (2012) 1.
[64] Michelson K (2000) 60.
[65] Morrow K 'Rio + 20 the Green Economy and Re-orienting Sustainable Development' (2012) 4 *Environmental Law Review* 291.
[66] Beyerlin U (2006) 263.
[67] Michelson K (2000) 57-58.
[68] Sands P & Peel J et al '*Principles of International Environmental Law'* 3 (2012) ch 6 192.

The competition for influence between the North-South became more evident in the trade field when the countries of the South managed to obtain an international agreement to hold a United Nations Conference on Trade and Development (UNCTAD) in Geneva in 1964.[69] To ensure legal certainty in the stability of investments from foreign companies the need to balance the rights of sovereign states over their natural resources was addressed during UNCTAD.[70]

During the late 1960's the international society became aware of the close interdependency between development and the protection of the environment. The change on how states started to perceive this issue was significant and emanated in two important documents in the early 1970's.[71] The first of these documents was the Founex Report on development and the environment in 1971 where the need to incorporate environmental concerns was highlighted into a broader understanding of the environment.[72] The Founex Report[73] also stated that developing countries must define the minimum environmental standards that they wishes to impose to develop their social and cultural objectives.[74] On the other hand the Northern countries feared the pursuit of a Third World agenda on environmental matters by the South.[75]

The evolution of environmental law the of the modern era can be traced back in most instances to the United Nations Conference on the Human Environment held in Stockholm in 1972. Before the Stockholm Conference in 1972 International treaty-making was clearly dominated by the developed/industrial states with the under developing countries not been able to influence the international environmental treaty-making. Therefore most of the treaties that were concluded prior to the 1972 era almost never really addressed the economic and social needs of the under developing countries.[76]

[69] Pauwelyn J (2013) 29.
[70] Sands P & Peel J et al 2012 ch 2 40.
[71] Michelson K (2000) 78.
[72] Beyerlin U (2006) 263.
[73] Stalley P 'Norms from the Periphery: Tracing the Rise of the Common but Differentiated Principle in International Environmental Politics' (2018) *Cambridge Review of International Affairs* 2.
[74] Sohn L 'Stockholm Declaration on the Human Environment' (1973) 14 3 *Harvard international Law Journal* 503.
[75] Michelson K (2000) 79.
[76] Shelton D 'Stockholm Declaration (1972) and Rio Declaration (1992)' (2008) *Max Planck Encyclopedia of Public International Law* 2.

Before 1972 environmental legislation was negotiated in an ad hoc and sporadic manner. The scope and interest covered of the said legislation were very confined and of a regional nature. It was evident at the Stockholm Conference in 1972 that a huge difference between developing and developed countries existed.[77] Some of the major differences between the North-South states revolved around developed countries wanting to formulate a global environmental ethos, with the idea that the world be regarded as a body of national and international legislation and policy significance. The focus of developing countries on the other hand was on the need for development and economic growth.[78]

The key outcomes of the Stockholm declaration were the action plan for the Human Environment and the Stockholm Declaration of the United Nations Conference on the Human Environment. The action plan contained 109 recommendations whilst the Stockholm Declaration consisted of 26 principles[79] that will aim to inspire and guide the citizens of the world to preserve and enhance the human environment.[80] Sohn stated that the main objectives of the Stockholm Conference were to 'create an attentiveness to the problems of the human environment' within the United Nations, and to direct and focus the attention globally of states and the public at large in the various countries on the importance of the problem.[81] For instance Principle 21 of the Stockholm Declaration on the Human Environment begins by explaining that "*states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies*".[82] The said principle was well portrayed in the Trail Smelter case by the international arbitral tribunal (It was required by the Tribunal that the effected parties to put in place a monitoring regime to ensure that further damaging

[77] Huang J 'Climate Justice: Climate Justice and the Paris Agreement' (2017) 9 *J. Animal & Envtl. L*. 26.
[78] Rajamani L (2012) 607-8.
[79] Beyerlin U & Stoutenburg JG 'Environment. International Protection' (2013) *Max Planck Encyclopedia of Public International Law* 2.
[80] Sohn (1973) 423.
[81] Sohn (1973) 423-24.
[82] Stockholm Conference (1972) United Nations A/CONF.48/14/Rev1 (Principle 21.

pollution did not occur).[83] The 26 principles of the Stockholm Declaration had a decisive influence on International environmental Law.[84]

2.3 THE NEW INTERNATIONAL ECONOMIC ORDER (NIEO)

This movement was initiated by primarily the developing countries[85] because it appeared that the economic order served the interest of developed countries.[86] The developing countries felt that there were many disparities such as economic development as a result of in particular colonialism, and therefore NIEO can be described as an attempt by the developing countries to remedy the global inequities[87] and the restructuring of the global economic system.[88]

The underlying global economic and social tensions caused frictions between the traditional and new international economic orders.[89] The 1974 resolution on the NIEO as formulated in the Sixth Session of the United Nations General Assembly, stated that the North and the South committed themselves *'... to work urgently for the establishment of a new international economic order based on equity, sovereign equality, common interests and cooperation among all states… which shall correct inequalities and redress existing injustices, make it possible to eliminate the gap between the developed and developing countries…'*[90]

The NIEO process resulted in the adoption of several resolutions, most notably the UN Declaration on Permanent Sovereignty over Natural Resources,[91] the Declaration on the Establishment of a New International Economic Order, along with a Programme of Action,[92] and the Charter of Economic Rights and Duties of States.[93] Focus was

[83] Brown Weiss E 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) *81 Geo. L.J.* 677,703.
[84] Beyerlin U & Stoutenburg (2013) 2.
[85] Randeniya C 'Sharing the World's Resources: Equitable Distribution and the North-South Dialogue in the New Law of the Sea' (2003) *15 Sri Lanka J. Int'l L.* 153.
[86] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) ch 8 121.
[87] Randeniya C (2003) 153.
[88] Morgera E 'The need for an international legal concept of fair and equitable benefit sharing' (2016) *27 2 The European Journal of International Law Oxford University Press* 358.
[89] Randeniya C (2003) 153.
[90] United Nations General Assembly Declaration on the Establishment of a New International Economic Order resolution 3201 (1974) 798.
[91] UN General Assembly Permanent Sovereignty over Natural Resources (1973) A/RES/3171.
[92] United Nations General Assembly Declaration on the Establishment of a New International Economic Order resolution 3201 (1974) 798.
[93] Charter of Economic Rights and Duties of States GA Res. 3281 UN GAOR (1974).

also placed on the need to adopt and implement an international code of conduct for transnational corporations and on the regulation of transfer of technology. None of the aforementioned resolutions or declarations was formally binding, and while the representatives of developed States with market economies allowed the Declaration on the Establishment of a NIEO to be adopted by consensus they did so with reservations. As for the Charter of Economic Rights and Duties of States, concerns over the standard of treatment for their investors abroad, especially the provisions related to expropriation and compensation, resulted in developed States voting against it. Whenever the Charter's provisions were cited in subsequent declarations developed States always insisted that they were not legally binding.[94] Pauwelyn argued that when the developing countries acted as a block through the G-77 they have managed to collectively extract the highest level of differential treatment in terms of trade and environmental related negotiations.[95]

The New International Economic Order (NIEO) marked a turning point in North-South relations insofar as developing countries drifted away from full cooperation with the North towards trying to impose on developed countries a new set of principles and rules of international law.[96] The two well-established principles of the sovereign equality of States and of non-intervention that have provided a basis for the claims by developing countries to a New International Economic Order can be said to comprise three elements: the right of States to choose freely their economic system; permanent sovereignty by States over their natural wealth and resources; and the equal participation of developing countries in international economic relations.[97]

In the 1960s and 1970s as much as today, developing countries saw the principle of sovereignty as representing an important protection for economically and politically vulnerable States against interference by more powerful foreign States,[98] initially and largely those in the North. At a practical level, the use of the principle as a defence has been questionable, just as the commitment to sovereign equality has always been historically inadequate to ensure an international legal order that would actively

[94] Marshall P 'Whatever happened to the NIEO?'(1994) 83 *The Round Table* 331.
[95] Pauwelyn J (2013) 39.
[96] Cullet (1999) 566.
[97] Cullet (1999) 567.
[98] Mcgee J & Steffek J 'The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law' (2016) 28 *Journal of Environmental Law* 56.

contribute to the development of the weakest sections of the international community. Legal equality and functional equality are not coextensive, and as such, sovereign equality was interpreted by developing countries as allowing also for affirmative action: a means by which substance would be given to the principle of sovereign equality.[99]

In a nutshell, equitable distribution is a concept formulated in order to share the earth's natural wealth amongst its peoples. This was a primary catalyst for the new regime propounded by the NIEO, for under the old regime, the parties with the economic and technical capabilities would have had a monopoly on benefiting from these resources.[100]

The principal rationale of this concept is rooted in equality. The equality of nations and peoples is a fundamental basis of modern international law, and equal access to resources is an important facet thereof. The emergence of the concept of intra-generational equity is significant in this regard.[101] This latter concept can be defined as fairness in utilisation of resources among human members of present generations, both domestically and globally.

Bedjaoui asserts that intra-generational equity has become a *de facto* legal principle on both sides of the divide. Thus, this supports the case for equitable distribution. As such, it is an effort to ensure that the inability of the developing nations to meet their basic needs is corrected. The necessity for equitable distribution is also enhanced by the fact that most of the resource depletion is caused by the excessive consumption patterns of the developed countries. Thus, in ensuring the benefits of the natural world accrue to the whole of mankind, the concept of equitable distribution plays an invaluable role.[102]

Primarily, the effect of the old regime would have been unacceptable, especially given the NIEO's need to actualise development and create equity in the international community. Securing economic development is a necessary requisite in achieving social equity, and the nexus between the economy and the right to development

[99] Salomon MC 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62 *Int'l & Comp. L.Q.*34.
[100] Marshall P (1994) 332.
[101] Salomon ME (2013) 33.
[102] Bedjaoui M 'Towards a New International Economic Order' (1979) *Holmes & Meier Publishers Inc.* 84.

requires no further clarification. It is widely perceived in developing countries that resource control and misdistribution by the North are the major sources of the widespread poverty and underdevelopment in the South. Thus, it is obvious that the benefits of resources should be equitably distributed to serve as a medium of achieving development. Such a distribution would be in accordance with the precepts of social and distributive justice, and is an actualisation of the right to development.[103]

The NIEOs overall lack of success has been attributed in part to developing countries not having presented a unified platform and an agreed set of concrete objectives. The impact of the debt crisis of the 1980s which had a devastating effect on developing countries shifted the attention of the international community from the international economic order to development in individual countries, which overshadowed the demands for NIEO. The main contributing failure to establishing a NIEO was because of the fact that industrialised states did not want it. The developed states were reluctant to participate in global negotiations as they did not want to be involved in creating rules that would not serve their economic interests.[104]

2.4 CONCEPT OF INTERGENERATIONAL EQUITY IN INTERNATIONAL ENVIRONMENTAL LAW

The South frequently is referred to as grudging partner in international environmental law negotiations.[105] The unwillingness of developing states, however, needs to be viewed in the context of the fact that the North and South have different interests. Whereas the South has environmental problems of poverty the North faces environmental problems deriving from the excess of affluence.[106]

The Stockholm Declaration recognises the afore-mentioned differential interest. The developing countries asserted their influence during the Stockholm conference and their interests were acknowledged in the Declaration (see Principles 8, 9, 10 and 11).[107] However, the victory that the developing countries achieved at the Stockholm conference did not last long. In general, the environmental problems deriving from the

[103] Salomon ME (2013) 48.
[104] Salomon MC (2013) 46.
[105] Mickelson (2000) 53.
[106] Ntambirweki J 'The Developing Countries in the Evolution of an International Environmental Law' (1991) 14 *Hastings Int'l & Comp. L. Rev* 907.
[107] Stockholm Conference (1972) United Nations A/CONF.48/14/Rev1 (Principles 8-11).

"excess of affluence" mostly have been the main concern of international environmental law.[108]

It is, therefore, not always unjustified that the developing countries view the environmental initiatives of the developed world with scepticism. Developing countries fear that the global environmental agenda, which they perceive as an agenda of the North, may hamper their economic growth. The different interest of the North and South also may be evident in the distinction between intergenerational and intra-generational equity. The North mostly focuses on the pursuit of intergenerational equity, whereas the South is sceptical of intergenerational equity, while the major part of the current generation does not have the means to address their most basic needs. How can one expect poor people to shoulder the burden of future generations? Furthermore, these future generations as a consequence also will include generations of the North, which implies that these people will need to ensure the affluence of future (Northern) generations. The connection with future generations is vague and it is difficult to see why current generations should make sacrifices for future generations, especially the poor. Intergenerational equity focusses too much on future justice and does not really address the injustices of the past.[109]

Another point of critique is that intergenerational equity does not reflect the fact that equity is not merely an abstract concept. Equity must be applicable between separate individuals of groups. For example, redistributive equity might be imposed on the relationship between developed and developing countries in order to pursue equality. However, this is not possible in the instance of future generations as they constitute a mere abstract group. Intergenerational equity further requires us to make assumptions about what future generations as they constitute a mere abstract group. Intergenerational equity further requires us to make assumptions about what future generations will value. In order to make these assumptions we will use our own present values to establish the future values. These present values do not always

[108] Ntambirweki J (1991) 924.
[109] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) ch 8 125-26.

aspire to equity as is reflected by the growing inequality of the current world order. This may mean that current inequity will be passed on to future generations.[110]

However, the main problem with intergenerational equity is the assumption that intra-generational equity is an extension of intergenerational equity, a viewpoint which entrenches the primary importance of intergenerational equity and demotes intra-generational equity to an incidental matter. While intergenerational equity acknowledges intra-generational equity, too much weight is accorded to intergenerational equity.[111]

Thus, equity first needs to be achieved in our present generation in order to bestow an equitable world upon future generations. This does not mean, of course, that we should not pay heed to the interests of future peoples, but that one should disregard the dualism implicit in the distinction between the two forms of equity. Too much focus on future generations makes the issue of equity abstract and does not address the dire needs of billions of people living in the world today. However, doing away with the notion of intergenerational equity and introducing a new concept is not a very plausible solution, as already it has been embedded in international environmental law. Rather, a re-interpretation of intergenerational equity is suggested.[112]

2.5 THE CONCEPT OF SUSTAINABLE DEVELOPMENT AND INTERNATIONAL ENVIRONMENTAL LAW IN THE NORTH-SOUTH DIVIDE

The Brundtland Report defines sustainable development as development "that meets the needs of the present without compromising the ability of future generations to meet their own needs". The first part refers to present needs and the promotion of equity for the current generation. Thus, equity in the present should not result in a situation where future generations are unable to meet their needs.[113]

[110] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) ch 8 126.
[111] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) ch 8 126.
[112] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) ch 8 126-27.
[113] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) ch 8 127.

It is not the other way around: the needs of the faceless future generation should not be pursued as a primary goal, with the needs first to address current inequity. This amounts to a call for some sort of distributive justice. The process of distributive justice is, however, qualified by the needs of future generations. This implies a check on current generations. There is no need to make a rigid distinction between the different forms of equity. The equity that is needed must be unlimited in relation to time and space. The acceptance of the importance of intergenerational equity also serves the self-interest of the North, as assistance to the South may prevent environmental destruction that can be seen as a prerequisite for development. In this sense, development which is more sustainable may be pursued. [114]

Following the Brundtland Report, the concept of sustainable development appears in several international and national legal instruments, reflecting concerns that go beyond economic growth and charting goals that follow a wide range of objectives, including protection of the natural environment, promotion of sustainable economic growth, and achievement of social development. In 1992, the United Nations Conference on Environment and Development (UNCED), also called the Earth Summit or the Rio Conference, outlined the profile of sustainable development in a set of principles that sought to balance the priorities of developed and developing countries. [115]

According to the Rio Declaration, sustainable development comprises intergenerational equity (Principle 3); the integration of environmental protection into the development process (Principle 4); intra-generational equity and the alleviation of poverty (Principle 5); consideration of countries' special development and environmental needs (Principle 6); reduction of unsustainable production and consumption (Principle 8); reductions in population (Principle 8); and effective environmental legislation (Principle 11).[116]

In the years following the Earth Summit, the concept of sustainable development was sharpened in major UN summits. Paragraph 6 of the 1995 Copenhagen Declaration,

[114] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) ch 8 127.
[115] Iqbal I Pierson C 'A North-South Struggle: Political and Economic Obstacles to Sustainable Development' (2016) 16 *Sustainable Dev. L. & Pol'y* 17.
[116] The Rio Declaration on Environment and Development [1992] A/CONF.151/26 (Vol. I) (Principles 3, 4,5,6,8 and 11).

for instance, features the interconnections between sustainable and social development. Paragraph 6 of the Copenhagen Declaration further underscores the importance of achieving environmentally sustainable economic activity through practices that promote social development, particularly for the poor.[117]

The broadest and most detailed instrument so far in the development of the international law norm of sustainable development has been Agenda 21 adopted at the 1992 Earth Summit. Agenda 21 represents a verbal commitment by nations around the world to take actions to further sustainable development. Agenda 21 is a global affirmation of the premise of the Rio Declaration that the right of development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations. It places the responsibility for implementing sustainable development principles on governments of both developing and developed state.[118]

Equitable social development that recognises empowering the poor to utilise environmental resources sustainably is a necessary foundation for sustainable development. We also recognise that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice.[119]

Sustainable development is the single most important concept in international environmental law in "the sense that the whole of international environmental law has to be developed further under an overall sustainable development umbrella". The classic definition of sustainable development is development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".[120]

The exact meaning and legal status of sustainable development has been a focal point of academic discourse and remains unclear to this day. It seems unlikely that sustainable development can be viewed as a legal obligation, but it does represent a policy which can influence the outcome of cases, the interpretation of treaties, and the

[117] Iqbal I Pierson C (2016) 18.
[118] Iqbal I Pierson C (2016) 18.
[119] Iqbal I Pierson C (2016) 18.
[120] Scholtz W Legal 'Protection of the Environment' in Strydom H (Edt) International Law (2017) *Oxford University Press* 512.

practice of states and international organisations, and may lead to significant changes and developments in the existing law.[121]

Scholars argues that "sustainable development is likely to be subject to mutually incompatible interpretive claims, and may remain a source of confusion rather that of enlightment as regards specific legal implication".[122]

The primary reason for the latter statement lies in the fact that sustainable development is as attempt to reconcile the right to pursue economic development, which is an attribute of permanent sovereignty, with the protection of the environment. This is also evident from Principle 3 of the Rio Declaration, which states that the "right to development" "should be fulfilled so as equitably to meet the developmental and environmental needs of present and future generations". The relative character of the competing interest of environmental sustainable development is "that both sides in any legal argument will be able to rely on it". Sands and Peel identify four elements of the concept of sustainable development: intergenerational equity, intra-generational equity, sustainable use and the principle of integration. It is important to reflect on these elements in order to gain an understanding of sustainable development.[123]

2.6 CONCLUSION

The New International Economic Order announced a radical and novel approach through the pursuit of equity and preferential treatment. The New International Economic Order resulted in the right to development which was also not accepted by developed states. The ecological crisis created the need for the acceptance of sustainable development which reconciles interests of developing and developed States.

Sustainable development allows for differential treatment in particular through the CBDRRC. The latter principle (CBDR was formulated in the climate regime with the additional element of 'respective capabilities') has played a fundamental role in the

[121] Scholtz W Legal 'Protection of the Environment' in Strydom H (Edt) International Law (2017) *Oxford University Press* 512.
[122] Scholtz W Legal 'Protection of the Environment' in Strydom H (Edt) International Law (2017) *Oxford University Press* 512.
[123] Scholtz W Legal 'Protection of the Environment' in Strydom H (Edt) International Law (2017) *Oxford University Press* 512.

evolution of the UN climate regime. This changed through a recognition of pragmatism and gave rise to the new approach in the Paris Agreement. The bottom-up approach could potentially mark a paradigm shift in developing developed states relations as well as international environmental law.

Differentiation and equity are critical to an effective multilateral environmental regime and are inextricably linked. At the heart of differential treatment lies the notion that equity or fairness dictates special or preferential treatment for certain countries, whether on the grounds of their differing capacities or their lesser contributions to the global environmental problem.

CHAPTER 3

Differential Treatment in the context of International Environmental Law and Climate Change

3. INTRODUCTION

"To argue in this way is to ignore the world we live in. We do all live in one planet, and all are interconnected; all nations are in legal terms equal sovereign members of the UN with the same rights and duties. But this statement of mixed fact and legal theory combines to hide a vicious reality. The world's unity, and the sovereign equality of nations, is mocked and nullified by the economic inequalities which exist between the so-called equal nations of the world, and in particular between the economic North and South of the world."[124]

There needs to be a deliberate North-South dialogue with the purpose of first identifying the underlying causes of the increasing inequality, and second agreeing on how to eliminate those factors.[125]

"Clearly, the parity of the developing countries with the developed ones is not compatible with the existing stocks of natural resources. For the survival of mankind the poor developing countries should remain in a state of underdevelopment because if the evils of industrialisation were to reach them, life on the planet would be in jeopardy."[126]

The existence of pervasive inequalities between states on the one side and ecological and economic interdependence on the other has given rise to a host of challenges in international cooperative efforts.[127] Differential treatment refers to the use of norms that provide different, presumably more advantageous, treatment to some states. Real differences exist between states: historic, economic, political, and others. Norms of

[124] Nyerere 'At the receiving end of the North-South dialogue' in Hadjor (ed) New perspectives in North-South Dialogue: Essays in honour of Olof Palme (1988) 19.
[125] Scholtz W (2008) 115.
[126] Anand 'Development and Environment: The Case of the Developing Countries' (1980) 20 *Indian J Int L* 8.
[127] Rajamani L (2006) 81.

differential treatment recognise and respond to these real differences between states by instituting different standards for different states or groups of states. Differential treatment, broadly conceived, is deeply embedded in the fabric of the new generation international environmental agreements and is, indeed, the essence of the compact between industrial and developing countries with respect to international environmental protection. Differential treatment has gained significant importance in international environmental law and has accordingly been the subject of recent discussion by scholars.[128]

Muylaert et al[129] argued that the 'common but differentiated responsibilities principle' (UNFCCC 1992 article 3) requires a consideration of temporal and sectoral factors, as well as geographic ones. In dealing with climate change the concepts of equity and responsibility will be fundamental tools to provide guidance to decision makers. Although the subject of climate change is globally seen as a controversial matter the precautionary principle still constitutes though a tool for the promotion of responsibility for example amongst others the disagreements on the causes and importance of increase in global temperature and the impact thereof for future generations.[130]

Parties to the UNFCCC have universally agreed that CBDRRC, the right to development, and the right to public participation must be respected in any concerted international effort to reduce global warming and adapt to the impacts of climate change.[131] Yet in much the same way that individual nations interpret and evolve, for example, the principle of economic freedom in ways that make sense to certain states culture, government, and socio-economic circumstances, these principles have been operationalised and interpreted in ways unique to the international climate negotiations. These efforts have not always achieved the principles' intended purposes, and, in fact, can be seen to have worsened existing inequities.[132]

[128] Rajamani L (2006) 81-2.

[129] Muylaert MS et al 'Equity, responsibility and climate change' (2004) *28 1 Climate Research Inter-Research Science Center* 89-92.

[130] Maguire R 'The Role of Common but Differentiated Responsibility in the 2020 Climate Regime: Evolving a New Understanding of Differential Commitments' (2013) 7 (4) *Carbon & Climate Law Review, Special Issue on Process, Principles and Architecture of the Post–2020 Climate Regime* 260.

[131] United Nations Framework Convention on Climate Change (1992) S. Treaty Doc No. 102-38 1771 U.N.T.S. 107 (Articles 3, 3(4) and 4(1)).

[132] Huang J (2017). 29.

At the Stockholm Conference, the developing countries steered away from highlighting environmental issues because they were concerned that it would slow down their economic development and limit their sovereignty. The developing countries feared that ecological values would take priority at the expense of development.[133] However, although the development imperative of developing states was confirmed by several principles recognising the special requirements of developing countries, the acknowledgement of a common protection imperative was also included.[134]

The objective of this chapter is to dissect the context of differential treatment, the origin of the CBDR and CBDRRC principles in terms of the North-South Divide in International Environmental Law.

3.1 THE STATUS AND CONTEXT OF DIFFERENTIAL TREATMENT

Deeply rooted in the old notions of fairness and equity, the idea of differential treatment between developed and developing countries started to appear in international environmental law in the last quarter of the twentieth century.[135] Arguably, it started to reflect for the first time equity concerns and the protection of the environment for future generations during the Stockholm Conference.[136] The aforementioned have underlain most environmental debates on a North-South basis for several decades.[137] Therefore, Beyerlin stated that the bridging of the North-South divide appears to be a prerequisite for any successful global environmental cooperation.[138]

Differential treatment addresses the fact that environmental issues, such as climate change, have too much of a universal impact for the answer to be merely a matter of domestic jurisdiction and recognises that imposing equal obligations on subjects of law that are unequal in relevant ways may be perceived as unjust if they worsen inequalities or enact unfair burdens on those least able to bear them.[139]

[133] Weisslitz M 'Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential versus Absolute Norms of Compliance and Contribution in the Global Climate Change' (2002) 13 *Colo. J. Int'l Envtl. L. & Pol'y* 480.
[134] Rajamani L (2012) 607.
[135] Deleuil T 'The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' (2012) 21 (3) *RECIEL* 271.
[136] Weisslitz M (2002) 479.
[137] Thérien J (1999) 723.
[138] Beyerlin U (2006) 260.
[139] Deleuil T (2012) 279.

Over the past two decades, various forms of differentiation have been introduced in environmental law instruments and have become an important feature of international law that aims to bring about practical (rather than formal) equality among *de facto* unequal states and to increase participation in, as well as the effectiveness of, international agreements.[140] At the same time, differential treatment has proven to be deeply contentious,[141] scholars in environmental law arguing that it should be temporary, that it fails to target beneficiaries appropriately, and undermines environmental outcomes.[142]

Cullet defines differential treatment as the 'instances where the principle of sovereign equality is side-lined to accommodate extraneous factors, such as divergences in levels of economic development or unequal capacities to tackle a given problem'.[143] However Stone argues that the meaning of 'differentiated' is problematic as every agreements differentiates for example in an ordinary contract, one side undertakes to deliver coal whilst the other undertakes to pay for it.[144]

Differential treatment has strong affinities with preferential treatment as conceived in the international law of the development era, and in practice, preferential or differential treatment lead to broadly similar results. Differential treatment, however, is predicated on different conceptual bases which emphasise solidarity and partnership, and substantive equality over formal equality.[145] Differential treatment seeks to foster a form of substantive equality which cannot be achieved through reliance on sovereign equality in a world where states are unequal in many respects.[146] It does not require the establishment of a 'new' legal order but seeks to achieve more equitable and effective results within the existing system. Differential treatment implies a sharing of costs and benefits for the benefit of all, but with costs and benefits shared according to an alternative criterion instead of strict reciprocity.[147] Differential treatment does not encompass every deviation from the principle of sovereign equality. It seeks to foster

[140] Voigt C &Ferreira F (2016) 59.
[141] Mcgee J & Steffek J (2016) 39.
[142] Cullet P (2016) 305.
[143] Cullet (1999) 551.
[144] Stone CD 'Common but Differentiated Responsibilities in International Law' (2004) *The American Journal of International Law* 277.
[145] De Jonge A (2014) 138.
[146] Maljean-Dubois S 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime' (2016) 25 *Rev. Eur. Comp. & Int'l Envtl. L.* 151.
[147] De Jonge A (2014) 138.

a form of substantive equality which cannot be achieved through reliance on sovereign equality in a world where states are unequal in many respects.[148]

The treatment of developing countries arises in virtually every discussion of international environmental protection and resource management. From a practical (non-political) perspective, developed countries are the source of much of the world's pollution and contain much of the population and natural resources. Achieving effective participation by developing countries in international environmental protection, however, is complicated by the fact that developing countries face greater difficulties when compared to developed countries with respect to managing environmental problems.[149] Developing countries often do not have sufficient technical expertise to evaluate complex technological proposals or to monitor ongoing performance, especially (as is often the case) where control of the day-to-day operations is effectively in the hands of foreigners.[150]

Under the UN Charter, and as a basic principle of international law,[151] all States are equal. In practice, huge differences between countries have always existed and will continue to exist, be it in terms of land mass, population, gross domestic product (GDP), GDP per capita, military capacity, natural resources, industrial production, private or public wealth, environmental conditions, history, culture, etc. Unless a treaty explicitly provides for differential treatment, these inter-country differences are papered over, and all State parties must be treated alike. Especially trade and environmental agreements include so-called 'differential treatment' for the group of developing as opposed to developed countries.[152]

Magraw argues that international environmental norms should be fashioned to take into account in an appropriate situations the specific capabilities and needs of developing countries. Two types of differential norms may be distinguished. The first type is referred to as a 'differential' norm. Magraw defines this as a 'norm that on its face provides different, presumably more advantageous, standards for one set of States than for another set'.[153] As stated by Romera and van Asselt it simply grants

[148] Maguire R (2013) 260.
[149] Voigt C & Ferreira F (2016) 59-60.
[150] Magraw DB (1990) 69-70
[151] Charter of the United Nations and Statute of the International Court of Justice 1945 (Article 2(1)).
[152] Castro P (2016) 380.
[153] Magraw DB (1990) 73-4

favourable treatment to development countries. The differential norms that distinguish between developed and developing countries are of interest in this regard.[154]

An example of a differential environmental norm is contained in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which allows developed countries five years to decrease pollution to a specified level, but developing countries- defined in terms of annual per capita consumption of ozone-depleting substances- are in turn allowed ten years to reach that same level.[155] The Montreal Protocol is highly unusual, perhaps unique, because it defines developing countries. In short it simply grants favourable treatment to developing countries.[156] The other conventions and instruments (such as UN General Assembly declarations) that provide differential treatment to developing countries may be relying on a common sense definition of the term or on the treatment of countries within the UN system (the United Nations, for example, maintains a list of least-developed developing countries).[157]

The Committee on Trade and Development in the WTO has defined special and differential treatment as a six-fold typology: provisions to increase trade opportunities of developing countries; provisions for safeguarding the interests of developing countries; flexibility in commitments, actions, and use of policy instruments; transitional time periods; technical assistance; and provisions relating to least-developed countries. Thus, international trade law has evolved so as to take account of the disparities among States in order to foster better participation, implementation, and compliance.[158]

The second type is a 'contextual' norm which implies a norm that 'on its face provides identical treatment to all States affected by the norm but the application of which requires (or at least permits) consideration of characteristics that might vary from country to country'. Contextual norms may be general or limited. General contextual

[154] Romera BM & Van Asselt H 'Reconciling Differential Treatment and the International Regulation of Aviation Emissions*'* (2015) 27(2) *Journal of Environmental Law* 260.
[155] Bankobeza S 'Effectiveness of Multilateral Environmental Agreements: Introduction to General *Aspects'* in Lewis M, Honkonen T & Romppanen S Edt. *International Environmental Law-making and Diplomacy Review (2016) University of Eastern Finland – UNEP Course Series 16 Law School University of Eastern Finland Joensuu Campus* 35.
[156] Ntambirweki J (1991) 910.
[157] Wiersema A 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements' (2009) 31 (1) *Michigan Journal of International Law* 238.
[158] Brown Weiss E *Common but Differentiated Responsibilities in Perspective* (2014) *Proceedings of the Annual Meeting (American Society of International Law) Cambridge University Press* 367.

norms are norms where the terms of the norm do not limit the characteristics that may be considered.[159] It provides identical treatment to all countries, but their application either requires or permits differentiation by considering factors that vary among countries. Contextual norms can thus also take into account a change in circumstances.[160]

In terms of limited contextual norms, the indeterminacy of the norm is restricted through the terms of the norm. The relevant characteristics that need to be considered are defined. Contextual and differential terms both allow for differentiation.[161] The difference is that contextual terms require additional explanation. Further, it is of interest to note that differential and contextual norms prima facie may seem beneficial to developing countries, but this may not always be the case. [162]

Understanding differentiation in international environmental agreements in terms of its potential for fostering procedural and substantive regard creates an alternative categorisation of differential treatment to those deployed in earlier writing. The Montreal Protocol and the Basel Convention heralded the beginnings of an era of pervasive differential treatment in multilateral environmental agreements. The Basel Convention of 1989, contains several provisions on differential treatment in favour of developing countries which outlines three primary ways in which to categorise differential treatment in international environmental law:[163]

- Provisions that differentiate between industrial and developing countries with respect to the central obligations contained in the treaty, such as emissions reduction targets;
- Provisions that differentiate between industrial and developing countries with respect to implementation, such as delayed compliance schedules, permission to adopt subsequent base years, delayed reporting schedules, and soft approaches to non-compliance; and

[159] Magraw DB (1990) 73-74.
[160] Romera BM & Van Asselt H (2015) 260.
[161] Scholtz (2008) 119.
[162] Magraw DB (1990) 74.
[163] Rajamani L (2012) 608.

- Provisions that grant assistance, inter alia, financial and technological.[164]

The principle which most clearly reflects the essence of differential treatment in international environmental law is the principle of common but differentiated responsibility.[165]

Differentiation, equity and ambition are critical to an effective multilateral environmental regime and are inextricably linked. At the heart of differential treatment lies the notion that equity or fairness dictates special or preferential treatment for certain countries, whether on the grounds of their differing capacities or their lesser contributions to the global environmental problem.[166]

The common but differentiated responsibility is a notion that despite the legal wrangling on the point is the overall principle guiding the future development of the climate regime even though this principle does not assume the character of a legal obligation in itself, it is of sufficient legal weight to form the legal and philosophical basis for the interpretation of existing obligations and the elaboration of future international legal obligations within the context of the existing instruments in the ongoing regime-building process.[167]

3.2 THE PRINCIPLE OF COMMON BUT DIFFERENTIAL TREATMENT (CBDR)

The principle of common but differentiated responsibilities was affirmed in the United Nations Framework Convention on Climate Change, opened for signature on 4 June 1992 at the Rio Conference.[168] The Rio Declaration includes two main principles concerned with differentiation. Principle 6, provides the general recognition of categories of States (developing countries, environmentally vulnerable countries,

[164] Huggins A & Saiful Karim MD 'Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime' (2016) 5(2) *Transnational Environmental Law* 432-33.
[165] Scholtz W 'Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism' (2008) 55(3) *Netherlands International Law Review* 119.
[166] Rajamani (2012) 623.
[167] Stalley P (2018) 4.
[168] Irish M 'Special and Differential Treatment, Trade and Sustainable Development' (2011) 4 *Law & Dev. Rev* 83.

States in transition to a market economy) and the need to consider their special situation and needs.[169] According to principle 6:

"The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries."[170]

The common but differentiated responsibility norm (CBDR) holds that developed countries bear the principal obligation for combating global environmental challenges such as climate change.[171] This obligation stems from developed countries' historical contribution to problems such as global warming, as well as their superior technical and economic capacity for adapting to and mitigating against the potential harmful impact of a warming climate.[172] The principle of common but differentiated responsibilities and respective capabilities (CBDRC) captures the idea that it is the common responsibility of states to protect and restore the environment but that the levels and forms of states' individual responsibilities may be differentiated according to their own national circumstances. This principle has shaped the evolution of the climate regime and has played an important role in promoting compromise and agreement. It is argued that some twenty years after the adoption of the United Nations Framework Convention on Climate Change (UNFCCC), the principle of CBDRC remains as relevant as ever.[173]

Principle 7 can be seen, conceptually, as a more specific application of the general principle of differentiation enshrined in principle 6 and earlier, in principle 12 of the Stockholm Declaration.[174] According to principle 7:

---

[169] Vaughan S 'Trade and Environment: Some North-South Considerations' (1994) 27 *Cornell Int'l L. J.*596.
[170] The Rio Declaration on Environment and Development [1992] A/CONF.151/26 (Vol. I) (Principle 6).
[171] Rajamani (2006) 119.
[172] Stalley P (2018) 4.
[173] Brunnée J & Streck C 'The UNFCCC as a Negotiation Forum: Towards Common but more Differentiated Responsibilities' (2013) 13 (5) *Climate Policy* 589.
[174] Viñuales JE 'The Rio Declaration on Environment and Development' in Viñuales JE (Ed) 'The Rio Declaration on Environment and Development *A Commentary'* (2015) *Oxford University Press* ch 1 28.

"States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."[175]

Although Principles 6 and 7 are often equated, their differing rationales must not be overlooked. Both aim at introducing differentiation but not on the same basis and with the same objectives. Specifically, unlike Principle 6, Principle 7 targets different contributions to environmental degradation and different capabilities, and it suggests that developed countries must carry a heavier burden as a result.[176] This difference explains why, unlike Principle 6, Principle 7 could not be placed within the set of "easy" principles requiring less discussion during the preparatory works, as well as why the United States decided to add an interpretive statement to it and not to Principle 6.[177]

Principle 7 provides the policy context for taking measures on global environmental problems based on the division of the world into developing and developed countries, taking as its starting point that the latter have contributed more to environmental degradation and can mobilise more financial and technological resources.[178] As with Principle 6, the means to implement differentiation under Principle 7 are further spelt out in other principles, most notably in Principle 9 (transfer of technology), Principle 11 (variation in the applicable standards) and Principle 12 linking trade and environmental policy, even though the latter does not even specifically refer to special and differential measures.[179]

Thus, the better view is that Principles 6 and 7 together, as further spelled out in other principles, provide the framework within which differentiation is taken up in the Rio Declaration. While Principle 6 is the broader principle that sets out the generic

[175] Rio Declaration on Environment and Development United Nations Conference (1992) (Principle 7).
[176] Rangreji L 'Reflections on the Sustainable Development Paradigm' (2013) 43 *Envtl. Pol'y & L.* 309.
[177] Stone CD (2004) 290-91.
[178] Cullet P 'Differential Treatment in Environmental Law Addressing Critique and Conceptualizing the next Steps' (2016) 5 (2) *Transnational Environmental Law* 310.
[179] Hébié M Common but Differential Responsibilities in Viñuales JE (Ed) 'The Rio Declaration on Environment and Development *A Commentary'* (2015) *Oxford University Press* ch 10 222-23.

parameters for differentiation, it is Principle 7 that has attracted most of the scholarly and policy-making attention. It is also Principle 7 that has been extensively used and repeated in various subsequent legal instruments.[180]

Despite the controversy surrounding its adoption, the CBDR principle breaks new ground in international law. It is an exception to the cardinal principle of sovereign equality of states and forms the legal framework governing ozone depletion and climate change.[181] Differential treatment is thus well enshrined in the foundational instruments of IEL.

Principle 7 of the Rio Declaration recognised differences between the North and the South, such as in terms of contributions to environmental degradation, but it did not go as far as imposing legal obligations on the North. Indeed, the United States (US) specifically indicated that it did not believe Principle 7[182] and refused to ratify the Kyoto Protocol on the basis that it exempts developing states from contributing to the solution of global warming and so, in effect, confers on them the right to pollute.[183] Commentators often take a similar line and argue against the existence of binding commitments of differentiation to be borne by the North.[184]

The relation between principles 6 and 7 of the Rio Declaration also calls for clarification. Manuals and monographs on international environmental law often address these two principles simultaneously under the heading 'Common but Differentiated Responsibility" (CBDR). Both principles are perceived as embodying CBDR, although they do not have the same content. Principle 7 allocates states environmental responsibilities according to their respective contribution to the degradation of the global environment and their capacities. To the contrary, differentiation under principle 6 finds its rationale in the special needs and interests of environmentally vulnerable and developing countries.[185]

[180] Cullet P 'Common but Differential Responsibilities' in Viñuales JE (Ed) 'The Rio Declaration on Environment and Development *A* Commentary' (2015) *Oxford University Press* ch 11 241.
[181] Atapattu S 'Climate Change, International Environmental Law Principles, and the North-South Divide' (2017) 26 *Transnat'l L. & Contemp. Probs*. 253.
[182] Atapattu S (2017) 254.
[183] Scholtz W 'Equity as the Basis for a Future International Climate Change Agreement: Between Pragmatic Panacea and Idealistic Impediment. The Optimisation of the CBDR Principle via Realism' (2009) 42 (2) *The Comparative and International Law Journal of Southern Africa* 167.
[184] Cullet P (2016) 310.
[185] Hébié M (2015) 226.

The adoption process of the two principles also reflects the perception of the drafters of the Rio declaration that their legal effects were different. While Principle 6 was adopted in New York as part of the "easy principles", Principle 7 remained contentious, prompting the US last minute "interpretative statement". Principle 7 can therefore hardly be described as a "practical consequence of Principle 6" or merely as an elaboration of this provision. It provides a different and separate rationale for differentiation. [186]

The first explicit adoption by a multilateral environmental agreement of Common but Differentiated Responsibilities was the United Nations Framework Convention on Climate Change (FCCC).[187] Article 3 of the UNFCCC embodies principles which are to guide the actions of the parties in achieving the objective and implementing the provisions of the Convention. The ultimate objective of the Convention is to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[188]

Mickelson argues that the principle of Common but Differentiated Responsibilities did not originate in the context of climate change, but it is in the climate change context where it has achieved its best-known (and most controversial) formulation. It is contained in exceptionally clear terms in the United Nations Framework Convention on Climate Change.[189] Article 3(1) refers to (inter-generational) equity as well as the CBDR principle and reads that:[190]

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[191]

[186] Hébié (2015) 226
[187] Stalley P (2018) 4.
[188] Scholtz W (2009) 168.
[189] Mickelson (2009) 413-14.
[190] Scholtz W (2009) 168.
[191] United Nations Framework on Climate Change 1992 FCCC/INFORMAL/84 GE.05-62220 (E) 200705 (Article 3(1)).

3.2.1 The Kyoto Protocol

To give effect to the objectives of the United Nations Framework Convention on Climate Change, the Kyoto Protocol to the Convention was adopted in 1997. The Kyoto Protocol contains hard and specific rules designed to combat global climate change.[192] After the Kyoto Protocol was entered into force, it is crucial to determine whether the Kyoto Protocol is capable of achieving the stated objective of the climate change regime. The objective of the stabilisation of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[193]

The provisions of the Kyoto protocol remain a special case of differential treatment for two reasons.[194] Firstly, the protocol was implemented through the clean development mechanism, the aspect of Principle 6 requiring international actions in the field of the environment to also address the needs of developing countries. In practice, however, only a few developing countries, especially Latin-American countries and India took advantage of this mechanism. The clean development mechanism impact on least developed countries was rather limited because of the types of activities for which admission reduction certificates are granted.[195]

The Kyoto Protocol is also different from other instruments by the type of differential treatment it institutes in favour of developing countries. Instead of traditionally differentiating with respect to the implementation, it exempted developing countries from some of its core, and arguably, more burdensome provisions. As a consequence, the Protocol remained unpopular with developing countries[196] especially due to the economic costs that the Protocol imposes on industrialised countries, as well as the exemption from commitments for developing countries. The latter have been cited as

[192] Tladi D 'What impact will the Kyoto Protocol have on global climate change?' (2005) 46 (1) *Codicillus* 43.
[193] Tladi D (2005) 44.
[194] French D & Rajamani L 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere' (2013) 25(3) *Journal of Environmental Law* 440.
[195] Hébié M 'Common but Differential Responsibilities' in Viñuales JE (Ed) 'The Rio Declaration on Environment and Development A Commentary' (2015) *Oxford University Press* ch 10 222/3.
[196] Hébié M (2015) 222.

the main reasons why the United States has refused to ratify the treaty, even though it had signed the Protocol in 1997.[197]

The Conference of the Parties, which is the Supreme Body of the UNFCCC, convened in December 1997 in Japan to delineate specific emission standards for developed and developing nations, as was previously proposed at Rio. The purpose of this meeting was to establish tools for implementing the strategies proposed at Rio. Under the UNFCCC:[198]

Developed countries are expected to stabilise their emissions and assist other countries in meeting their commitments by offering financing and/or technology transfers.... Developing countries assumed no stabilisation commitments, only reporting obligations and should obtain both financial assistance and technology transfers from developed countries.

According to the principle of common but differentiated responsibilities (CBDR) all states have common environmental responsibilities but it is how each of these states deals with their responsibilities individually to suit their specific requirements in terms of their historical, economic, social and ecological variables. [199] However, in the Kyoto Protocol both of these concepts (asymmetric substantive environmental obligations of states and the mechanism for assistance with compliance) are unilaterally benefiting the developing countries and can be interpreted as *positive* and *benign* discrimination of the Third World.

Castro states that the Kyoto Protocol represents the most extreme example of differential treatment between North-South countries which resulted in the categorisation of its parties into three groups of countries those listed in Annex I to the Convention (the so-called 'Annex I countries'), those listed in Annex II (which is a subset of Annex I), and those not listed in either (the 'non-Annex I countries'). The latter has been severely criticised in the Kyoto Protocol for not reflecting more the geo-political, economic and or environmental realities. These groups were differentiated in terms of their central emissions reduction and reporting obligations, implementation

[197] Van Asselt H '*From* UN-ity to Diversity - The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change' (2007) (1) *CARBON & CLIMATE L. REV.* 17.
[198] Weisslitz M (2002) 483.
[199] Huggins A & Saiful Karim MD (2016) 427-28.

rules, and provision of support.[200] The afore-mentioned has lead towards a more conceptual approach in which the circumstances of countries with regards to their relative capacity and vulnerability were highlighted that would in practice result in an increase of more differentiation.[201]

The Kyoto Protocol follows the blueprint of the UNFCCC as the central obligations of the Protocol are applicable to developed countries. Article 3 compels Parties included in Annex I of the UNFCCC (developed countries) to ensure, individually or jointly, that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases included in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008-2012. In terms of art 3(2) the Parties are required to have made progress in achieving their commitments under the Protocol by 2005.[202]

However, the Protocol failed to bring about significant GHG emission reductions at the global level due to a lack of comprehensive and effective participation of all major GHG emitter countries. The lack of participation is considered the by-product of various factors attributed with the top-down rigid approach of the Kyoto Protocol. The reasons for the afore-mentioned are the following 2 factors which is a predetermined legally-binding rigid set of GHG emission reduction targets that made major GHG emitter countries reluctant to participate in the Kyoto framework and the distribution of burden-sharing solely on the basis of historic contribution that let some major GHG emitters countries (with no historic contributions) get away with taking up mitigation as an obligation. The architecture of the Kyoto Protocol also left no room to broaden the group of Parties to include those that contribute most to the climate change. Moreover, the top-down approach of the Kyoto Protocol failed to induce state Parties' national climate change policies to adopt an effective emissions reduction path for achieving the mitigation targets.[203]

[200] Castro P (2016) 380.
[201] Romera BM & van Asselt H (2015) 259.
[202] Scholtz (2008) 123-24.
[203] Zaman ST 'The Bottom-up Pledge and Review Approach of Nationally Determined Contributions (NDCs) in the Paris Agreement: A Historical Breakthrough Or a Setback in New Climate Governance' (2018) 5 (2) *IALS Student Law Review* 5.

The benign discrimination as discussed above is not the only means to achieve justice in between the North-South. Another concept that has been development to bridge the North-South divide is equitable participation in international decision-making. In order to ensure that none of the parties enjoy dominance over the other voting procedures were developed to ensure a fair process to manage the process of voting in the international environmental treaty regimes. The first of these procedures was the participation in decision-making of the Conference of the Parties (COP) of a Multilateral Environmental Agreement (MEA). There were a number of questions and controversies around the rules of voting such as the majority required for decisions by the COP on matters of substance. As a result of the afore-mentioned the COP will only take decisions through consensus. During the 1985 Vienna Convention the consensus vote was amended to a two-thirds majority vote.[204]

The Kyoto Protocol's compliance and control system were finally adopted by the COP/MP 1 at its Montreal meeting in 2005. The compliance committee consists of (two branches namely the facilitative and enforcement branches, a plenary and a bureau. The composition of the branches is ten members each. The ten members are divided as follows: six members from the developing (non-Annex 1) countries and four from the other side. Although the enforcement branches responds only to non-compliance matters relating to Annex 1 parties the sophisticated voting system that they have applied seems to be just and fair.[205]

The Clean Development Mechanism (CDM) under the Kyoto Protocol provides for Annex 1 parties to implement emission reduction projects in non-Annex 1 parties in return for certified emission reductions that can be used by Annex 1 parties to assist them to meet the required emission targets. The ultimate aim is to assist the developing countries to achieve sustainable development. The CDM is managed by an executive board under the supervision and authority of the COP/MOP. The executive board also plays a vital role in establishing the relationship and cooperation between North and South in the CDM. The composition of the executive board is similar to the two branches.[206] In order to facilitate reaching the prescribed reduction and limitation goals, the Kyoto Protocol provides three "flexible mechanisms": Joint

[204] Beyerlin U (2006) 283.
[205] Beyerlin U (2006) 285.
[206] Beyerlin U (2006) 286.

Implementation (Article 6), the Clean Development Mechanism (CDM, Article 12) and Emissions Trading (Article 17). These economic instruments are meant to reduce the cost of fulfilling the Kyoto Protocol obligations by allowing reductions achieved in one State to be credited to the emission reduction account of another State. In other words, they allow reductions to be achieved where it is most cost-effective to do so.[207]

These mechanisms have been widely used. The CDM, in particular, has generated transactions worth several billion dollars. In addition, a similar mechanism enables groups of states to jointly fulfil their obligations (Article 4). This has led to a significant redistribution of reduction obligations among the member States of the European Union (EU) (through a burden-sharing agreement - the so-called "EU bubble"). The fact that the scope of the Kyoto Protocol obligations is limited to the old industrial States explains why the Kyoto Protocol does not provide for a financial transfer mechanism in favour of developing countries which is usually contained in universal multilateral environmental agreements.[208]

The functioning of the Montreal Multilateral Fund cannot be controlled by any of the two groups of states. The reason being that a two-thirds majority is required which must include both industrialised and developing states.

The Global Environmental Facility (GEF) is the financing instrument of the Conventions of Climate Change and Biological Diversity. The GEF Council consist of (32) thirty two members equally represented from both sides (the developed and developing states). The decisions are normally taken through consensus but if not possible through a majority vote of 60 percent.

It is evident that that the current decision-making practices in the global environmental sphere do not show consistent patterns of equitable global participation in the North-South dimension. The uncertainty which exists due to none formalisation of voting and when the voting rules was introduced it differs considerably from each other. It should be the rule that equally should meet the interest and needs of both sides.[209]

[207] Bothe M (2014) 110-1.
[208] Bothe M (2014) 110-1.
[209] Beyerlin U (2006) 288.

The conservation and sustainable use of the biological diversity is an important issue in the North-South debate. The reason being that the developing states own the natural and biological resources but unfortunately in most cases do not have the technical knowledge required to optimally utilise those resources and to protect them from over exploitation by industrialised states.[210]

Voluntary commitments that were proposed for developing countries were rebuffed by those states out of fear that even a mere agreement to voluntary stabilisation of emissions would automatically lessen the contributory and compliance efforts to be made by developed countries.

Again, developing nations hesitated to limit aspects of their conduct that caused environmental damage, fearing that these agreements would cripple their economic development and infringe on their state sovereignty. [211]

The Kyoto Protocol does not contain any rules limiting emissions of particular gases. Instead, the parties agreed to a more abstract limit, a limit on aggregate greenhouse gas emissions. This approach allows countries to relinquish carbon dioxide reductions in exchange for reducing other specifically listed greenhouse gases. The Kyoto Protocol requires each developed country to meet quantitative limits for "carbon dioxide equivalent emissions." The Kyoto protocol contemplates at least a five percent reduction in developed country greenhouse gas emissions, on average, by the "commitment period 2002 to 2012." This modest five percent average cut from developed countries left little room for differentiated developing country reductions, and the Kyoto Protocol contains no specific mandates for developing country emission reductions.[212]

The mechanism of this type that is provided by the UNFCCC system is unrelated to the reduction and limitation obligations established by the Kyoto Protocol. As to the latter, the CDM constitutes a mechanism which facilitates investment in developing countries as well as technology transfer. The functioning of the legal regime established by the Kyoto Protocol is safeguarded by an elaborate system of

[210] Beyerlin U & Holzer V 'Conservation of Natural Resources' (2013) *Max Planck Encyclopedia of Public International Law. Oxford University Press* 2.
[211] Weisslitz M (2002) 483-84.
[212] Weisslitz M (2002) 484.

compliance control (Article 18). The Annex I States that have assumed the Kyoto Protocol obligations seem to have roughly reached their prescribed goals as of the end of 2012;' however, these reductions only constitute a small part of the reductions which would be necessary worldwide.[213]

The overall content of greenhouse gases in the atmosphere is still increasing. The Kyoto Protocol could only be a first step, addressing only a part of the problem of global warming. While on the one hand, critics claim that its reduction obligations are too mild, and on the other hand, the Kyoto Protocol regime, at least from a short-term perspective, involves considerable costs, as a result of which there have been objections, asserting that the Kyoto Protocol compromises the competitive situation of the States which have assumed these obligations in relation to those which have not.[214]

This is considered to create an undue advantage for the so-called threshold countries (in particular China, India and Brazil), which are not included in Annex I. This is an essential reason for non-ratification by the US, which has thus given itself a (short-term) competitive advantage. Thus, although the contributions of the Kyoto Protocol to the solution of the climate change problem have been significant, they are of limited importance if one looks at the global situation as a whole. A broader approach within the UNFCCC is necessary.[215]

3.2.2 The Principle of Common but Differentiated Responsibilities and Respective Capabilities

Scott and Rajamani argues that while the status, meaning, and implications of the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) are contested and unclear, it requires that developed countries should take the lead in addressing the causes and effects of climate change.[216] Bodansky further states that other important norms, such as the principle of common but differentiated responsibilities and respective capabilities (CBDRRC), are extremely vague. In addition, states have delegated relatively little decision-making authority to

[213] Bothe M 92014) 111.
[214] Bothe M (2014) 110-1.
[215] Bothe M (2014) 110-1.
[216] Scott J & Rajamani L 'EU Climate Change Unilateralism' (2012) 23 (2) *The European Journal of International Law* 476.

international institutions. Indeed, after more than a quarter century, the parties are still unwilling to adopt a voting rule that would, in effect, transfer some of their individual control to the parties collectively. As a result, meetings of the parties operate by consensus, allowing small groups, if not individual states, to prevent outcomes with which they disagree.[217]

The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) lies at the heart of the international pact on climate change. It is articulated in Article 3 of the Framework Convention on Climate Change (FCCC),[218] and reiterated in numerous decisions taken by parties, including the decision launching the negotiations that led to the Kyoto Protocol.[219]

The CBDRRC principle (*CBDR was formulated in the climate regime with the additional element of 'respective capabilities'*) has played a fundamental role in the evolution of the UN climate regime. Like other environmental treaties dealing with global concerns and common resources, the UNFCCC incorporated differential treatment between countries as a guiding principle. Such differentiation in favour of developing countries reflects the idea that while there is a common responsibility to deal with the climate problem, the biggest share of the effort to mitigate and adapt to climate change is to be borne by developed countries. Developing countries have consistently argued that developed countries are the main culprits historically responsible for causing climate change. As such, they argue that developing countries should be exempted from key commitments in the climate. The CBDRRC principle establishes a common responsibility among states for protecting the climate system, but sanctions, in light of pervasive differences between states in their contributions to the stock of global greenhouse gases (GHG) and their economic capabilities, differs among states in their efforts to address climate change.[220]

CBDRRC is articulated through differential treatment with respect to central obligations (e.g. the Kyoto Protocol's emission targets only apply to developed countries), as well as differential treatment in the implementation of commitments, with developing

[217] Bodansky D The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections (2017) 49 Arizona State Law Journal 696.
[218] Scott J & Rajamani L (2012) 76.
[219] Berlin Mandate United Nations (1995) FCCC/ CP/1995/7/Add.1 (Article 3).
[220] Romera BM & Van Asselt H (2015) 269.

countries receiving assistance in a variety of forms (financial, technical, capacity-building).

CBDRRC reflects the idea that while there is a common responsibility to deal with climate change, the biggest share of the effort to mitigate and adapt to climate change is to be borne by developed countries. However, the principle is open to diverging interpretations. As a result, its precise contents and application in the future of the climate change regime remain contested.

The articulation of CBDRRC through contextual rather than differential norms seems to better accommodate the changing realities and particularities of the aviation sector, such as the steep growth of the sector in countries such as China and India or the special situation of dependency of certain island states. The move towards contextual provisions applying differential treatment at the implementation level in ICAO reveals a willingness to accommodate political elements and a shift towards the "and respective capabilities" part of CBDRRC.[221]

3.3 CONCLUSION

Much work has been done over the past four decades since the Stockholm Declaration in an attempt to establish fairness and equity between the North and South countries to find a solution for the rigid, strict binary differential treatment. The changes with regards to the way that differential treatment was applied evolved progressively over the years.

The principle of differential treatment has been contained in various treaties and declarations over the past years. For instance, in 1992 with the adoption of the Rio Declaration the principle of 'common but differentiated responsibilities', was accepted which establishes an obligation on all states to co-operate towards environmental integrity, while acknowledging that developed countries have a greater responsibility as a result of the pressure their societies have placed on the global environment and of their assumed greater economic and technological capabilities.

[221] Romera BM & Van Asselt H (2015) 261.

In international environmental law, differentiation has assumed pivotal, almost defining characteristics, placing heavier burdens on developed countries while providing for differential (and preferential) treatment of developing countries.

With the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and with the acceptance of the Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC), along with an acknowledgement that developed countries should take the lead in the joint effort to combat climate change and its adverse effects, an even heavier burden was placed on developed countries. The latter created a strict binary differentiation system, where only developed country parties and countries with economies in transition assumed legally binding, quantified, absolute economy-wide mitigation commitments, while developing country parties were exempted from doing so.

CHAPTER 4

Differential Treatment in the context of the Paris Agreement and Climate Change

4.1 INTRODUCTION

In this chapter the relevance of the North-South Divide with regards to differentiation within the United Nations Framework Convention on Climate Change (UNFCCC) will be outlined within the wider context of global climate change governance. In doing so the post 2015 Paris Agreement will be investigated. Contentions over differential treatment have played a significant role in the shaping of the UN Framework Convention on Climate Change (UNFCCC), its Kyoto Protocol, and the global treaty signed in Paris in December 2015. The UNFCCC has provided a forum for key differential treatment issues to be discussed alongside international climate policy. However, the issue of differentiation once again proved to be a controversial issue in the climate change regime debate at the Paris Conference of the Parties to the UNFCCC (COP).

The 1992 Rio Declaration recognised in its Principle 7[222] the common but differentiated responsibilities (CBDR) of States. This principle has since been given increasing recognition in the domain of international environmental law, with the early climate regime giving the best illustration of the principle.

The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) is strongly embedded in the climate regime. It plays a structural role in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) as well as in the 1997 Kyoto Protocol[223] and Parties have attempted to agree on measures to

[222] The Rio Declaration on Environment and Development [1992] A/CONF.151/26 (Vol. I) (Principle 7).

[223] Maljean-Dubois S "The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime" (2016) 25 (2) *Rev of European, Comparative & Intl Environmental L* 151.

stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[224]

In the years leading up to Paris, an understanding emerged on the critical relationship between the ambition of global efforts to lower greenhouse gas (GHG) emissions, differentiation between developed and developing countries, and mobilisation of the financial resources needed to support climate change efforts. The greater the overall ambition, the greater the need for differentiation in efforts between developed and developing countries, as well as for increased financial resources to support these ambitious efforts. Developed countries, scarred by the Kyoto Protocol which required them alone to take on absolute emission reduction targets were fiercely resistant to another differentiated climate agreement. They were also reluctant, with their faltering economies, to finance global efforts to combat climate change. Developing countries, for their part, were loath to relinquish the differential treatment that had benefitted them thus far, and to assume a larger share of the financial burden for lowering emissions.[225]

But despite the creation of the 1997 Kyoto Protocol and instruments such as the Clean Development Mechanism, emissions of the main GHGs (carbon dioxide, methane and nitrous oxide) rose steadily over this period. The 2009 Copenhagen conference, intended to create a more effective successor treaty to the Kyoto Protocol, collapsed in acrimony, leading many observers to conclude that multilateral climate diplomacy had reached a dead end.[226]

Just before COP21 in Paris, the draft agreement reflected the divergent positions, with many different and often antagonistic options remaining in the draft text until the very end. The success of the negotiations under the ADP was to depend, amongst other things, on a common understanding of equitable sharing of efforts and benefits. This related not only to parties' INDCs, but also to issues such as adaptation, finance,

[224] Savaresi A 'The Paris Agreement: a new beginning?' (2016) 34 (1) *Journal of Energy & Natural Resources Law* 16.
[225] Rajamani L "Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics" (2016) 65 (2) *ICLQ* 494.
[226] Falkner R 'The Paris Agreement and the New Logic of International Climate Politics '(2016) 92 (5) *International Affairs* 1107.

technology transfer, capacity building, loss and damage, and transparency and compliance.[227]

Hence, COP-21 brought to an end over 20 years of UN negotiations focused on a misguided approach of establishing mandatory emission reductions. Instead, the Paris Agreement acknowledges the primacy of domestic politics in climate change and allows countries to set their own level of ambition for climate change mitigation. It creates a framework for making voluntary pledges that can be compared and reviewed internationally, in the hope that global ambition can be increased through a process of 'naming and shaming'. By sidestepping the distributional conflicts that were inherent in the post-Kyoto negotiations, the Paris Agreement manages to remove one of the biggest barriers to international climate cooperation. It recognises that none of the major powers can be forced into drastic emissions cuts. However, instead of leaving mitigation efforts to an entirely bottom-up logic, it embeds country pledges in an international system of climate accountability and a 'ratchet' mechanism. In this sense, the Paris climate summit heralds the beginning of a new era in international climate politics, one that offers the chance of more durable international cooperation.[228]

The Paris Agreement restates the principle of differentiation, but renders it a more dynamic meaning. In its operational provisions, it moves from self-differentiation with respect to the central obligations to a more classical form of differential treatment between categories of countries - with respect to the means of implementation. The Paris Agreement thus approaches differentiation in various ways in different parts of the Agreement, carefully balancing what will be differentiated and what will be common in the post- 2020 period.[229]

The main objective of this chapter is to dissect the application of differential treatment in the Paris Agreement in an attempt to establish whether or not any changes have occurred Post Paris Agreement with regards to the way in which differential treatment was applied.

[227] Maljean-Dubois S (2016) 152.
[228] Falkner R (2016) 1108.
[229] Maljean-Dubois S (2016) 152.

4.2 THE PARIS AGREEMENT

UN Secretary General Ban Ki-moon characterised the 2015 Paris Agreement, adopted after years of deeply contentious multilateral negotiations, as a monumental triumph. Indeed, not because it decisively resolves the climate crisis, which it does not, but because the Paris Agreement represents a historic achievement in multilateral diplomacy.[230]

Regardless of its designation, the Paris Agreement is a treaty according to the 1969 Vienna Convention on the Law of Treaties. It is a legal agreement, even if it is often soft and mainly procedural. It is a universal agreement applicable to all, with no strict binary differentiation between developed and developing countries anymore, yet it remains based on the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC), affording some flexibility to developing countries in light of different national circumstances even within that group of nations.[231]

By breaking the cycle of inaction, the Paris Agreement undoubtedly marked a turning point in the climate regime. After years of delay and the apparent breakdown of negotiations at Copenhagen, climate governance has been put on a new footing. It has shifted from a negotiation phase to one focused more squarely on articulating and implementing what states have agreed on. However, what makes the Paris Agreement even more notable is the fact that it was negotiated within an international context characterised by 'grid- lock' and mounting global risks.[232]

Developing countries evoked CBDR-RC as a "firewall" against new or stronger commitments, while developed countries demanded that developing countries assume mitigation targets as a pre-condition to further action. To solve this challenge, differentiation in the new agreement needed to build on the existing approach of the Convention, but also to reform it by adopting a more nuanced, diversified form of differential treatment.[233] The Paris Agreement therefore had to strike a careful balance between, on the one hand, raising ambition and ensuring universal participation, and,

[230] Rajamani L (2016) 493.
[231] Maljean-Dubois S Wemaere M 'The Paris Agreement: A Starting Point towards Achieving Climate Neutrality' (2016) *CCLR* 1.
[232] Held R & Roger C 'Three Models of Global Climate Governance: From Kyoto to Paris and Beyond' (2018) 9 (4) *Global Policy* 527.
[233] Falkner R (2016) 1111.

on the other hand, maintaining equitable differentiation. It indicated that developing countries could have a role to play in the provision of support and mobilisation of climate finance.[234]

4.3 DIFFERENTIATION IN THE PARIS AGREEMENT

Differentiation has been a recurrent issue in the UN climate change regime since its inception. In Paris, it proved one of the most difficult issues to resolve, and played out across all of the elements of the Paris Agreement: mitigation, adaptation, finance, and transparency.[235] The principle of common but differentiated responsibilities and respective capabilities means that, while the Convention recognises all countries have a responsibility on climate change, there are differences in the historical contributions of parties to climate change. Indeed, developing parties claim that developed countries, who have contaminated more historically, should now contribute more. This principle also recognises respective capabilities of parties, which means that every party has different economic and technological capacities to contribute to the regime.[236]

The importance and relevance of differential treatment needs to be restated in the context of today, which emphasises the challenges to differentiation in the climate change regime and its weakening in the Paris Agreement by the UNFCCC 21st Conference of the Parties (COP) in December 2015. Challenges notwithstanding, the broader lesson of the Paris Agreement is the confirmation that differentiation cannot be done away with, even if the Agreement introduces a distinct version of the principle.[237]

The Paris Agreement largely completes the move away from the Kyoto Protocol's categorical approach to differentiation. Perhaps most significantly, it does not include any reference to the annex structure of the UNFCCC, marking an end to the divide

[234] Voigt C &Ferreira F (2016) 64.
[235] Bodansky D (2016) 298.
[236] Ediboğlu E "The Paris Agreement: Effectiveness Analysis of the New UN Climate Change Regime" (2017) 17 *U College Dublin L Rev* 168-69.
[237] Cullet P 'Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps' (2016) 5 (2) *Transnational Environmental Law* 314.

between Annex I and non-Annex I countries. Instead, it takes a more particularised approach, reflecting the principle of CBDR-RC differently in its different elements.[238]

The agreement also marks the completion of a decade long transition from a top down binding regime focused on developed country mitigation to a bottom up and substantively non-binding approach to global co-operation on climate change with key binding process elements.[239] As a "bottom-up" treaty, however, it allows States to set their own emissions targets. Even before the U.S. withdrawal, States Parties' commitments fell far short of what is required to achieve the treaty's objectives.[240]

But what is new is that the degree of differentiation varies according to the various elements and topics of the Agreement, being more or less implicit, and more or less stringent. The balance between what is common and what is differentiated has been carefully addressed, resulting in a much more nuanced picture than in the previous regime.[241]

The Lima Call for Climate Action of 2014 contains an explicit reference to the CBDRRC principle, but it is qualified by the clause in light of different national circumstances. This qualification which represents a compromise arrived at between the United States and China arguably shifts the interpretation of the CBDRRC principle.[242] The qualification of the principle by a reference to national circumstances introduces a dynamic element to the interpretation of the principle. As national circumstances evolve, so too will the common but differentiated responsibilities of States.[243] It is this version of the principle of common but differentiated responsibilities with the qualifier in light of different national circumstances that features in the Paris Agreement. In Article 2.2 of the Paris Agreement the language of the Lima decision is re-stated, that

[238] Voigt C & Ferreira F (2016) 291.
[239] Doelle M 'The Paris Agreement, Historic Breakthrough or High Stakes Experiment?' (2016) *Dalhousie University Schulich School of Law* 1.
[240] Banda ML 'The Bottom-up Alternative: The Mitigation Potential of Private Climate Governance after the Paris Agreement' (2018) 42 *Harv. Envtl. L. Rev.* 325.
[241] Maljean-Dubois S (2016) 157.
[242] Rajamani *L* 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 (1) *Int'l & Comp LQ* 509.
[243] Zahar A 'Collective Obligation and Individual Ambition in the Paris Agreement' (2020) 9 (1) *Transnational Environmental Law* 167.

the agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities.[244]

It reads as follows: *'this Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'*.[245]

The overall approach to differentiation, therefore, is not premised on contribution to the problem, alone, but on an amalgamation of country-specific responsibilities, capabilities, and circumstances which also services the purpose of the agreement and its long term goals. The qualifier "in the light of different national circumstances" introduces a dynamic and flexible element for interpreting responsibilities and capabilities, broadening the parameters of differentiation.[246] Many of the obligations that will become legally binding once the Paris Agreement enters into force will apply to all parties.[247]

4.3.1 Mitigation

The nuanced and subtle approach to differentiation is most evident in the mitigation provisions. Article 4 of the Paris Agreement[248] is made up of common, general, provisions that apply to all parties, while also specifying parameters to guide developed and developing countries in the article's implementation, allowing more flexibility to the latter and within this category, allowing additional flexibility to Alliance of Small Island States (AOSIS) and the group of Least Developed Countries (LDCs).[249]

For instance, Article 4.1 defines a global trajectory:[250] all parties commit to contributing to global peaking of Greenhouse Gas Emission (GHG) as soon as possible, reducing emissions rapidly thereafter, and achieving a balance of emissions and removals in the second half of this century.[251] While this global trajectory applies to all parties

[244] Rajamani (2016) 508.
[245] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 2.2).
[246] Voigt C &Ferreira F (2016) 67.
[247] Maguire R (2013) 265.
[248] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 4).
[249] Maljean-Dubois S (2016) 157.
[250] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 4.1).
[251] Dambacher BMR Stilwell MT and McGee JS Clearing the Air: Avoiding Conflicts of Interest within the United Nations Framework Convention on Climate Change (2020) 32 *Journal of Environmental Law* 65.

jointly, it recognises that developing countries will take longer to reach the peak of their emissions.[252]

The legally binding obligation in Article 4.2[253] to prepare, communicate and maintain successive nationally determined contributions applies to each party individually. It is followed by several modulators that allow for differentiation in the content (i.e. level of ambition) and form (i.e. type of target) of NDCS.[254] The self-determined aspect of each party's level of effort is accompanied by obligations of conduct in Articles 4.3 and 4.4.[255]

The NDCs of each party are to reflect its highest possible ambition, but such a level of ambition is also to reflect its responsibilities, capabilities, and circumstances, as well as represent a progression from previous efforts.[256] The basic commitments with respect to NDCs are not differentiated. Instead, each party, in formulating its NDC, is to reflect the principle of CBDR-RC in light of different national circumstances in essence, self-differentiating the NDCs. The article on mitigation also incorporates some differentiation in the expectations it sets.[257] For example, article 4.4[258] stipulates that developed countries should continue to take the lead by undertaking economy-wide absolute targets, while developing countries are to assume economy-wide targets when their circumstances allow for such a target. This is a significant evolution from the Convention, which did not contain prescriptive guidance on the type of mitigation effort expected of developing countries.[259]

Until the Paris Agreement, developing countries have not been required to set emission reduction targets and were subject to looser requirements for reporting on their actions and climate impacts, hence they had to build on other climate policy experience when preparing the NDCs.[260] The Paris Agreement does not oblige parties to actually fulfil these NDCs, hence their content is not as such legally binding. Parties

[252] Voigt C & Ferreira F (2016) 297.
[253] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 4.2).
[254] Zahar A (2020) 167.
[255] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Articles 4.3 and 4.4).
[256] Röser F Widerberg O Höhne N et al 'Ambition in the Making: Analysing the Preparation and Implementation Process of the Nationally Determined Contributions under the Paris Agreement' (2020) 20 (4) *Climate Policy* 417.
[257] Bodansky D (2016) 305.
[258] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 4.4).
[259] Voigt C & Ferreira F (2016) 68.
[260] Röser F Widerberg O Höhne N & Day T (2020) 417.

are only required to pursue measures with the aim of achieving the objectives of such contributions.[261]

Articles 4.9 and 4.10 of the Paris Agreement deals with the timeframes.[262] Parties were also unable to agree on a common timeframe for NDCs, i.e. whether NDCs should all cover the same period. Most INDCs submitted in the run-up to Paris indicate an implementation timeline up to 2030 and some to 2025, some start in 2020, others in 2021, some indicate a multi-year target period and others a single year target. The Paris Agreement now obliges parties to submit an NDC every five years,[263] but does not indicate whether the new NDCs should cover a 5 or 10 year period.[264]

The assessments of Intended Nationally Determined Contributions (INDCs) handed in before Paris indicate that the combined level of efforts is clearly insufficient to have a high probability of staying below 2 degrees Celsius, let alone 1.5 degrees Celsius. An important yardstick of success of the Paris Agreement is thus its ability to increase ambition over time. The Paris Agreement seeks to address this issue via regular updates of NDCs in what has been labelled as cycles.[265] Each successive update of NDCs is expected to reflect a party's highest possible ambition and to be stronger than the previous one (the principle of progression).[266]

Under the new agreement, differentiation is applied in different ways across thematic areas, and in a pragmatic rather than ideological or politicised way. While all parties are obliged to contribute to mitigation ('all Parties are to undertake and communicate ambitious (mitigation) efforts'), differentiation is achieved as each party determines the type, scope and stringency of its own mitigation contribution in a bottom-up pledge and review system.[267] For mitigation, key issues in the negotiations were not only the

[261] Bodle R Donat L Duwe M 'The Paris Agreement: Analysis, Assessment and Outlook' (2016*) CCLR* 7.
[262] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Articles 4.9 and 4.10).
[263] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 4.9).
[264] Bodle R Donat L Duwe M (2016) 7.
[265] Lyster R 'Climate Justice, Adaptation and the Paris Agreement: A Recipe for Disasters?' (2017) 26 (3) *Environmental Politics* 447.
[266] Bodansky D (2016) 303.
[267] Savaresi A & Sindico F 'The Role of Law in a Bottom-Up International Climate Governance Architecture: Early Reflections On the Paris Agreement' (2016) 26 *Questions of International Environmental Law* 3.

legal nature and content of individual commitments, but also whether and how the agreement should provide a long-term objective and direction.[268]

One of the most important Paris outcomes is the temperature limit: - the Paris Agreement specific objective of holding temperature "well below" 2 degrees Celsius while also pursuing efforts to stay below 1.5 degrees Celsius.[269] This represents a carefully drafted compromise between the Alliance of Small Island States (AOSIS) and the group of Least Developed Countries (LDCs), who demanded a 1.5 degrees Celsius limit, and some other countries who argued that the temperature goal needed to be credible.[270]

The vulnerable states advocating a below 1.5 degrees Celsius goal were partially successful. The Agreement defines its aim as holding the increase in global average temperature to "well below" 2 degrees Celsius a strengthening of the below 2 degrees Celsius goal in Copenhagen and Cancun. Moreover, it recognises that the 1.5 degrees Celsius would significantly reduce the risks and impacts of climate change and pledges to pursue efforts" to achieve that goal.[271]

To address concerns of developing countries about the global emission objective, some qualifiers were included:[272] In addition to the 2/1.5 degrees Celsius temperature goal, the Paris Agreement also articulates a global emissions peaking goal, which parties are to achieve as soon as possible (but with a recognition that this will take longer for developing countries), with rapid reductions thereafter,[273] and the entire paragraph is to be seen in the context of equity, sustainable development and poverty eradication.[274]

While the Paris Agreement at least puts in place review mechanisms, its core commitments are also based on what countries are willing to do. While this may have led to an Agreement that entered into force rapidly and enjoys wide participation, the risk remains that, like the APP, countries do not follow through. What remains to be

[268] Pickering J McGee JS Stephens T & Karlsson-Vinkhuyzen SI 'The Impact of the US Retreat From the Paris Agreement: Kyoto Revisited?' (2018) 18 (1) *Climate Policy* 818.
[269] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (par 17).
[270] Sharma A 'Precaution and Post-Caution in the Paris Agreement: Adaptation, Loss and Damage and Finance' (2017)17 (1) *Climate Policy* 35.
[271] Bodansky D (2016) 305.
[272] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Par 27).
[273] Bodansky D (2016) 302-3.
[274] Bodle R Donat L Duwe M (2016) 7.

determined is how international agreements that include such voluntary elements can ensure that countries do not backtrack. The mechanisms of the Paris Agreement namely the no backsliding principle, the transparency framework, the global stocktake, its implementation and compliance mechanism may suffice, but their functioning in practice will require careful assessment.[275]

The basis for differentiation in the mitigation provisions, therefore, is a complex balance among parties' responsibilities, capabilities, and circumstances.[276] Thus the mitigation section of the Paris Agreement operationalises the CBDRRC principle through self-differentiation, but sets normative expectations in relation to the types of actions developed and developing country Parties should take, and in relation to progression through successive cycles of contributions.[277]

Rajamani[278] opines that it is worth noting that many of the provisions in the mitigation section are undifferentiated, in particular key provisions prescribing individual binding obligations of conduct for Parties. Secondly, the provisions that incorporate differentiation are couched either in recommendatory terms or phrased to set expectations rather than bind.

Thus arguably disciplining self-differentiation. Self-differentiation is the pragmatic choice for mitigation, the most contentious section of the Paris Agreement, because it provides flexibility, privileges sovereign autonomy and encourages broader participation. However, while it respects 'national circumstances' and 'respective capabilities', it leaves little room for tailoring commitments to differentiated responsibilities for environmental harm.[279]

4.3.2 Finances

The Paris Agreement clearly continues to assign the core responsibility for the provision of finance to the developed countries and recognises that developing countries require support to effectively implement the Agreement. However, it departs

[275] Van Asselt H 'The Continuing Relevance of the Asia-Pacific Partnership (+) For International Law on Climate Change' (2017) (3) *CCLR* 185.
[276] Voigt C & Ferreira F (2016) 68.
[277] Rajamani (2016) 511.
[278] Rajamani (2016) 510.
[279] Rajamani (2016) 511.

from the UNFCCC in that it explicitly opens possibilities for *'other countries'* to provide climate finance, thereby also softening the developed-developing country divide.[280]

On the receiving end, therefore, the Paris Agreement clearly entitles developing countries to receive support. It does not, however, condition developing countries' actions on support.[281] Rather, as Article 4.5 makes clear, enhanced support for developing countries will allow for higher ambition in their actions. Read in conjunction, Articles 3, 4.5 and 7.13 establish a strong link between support and the degree of effectiveness and ambition in the actions of developing countries.[282]

The differentiation is very clearly expressed. Developed countries have strong obligations. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation and as part of a global effort, developed country Parties should continue to take the lead although this does not exempt them from fulfilling their obligations under the Agreement.[283]

On the giving end, Article 9 offers the most clear-cut, bifurcated version of differentiation in the Paris Agreement. Article 9.1 reaffirms developed countries' legally binding commitments under the Convention to provide financial resources to developing countries. Support from other parties is voluntary, as per Article 9.2.[284] Proposals to commit those developing countries 'in a position to do so or even willing to do so to provide finance were flatly rejected. This, nevertheless, represents a considerable increment to previous practice under the Convention, in which developing countries simply had no formal role in climate finance or in supporting other countries; nor did they receive any recognition for doing so.

The most controversial provision was whether and how the Paris Agreement in Article 9.5[285] would include quantified legal obligations. The African states had proposed a more specific provision: a quantitative finance goal, based on an assessment of impacts and adaptation costs. But developed (and some developing) states were unwilling to accept a quantitative goal, so the global goal on adaptation in the Paris

[280] Castro P (2016) 384.
[281] Voigt C & Ferreira F (2016) 68.
[282] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Articles3, 4.5 and 7.13).
[283] Maljean-Dubois S (2016) 157.
[284] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 9.2).
[285] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 9.5).

Agreement is formulated in general, qualitative terms, namely, to enhance adaptive capacity, strengthen resilience, and reduce vulnerability to climate change. New issues included addressing more generally the transformational role of financial flows, and whether parties other than those in Annex II should take some form of action in this regard.[286]

Developed countries shall provide financial resources to assist developing countries, while other parties are encouraged to provide such support voluntarily Article 9.2.[287] The Intended Nationally Determined Contributions (INDCs) are one of the most important elements of the Paris Agreement. In addition, the Paris Agreement includes a 5 year revision process for INDCs in order to measure and monitor ongoing progress.[288]

The concept of transformational change has entered climate policy relatively recently, and has taken on particular relevance in the context of climate finance. Transformational change signifies a step change beyond short term, incremental adjustments, and in that sense is undoubtedly needed to address climate change. If poorly and unilaterally defined, transformational change risks imposing a vague set of undefined pressures on developing countries. The pursuit of low carbon objectives is still seen by many developing countries as carrying the risk of downsides for other objectives such as economic growth, energy access, improved local environmental issues, and more equal distribution.[289]

There was a broad common understanding that climate finance is an enabler for action and that the global mitigation and adaptation efforts require major shifts in financial flows and private investments. The Paris Agreement is a major innovation because it includes this role of financial flows in the purpose of the Agreement, alongside the long-term goal on mitigation and adaptation.[290] The legal link in Article 3 requires all parties to make ambitious efforts towards making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development.[291]

[286] Bodansky D (2016) 308.
[287] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 9.2).
[288] Grigoroudis E Kanellos F Kouikoglou VS et al 'The Challenge of the Paris Agreement to Contain Climate Change' (2017) *Intelligent Automation & Soft Computing* 2.
[289] Winkler H & Dubash NK 'Who Determines Transformational Change in Development and Climate Finance?' (2016) 16 (6) *Climate Policy* 783-84.
[290] Sharma A (2017) 42.
[291] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 3).

Progress towards this objective is also part of the global stocktake. It has the potential to send a strong signal to all relevant actors, including the private sector, to re-assess and redirect investments. Proposals to capture more specific issues such as fossil fuel subsidies, carbon pricing, mainstreaming and enabling environments are not included in the final text or only play a marginal role.[292]

There was general agreement that the financial obligations on Annex II parties of the UNFCCC would continue to apply. One of the main political issues in Paris was whether the Agreement should, in addition, anchor and continue the political commitment made in Copenhagen to mobilise USD 100 billion per year by 2020, or even specify higher amounts.[293] The final text of the Paris Agreement does not contain quantified obligations or a reference to the USD 100 billion commitment. It restates the continuing existing obligations under the UNFCCC, by referring to developed countries instead of Annex II. However, the Paris Decision explicitly refers to the 100 billion goal, stating that developed countries[294] intend to continue it until 2025[295] and that a new collective quantified goal shall be set before that year, with the USD 100 billion as a floor.[296]

The flipside of the political discussion over a quantified obligation were demands from developed countries that the Agreement should capture the notion of a broader range of contributors, i.e. that developing countries with the capacity to contribute to climate finance should do so.[297] They argued that this would reflect todays and future economic realities, and that in fact some developing countries were already contributing.[298] Developing countries opposed this notion because they regarded climate finance as a core responsibility of developed countries and because they did not want to formalise their voluntary efforts and raise future expectations.[299] The Paris

[292] Bodle R Donat L Duwe M (2016) 11.
[293] Kinley R 'Climate Change after Paris: From Turning Point to Transformation' (2017) 17 (1) *Climate Policy* 11.
[294] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1Paris Agreement (par 53).
[295] Rajamani L (2016) 12.
[296] Winkler H Mantlana B & Letete T 'Transparency of Action and Support in the Paris Agreement' (2017) 17 (7) *Climate Policy* 861.
[297] Rajamani L (2016) 512.
[298] Winkler H 'Putting Equity into Practice in the Global Stocktake under the Paris Agreement' (2020) 20 (1) *Climate Policy* 125.
[299] Bodle R Donat L Duwe M (2016) 11.

Agreement addresses the issue in weak terms by encouraging other parties to provide support voluntarily and also to communicate the respective information biennially.[300]

Apart from providing financial support, the Paris Agreement establishes that developed countries should continue to take the lead in the global effort to mobilise climate finance from a wide variety of sources.[301] Developed countries and in particular the EU sought to include that all developing countries should also in some, self-differentiating form take action to help mobilise climate finance.[302] This notion is basically not captured in the Paris outcome except that it is defined as a global effort and that developing countries are encouraged to provide information on support provided and mobilised by them. Generally, the provisions on finance and transparency of support are quite bifurcated with exclusive or stronger obligations on developed countries.[303]

Support, including financial support, is included in the Paris Agreements transparency framework in Articles 9.7 and 13 of the Paris Agreement.[304] The framework defines the purpose of transparency of support as providing clarity not only in terms of support provided, but also received, and also to provide a full overview of aggregate financial support. Broadly similar to the existing system, the information provided under the transparency framework is subject to a technical expert review, but the Paris Agreement also includes finance in the following multilateral consideration of progress, together with NDC implementation.[305]

In addition, there are specific obligations on developed countries to biennially communicate *ex ante* and *ex post* information on climate finance provided and mobilised. All this information also feeds into the global stocktake contained in Article 14.[306] Developing countries are entitled to support for implementing the transparency provisions. The Paris Agreement does not address the issue of whether financial resources should be "new and additional", which had long been a bone of contention.

[300] Pauw P Mbeva K & van Asselt H Subtle Differentiation of Countries' Responsibilities under the Paris Agreement (2019) 5 (1) *Palgrave Communications* 5.
[301] Kuyper J Schroeder H & Linnér B 'The Evolution of the UNFCCC' (2018) 43 *The Annual Review of Environment and Resources* 357.
[302] Pauw P Mbeva K & van Asselt H (2019) 4.
[303] Doelle M (2016) 11-2.
[304] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Articles 9.7 and 13).
[305] Maljean-Dubois S (2016) 153-6.
[306] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 14).

Future role of the Green Climate Fund and the Adaptation Fund: The Paris Agreement is served by the existing financial mechanism under the UNFCCC, with the Green Climate Fund and the GEF as its operating entities. Demands by developing countries to give the Green Climate Fund a special role were not met.[307] The Paris Agreement keeps open the possibility that the Adaptation Fund could serve the new Agreement.[308]

A surprise positive outcome from the Paris conference, however, is that a share of the proceeds from the new Sustainable Development Mechanism has been agreed, not only to cover the administrative expenses of the mechanism but also to meet the costs of adaptation in developing countries that are particularly vulnerable (UNFCCC, 2015b). This has been a divisive topic in the past, with developed countries unwilling to extend the share of proceeds that are applied to the Clean Development Mechanism under the Kyoto Protocol as an adaptation levy to Joint Implementation and emissions trading. The Agreement does not state what this share will be – this decision will be taken at CMA1.[309]

Differentiation in the finance provisions is thus relatively close to the type of differentiation seen in the FCCC. Although there is a departure in that the donor base has been slightly expanded, it is a less radical departure from the Convention than, for instance, the self-differentiation (albeit bounded) seen in the mitigation provisions.[310]

Voight and Ferreira[311] states that article 9 of the Paris Agreement differentiates financial obligations under the Paris Agreement in distinctive ways. It is clear and strict with regard to the provision of support, attributing a strong normative weight to developed countries' conventional obligations; other parties are only encouraged to provide support. When it comes to the mobilisation of climate finance, article 9 is more nuanced, mirroring to some extent the approach taken for mitigation, that is, a provision applicable to all, to which is added an obligation of conduct, namely that developed countries should continue to take the lead.

[307] Kreienkamp J & Vanhala L 'Climate Change Loss and Damage' (2017) *Global Governance Institute* 13.
[308] Bodle R Donat L Duwe M (2016) 12.
[309] Sharma A (2017) 42.
[310] Rajamani L (2016) 513.
[311] Voigt C & Ferreira F (2016) 299.

4.3.3 Adaptation

In the negotiations up to Paris, many developing countries were concerned that the political and public focus on mitigation would side line adaptation to the existing and inevitable effects of climate change. It does recognise, for the first time, a global goal of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change.[312]

Adaptation refers to practical steps to protect countries and communities from the likely disruption and damage that will result from effects of climate change.[313] The Paris Agreement (2015) has opened a new approach by giving a strong position to adapt[314] to the impacts of climate change.[315] The adaptation provisions are contained in article 7 of the Paris Agreement.[316]

Adaptation may also be a component of NDCs, although parties are not obliged to include it.[317] It is also part of the global stocktake that will take place every five years to assess progress towards the purpose of the Paris Agreement.[318] How to collectively take stock of the quite different individual adaptation efforts and needs with respect to the long term goal is likely to require further discussion. The global stocktakes mandate to measure collective progress on adaptation is a first for the international climate regime.[319] The Paris Agreement also requires that developing countries adaptation efforts shall be recognised, probably to give them more political visibility, but what this means and implies is not clear.[320]

[312] Lesnikowski A Ford J Biesbroek R et al 'What does the Paris Agreement mean for Adaptation?' (2017) 17 (7) *Climate Policy* 828.
[313] Cuomo CJ 'Climate Change, Vulnerability, and Responsibility' (2011) 26 (4) *Hypatia Responsibility and Identity in Global Justice* 693.
[314] Cullet P & Stephan RM 'Introduction to 'Groundwater and Climate Change: Multi-level Law and Policy Perspectives' (2017) 42 (6) *Water International* 644.
[315] Weikmans R Van Asselt H & Roberts JT 'Transparency requirements under the Paris Agreement and their (un)likely impact on strengthening the ambition of nationally determined contributions (NDCs)' (2020) 20 (4) *Climate Policy* 512.
[316] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 7).
[317] Winkler H Mantlana B & Letete T (2017) 856.
[318] Craft B & Fisher S 'Measuring the Adaptation goal in the Global Stocktake of the Paris Agreement' (2018) 18 (9) *Climate Policy* 1204.
[319] Craft B & Fisher S (2018) 1203.
[320] Lesnikowski A Ford J Biesbroek R et al (2017 828.

The provisions on adaptation article 7[321] of the Paris Agreement are more uniform.[322] They concern parties in general or each party, with no specific obligations for developed countries. However, they do provide preferential treatment to developing countries or to developing country Parties that are particularly vulnerable to the adverse effects of climate change.[323] In the same way, continuous and enhanced international support shall be provided to developing country Parties for adaptation. Emphasis is put on the different vulnerabilities and capacities of countries in adapting to climate impacts. However, there is no official list of the most vulnerable countries and the assessment of vulnerability to climate change is much debated.[324]

The Paris Agreement aims at achieving a balance between financial resources allocated to mitigation and to adaptation. In this respect, adaptation receives the same level of visibility in the Paris Agreement as mitigation. However, on substance, the individual obligations regarding adaptation are both less prescriptive and less precise than those on mitigation, it is qualified by the phrase as appropriate, thus softening the obligation.[325]

Other provisions are for a large part worded in soft language for instance Article 7.2, Parties recognise that adaptation is a global challenge, in Article 7.5 recognise the importance of, acknowledge,[326] but the obligation to enhance capacity building is crafted in the passive tense, and does not place the burden for doing so on Parties, either individually or collectively and therefore reflecting the difficulty of prescribing at the international level specific adaptation actions for individual countries.[327]

The Paris Agreement establishes a global goal on adaptation, namely to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change in the context of the temperature goal. The goal is qualitative and does not include a quantitative goal for adaptation finance, despite demands by e.g. the African Group and the Like Minded Developing Countries in Climate Change (LMDCs). However, the

[321] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 7).
[322] Voigt C & Ferreira F (2016) 299.
[323] Maljean-Dubois S (2016) 157.
[324] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 6.4).
[325] Rajamani L 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *Journal of Environmental Law* 352-53.
[326] Bodle R Donat L Duwe M (2016) 10.
[327] Rajamani L (2016) 353.

Paris Agreement recognises the link between mitigation ambition and adaptation needs, and that such needs involve costs.[328]

There is a soft obligation that parties should, as appropriate submit adaptation communications which will be recorded in a public registry. The Paris Agreement allows for much flexibility. The communications can be submitted in conjunction with or as part of their NDCs, NAPs or NCs, and should not create additional burden for developing countries. Periodical updates are mentioned, but the Paris Agreement does not specify the timing. Guidance for the content of these communications is vague and they may include adaptation priorities, plans and actions, and support needs.[329]

The Paris Agreement seeks to address the so far relatively small share of climate finance that goes into adaptation. It states the aim of achieving a balance between mitigation and adaptation, and developing countries are entitled to continuous and enhanced international support for adaptation actions. The Paris Decision establishes processes for assessing adaptation needs, for mobilising adaptation finance and for reviewing the adequacy of support. However, most provisions are descriptive, and the Paris Agreement does not establish a quantitative finance goal for adaptation. The Paris Agreement also recognises the link between mitigation ambition and the need for adaptation support.[330]

The African Group and other developing countries had also proposed to anchor the Adaptation Fund in the Paris Agreement text, in order to secure its future existence. This was met by concerns mainly because the Adaptation Fund works under the Kyoto Protocol and has a special governance and funding model. The resulting compromise in the Paris Decision states that the Adaptation Fund may serve the Paris Agreement in the future if the CMA and the Kyoto Protocols CMP so decide.[331]

The Paris Agreement does not explicitly task any institution with adaptation, but sets out that cooperation on adaptation should take into account the Cancun Adaptation

[328] Bodle R Donat L Duwe M (2016) 10.
[329] Rajamani L (2016) 353.
[330] Winkler H Mantlana B & Letete (2017) 855-56.
[331] Nhamo G & Nhamo S 'Paris (COP21) Agreement: Loss and damage, adaptation and climate finance issues' (2016) 11 (2) *International Journal of African Renaissance Studies Multi Inter and Transdisciplinary* 126-27.

Framework. The Adaptation Committee, established by the UNFCCC's COP, is tasked by the Paris Decision to review the existing UNFCCC institutions on adaptation with a view to improving coherence.

The basis for differentiation under this article is mostly the vulnerabilities and capabilities of parties. However, the agreement does not specify which developing countries are particularly vulnerable. One can only assume that they are the same types listed in article 4.8 of the Convention.[332]

4.3.4 Loss and Damage

The Paris Agreement addresses for the first time in a treaty the contentious matter of loss and damage caused by climate change. There is a great deal of ambiguity in the agreement on how this complex issue will be addressed.[333] It is necessary to take into account the fact that Article 8 of the Paris Agreement now establishes Loss & Damage as a new pillar of international climate change law.[334]

For the purposes of our interpretation of Article 8 of the Paris Agreement,[335] three terms play particularly important roles: 'responsibility', 'liability' and 'compensation': Whereas the notion of state responsibility is well established as referring to acts which are unlawful under international law, the term liability is much less clearly defined.[336] The term has been used to distinguish it from responsibility – for example to cover situations of trans-boundary harm caused by activities that prima facie are not unlawful under international law. If a state commits an internationally wrongful act, this may entitle others to respond; by seeking cessation and/or reparation.

Reparation may take the form of restitution in kind, compensation through the payment of money and satisfaction which covers the residual ways of redressing the wrong. Thus, whereas 'responsibility' is well established under international law and comes with a distinct set of consequences, 'liability' is not clearly defined. However, where drafters of a legal text use both of these terms without indicating that the two terms

[332] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 4.8).
[333] Savaresi A (2016) 24.
[334] Mace MJ & Verheyen R 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 (2) *RECIEL* 204.
[335] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 8).
[336] Broberg M 'Interpreting The UNFCCC's Provisions on 'Mitigation' and 'Adaptation' in Light of the Paris Agreement's Provision on 'Loss And Damage' (2020) 20 (5) *Climate Policy* 529.

are meant to be synonymous, we may reasonably assume that 'liability' covers something else. Finally, 'compensation' is a subset to reparation.[337] Within the climate change debate, the question of north-south relations and climate justice has played – and continues to play – a key role. This is also true with regard to the introduction of Loss & Damage which constitutes a compromise between the north and south.[338]

There is no official definition for Loss & Damage but it would be important to understand the meaning of the terms loss and damage. Under international law these terms denote responsibility for harm as, for example, reflected in Article 36 of the ILC Articles of 2001 on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Damage denotes loss, *damnum*, usually a financial quantification of physical or economic injury or damage or of other consequences of a breach of an international obligation.[339]

Whether and how Loss & Damage should feature in the Paris Agreement was one of the politically most sensitive questions due to concerns by developed countries that this could entail state responsibility, liability and claims for compensation.[340] Loss & Damage now features in the Paris Agreement as a distinctive issue with its own Article, suggesting that it is not treated as a sub-category to adaptation.[341]

The Paris Agreement recognises that minimising and addressing Loss & Damage is important, and that limiting global temperature increase to 1.5 degrees Celsius would reduce climate change impacts and thus Loss & Damage. However, the Paris Decision explicitly excludes liability and compensation claims from the scope of Loss & Damage.[342] The question of climate displacement was not addressed in the Paris Agreement itself, but the Paris Decision mandates the Executive Committee of the Warsaw International Mechanism to establish a task force on the subject.[343] The prominent placement of loss and damage in the Paris framework is balanced by the

[337] Mace MJ & Verheyen R (2016) 205-6.
[338] Broberg M (2020) 529.
[339] Broberg M (2020) 529.
[340] Lyster R (2017) 450.
[341] Kinley R (2017 11.
[342] Doelle M (2016) 11.
[343] Okereke C and Coventry P 'Climate Justice and the International Regime: Before, During and After Paris' (2016) 7 (6) *Climate Change* 25.

overtly "soft" approach that the text enshrines.[344] Article 8.3 of the Paris Agreement[345] clarifies that the Parties' obligations are of co-operative and facilitative character – reiterating the approach adopted in the Bali Action Plan.[346]

A major success for Small Island States was the establishment of a permanent institution. In 2013, the parties to the UNFCCC agreed to establish the Warsaw International Mechanism on Loss and Damage (WIM).[347] The Paris Agreement confirmed the role of this mechanism and extended its mandate. The agreement provides that action and support related to loss and damage should address, among other things, non-economic losses and the resilience of communities and livelihoods.[348]

Some of the areas of cooperation and facilitation identified in Article 8 are, in fact, forms of adaptation, aimed at preventing damage, including early warning systems, emergency preparedness, and comprehensive risk assessment and management. Nevertheless, Article 8 gives loss and damage a foothold in the regime, which developing countries are likely to use to push the issue going forward.[349]

4.3.5 Inter and Intra Generational Equity Principle

Climate change has consequences that extend far beyond the current generation. If the current generation continues to emit GHGs without taking drastic measures to mitigate emissions, these adverse consequences could be extend to cause harm for several future generations. Thus, inter-generational equity has become an important principle in the context of climate change. Article 3.1 of the United Nations Framework Convention on Climate Change (UNFCCC) reads as follows: "*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed*

[344] Conway D Loss and Damage in the Paris Agreement (2015) Climate Focus 3.
[345] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 8.3).
[346] Conway D (2015) 3.
[347] Benjamin L Thomas A Haynes R 'An 'Islands' COP'? Loss and Damage at COP 23' (2018) *RECIEL* 7.
[348] Duyck S 'The Paris Climate Agreement and the Protection of Human Rights in a Changing Climate' (2015) 26 (1) *Yearbook of international Environmental Law* 12.
[349] Bodansky D (2016) 308.

country Parties should take the lead in combating climate change and the adverse effects thereof".[350]

Equity is a core human value, and has been one of the guiding principles of the United Nations Framework Convention on Climate Change (UNFCCC, 1992) from the start. Fairness or equity is operationalised in the climate regime through the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC).[351] Thus far, this has primarily taken the form of a clear distinction between the commitments required of Annex I (developed country) and non-Annex I (developing country) Parties. This balance between commitments and the current model of differentiation has been challenged by many developed countries as ineffective and inequitable.[352] The 2015 Paris Agreement also honours equity in a central cross-cutting provision by the following - the Agreement will be implemented to reflect equity[353] Article 2.2.[354]

One of the means of putting equity into practice, namely, in the rulebook for the global stocktake (GST).[355] The Paris Agreement establishes the GST as a process to take stock of implementation of the Paris Agreement and assess collective progress towards its long-term goals every five years Article 14[356]. The hybrid nature of the Paris Agreement is founded on contributions that are nationally determined, yet it is clear that the aggregate effects of the current nationally determined contributions (NDCs) are not sufficient to meet long-term goals. The GST is considered a central element to enhance ambition, linking individual planning processes to the purpose of the Agreement and its collective goals. It is sometimes referred to as a ratchet mechanism, an important tool to increase the level of ambition of individual actions by taking stock collectively.[357]

[350] United Nations Framework on Climate Change (1992) FCCC/INFORMAL/84 GE.05-62220 (E) 200705 (Article 3.1).
[351] Winkler H (2020) 124.
[352] Winkler H & Rajamani L 'CBDR&RC in a Regime Applicable to All' (2014) 14 (1) *Climate Policy* 103.
[353] Winkler H (2020) 124.
[354] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 2.2).
[355] United Nations Framework Convention on Climate Change (UNFCCC). (2018a). (2018) 3/CMA.1 to 12/CMA.1. FCCC/PA/CMA/2018/3/Add.1. Katowice.
[356] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 14).
[357] Winkler H (2020) 124-25.

The rationale is that, if countries consider that others are also taking on a relative fair share, they will be willing to raise their own ambition. If this virtuous cycle operates, equity is an enabler of ambition. Therefore, putting equity into practice is critical to implementing fair sharing of responsibilities. According to the Paris Agreement, the GST must be undertaken in the light of equity and best available science Article 14.1.[358]

The global stocktake is required to assess collective progress in the light of equity and the best available science. The inclusion of equity in the Paris Agreement was a negotiating coup for several developing countries, in particular the Africa Group, that had long championed the need to consider Parties' historical responsibilities, current capabilities and development needs in setting expectations for nationally determined contributions. It is unclear at this point how equity, yet to be defined in the climate regime, will be understood and incorporated in the global stocktake process. Nevertheless, the inclusion of equity in the global stocktake leaves the door open for a dialogue on equitable burden sharing. Finally, the outcome of the stocktake is required to inform Parties in updating and enhancing their actions and support in a nationally determined manner.[359]

Under the 1992 UNFCCC, the main way of putting equity into practice was through the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC). Equity and CBDR&RC are both among the principles in UNFCCC Article 3.1.[360] The language in Article 3(1)[361] of the UNFCCC ('accordingly') suggests that an application of the notion of equity would require developed countries to take the lead in combating climate change and its adverse effects.[362] This is followed through by the differentiated commitments of developed and developing countries seen in Article 4.[363]

The principle of CBDR&RC is conspicuous by its textual absence from the Durban Platform. This was no benign oversight, but an explicit part of the negotiations in Durban, with omission of the term equity accepted with a reference to under the

[358] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 14.1).
[359] Rajamani L (2016) 504.
[360] Winkler H (2020) 125.
[361] United Nations Framework on Climate Change (1992) FCCC/INFORMAL/84 GE.05-62220 (E) 200705 (Article 3.1).
[362] Voigt C "Equity in the 2015 Climate Agreement" (2014) 4 (1-2) *Climate L* 55.
[363] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 4).

Convention, implicitly including its principles. Yet, the lack of an explicit reference signals a recasting of differentiation. Clearly, the CBDR&RC principle must be reinterpreted in a more nuanced fashion if it is to operationalise equity and help guide the fashioning of commitments in a regime applicable to all under the UNFCCC.[364]

With rapid changes both in socio-economic circumstances and increasing urgency to act on climate, the pressure increased to broaden participation to all countries.[365] How equity would be reflected in a regime applicable to all became highly contested in the process from the 2011 Durban Climate Conference, where the negotiations were launched, to the 2015 Paris Climate Conference, where the Paris Agreement was adopted. Seeking more nuanced forms of differentiation was hotly debated in the lead up to Paris.[366]

The Paris Agreement moved unambiguously beyond Annex-based differentiation, it lists no countries, only referring to developed and developing countries without defining which country/nation is in which category. Yet equity is included in Article 2 of the Paris Agreement, which is to be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[367] The last clause was added to the principle of CBDR&RC, taken verbatim from a bilateral statement of two major countries (United States –China, 2014). The long-term goal on mitigation is to be achieved on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.[368]

Parties were urged to explain how their NDCs are considered fair in the decision on adoption of the Paris Agreement. Equity is an important element post Paris. According to Klinsky et al[369] '*Rigorous analysis that systematically considers the issue of justice is essential for our ability to understand and meaningfully inform the politics of climate action, especially in the post-Paris world'*.

[364] Winkler H & Rajamani L (2014)103.
[365] Winkler H (2020) 125.
[366] Rajamani L "Differentiation in the Emerging Climate Regime" (2013) 14 (1) *Theor Inq L* 163.
[367] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Article 2).
[368] Winkler H (2020) 125-26.
[369] Klinsky S et al. 'Why Equity is Fundamental in Climate Change Policy Research' (2016) *Global Environmental Change* 4.

The Paris rulebook addressed equity in several places.[370] There is some preamble recitation of equity as a principle, citing CBDR&RC and equitable access to sustainable development.[371] Equity and fairness are referenced in information to facilitate clarity, transparency and understanding of NDCs). However, the paragraph references existing language in the Paris Agreement or decisions, so that the only new guidance is to provide information on fairness considerations, including reflecting on equity.[372]

The 2018 Katowice Climate Package, which sets out the 'rulebook' for the implementation of the Paris Agreement, acknowledges only implicitly the country prioritisation set out in the Agreement.[373] For example, on support for NDC implementation, the Rulebook states that support will be provided to developing countries to implement Article 4 (on mitigation and NDCs) in accordance with Articles 9, 10 and 11 of the Paris Agreement.[374] The articles on climate finance (Article 9) and capacity building (Article 11) include explicit references to LDCs and SIDS.[375] Although the Katowice Climate Package clearly emphasises the primacy of mitigation in NDCs, it also claims to be 'without prejudice' to the inclusion of other components. Other such components could include adaptation, capacity-building, climate finance and technology transfer, as argued by developing countries.[376]

There are seven paragraphs (1, 2,13,27,31, 36 h, and 37 g) of decision 19/CMA.1[377] in the Paris rulebook that refer directly to equity or fairness (used interchangeably here), and an eighth paragraph 5 that makes an implicit reference. Para.1 Recalls Paris Agreement Article 14.1, including in the light of equity,[378] Para.2 equity considered cross-cutting, Para.5 implicit reference: expert consideration of inputs,

[370] United Nations Framework Convention on Climate Change (UNFCCC). (2018a). Decisions 3/CMA.1 to 12/CMA.1. FCCC/PA/CMA/2018/3/Add.1. Katowice.
[371] Lawrence P & Reder M 'Equity and the Paris Agreement: Legal and Philosophical Perspectives' (2019) 31 *Journal of Environmental Law* 512.
[372] Winkler H (2020) 126.
[373] United Nations Framework Convention on Climate Change (UNFCCC). (2018a) 3/CMA.1 to 12/CMA.1. FCCC/PA/CMA/2018/3/Add.1. Katowice.
[374] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Articles 4,9,10 & 112).
[375] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Articles 9 &11).
[376] Pauw WP Castro P Pickering J & Bhasin S (2020) 'Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?' (2020) 20 (4) *Climate Policy* 471-2.
[377] United Nations Framework Convention on Climate Change (UNFCCC). (2018a) 3/CMA.1 to 12/CMA.1. FCCC/PA/CMA/2018/3/Add.1. Katowice.
[378] Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1 (Articles14.1).

paragraphs 36 and 37 are the only reference to fairness – which include equity, see below Para.10 equitable participation Para.13 Outputs considered in light of equity, summarising opportunities and challenges Para.27 holistic and balanced approach, taking into account equity Para.31 Summary reports by co-facilitators of technical dialogue take into account equity Para.36 (h) sources of input at collective level: fairness considerations including equity, as in NDCs Para.37 (g)[379] Sources of inputs include: voluntary submissions by Parties, to inform equity considerations.[380]

While northern countries tend to emphasise the inter-generational equity principle, southern countries emphasise the intra-generational equity aspect. Southern states have consistently maintained that inequities among the current generation must be addressed before one can talk about equity among generations. While the intra-generational equity principle seeks to redress the imbalance and inequities in the current generation, it would be irresponsible to ignore the impact of our activities on future generations. The international community reaffirmed the inter-generational equity principle in the Paris Agreement.[381]

While the Paris rulebook for the global stocktake fails to elaborate what equity means in this context, a future possibility would be to focus on elaboration of an agreed understanding of intergenerational equity as a basis for the global stocktake process. This could be a positive move in terms of emphasising the need for states to raise ambition in order to avoid transferring the costs in harms of current emissions (unfairly) onto future generations. Empirical research suggests that in the climate change negotiations, both developing and developed countries have expressed a concern with intergenerational equity, while the former have emphasised that the responsibility for intergenerational equity rests squarely on the shoulders of developed countries. This again suggests the need to address north–south tensions as a pre- condition for moving forward in this area. The shift to self-differentiation in the climate regime makes it extremely important to utilise mechanisms outside the climate regime to hold states

[379] United Nations Framework Convention on Climate Change (UNFCCC). (2018a) 3/CMA.1 to 12/CMA.1. FCCC/PA/CMA/2018/3/Add.1. Katowice.
[380] Winkler H (2020) 126.
[381] Atapattu S (2017) 254-5.

accountable and ramp up ambition. Procedural equity remains important in such efforts to ensure their legitimacy and in turn effectiveness.[382]

4.4 CONCLUSION

In the run-up to the Paris Agreement, much work had been done to reach an agreement between the North and South to change the very strict binary differential treatment that existed between the developed and developing states. The Paris Agreement deals with differential treatment in a much more dynamic, nuanced and subtle way.

For instance one of the most important changes from the Kyoto Protocol in the Paris Agreement is the focus on the CBDRRC principle which is reflecting common but differentiated responsibilities and respective capabilities in the light of different national circumstances, secondly on the basis of the legal content of various provisions of the Paris Agreement and in particular on mitigation, finance, and transparency which represent new and dynamic aspects of differentiation.

A further major change in the Paris Agreement from the Kyoto Protocol was that the NDCs form part of a more bottom-up approach for international climate negotiations, involving voluntary commitments. Previously the negotiation process had been of a more top-down nature with a defined split between the Annex I and Non-Annex I parties accompanied by legally binding targets under the Kyoto Protocol. For the first time, the new process under the Paris Agreement includes voluntary commitments from all major global emitters, both developed and developing, including the US, China and India.[383] The bottom-up approach could potentially mark a paradigm shift in developing developed states relations as well as international environmental law.

It is therefore my premise that the Paris Agreement clearly departed from the dichotomy expression of differential treatment in the climate change regime that allows for binary obligations between developed and developing states but in the Paris Agreement it now provides for mitigation commitments and obligations for all states in terms of national circumstances.

[382] Lawrence P & Reder M (2019) 530-31.

[383] Winning M Price J Ekins P Pye S et al 'Nationally Determined Contributions under the Paris Agreement and the costs of delayed action' (2019) 19 (8) *Climate Policy* 948.

CHAPTER 5

5. CONCLUSION

The purpose of this thesis is to determine the impact of the Paris Agreement on the North-South Divide in International Environmental Law. The existence of pervasive inequalities between states on the one side and ecological and economic interdependence on the other has given rise to a host of challenges in international cooperative efforts.[384]

In Chapter 2, it is my finding that global climate change is a serious, severe, and potentially irreversible problem. If no actions are taken to curb greenhouse gas emissions, global temperatures and sea levels will rise, wreaking havoc on the earth, particularly in developing countries.[385]

The countries from the South felt that the industrialised states of the North are responsible for the degradation of their natural resources and global climate change and that the developed states should be held accountable. This was the essence of the conflict between the affluent countries of the North and the poor countries of the South.

The emergence of a truly global environmental consciousness of International Environmental Law may well be traced back considerably further than the Stockholm Conference. However the Stockholm Declaration facilitated the first international consensus concerning the application of CBDR to international environmental problems. This was in reaction to the developing countries' refusal to adhere to the same standards as the developed countries as they perceived this as a burden to their economic growth, which is unjust due to the developed countries' historical culpability.[386]

In 1974, through a series of General Assembly resolutions, developing countries sought to overhaul the international legal and economic system and challenge the basic traditions of international law based on the principles of the legal equality and

[384] Rajamani (2006) 81.
[385] Weisslitz M (2002) 474.
[386] Stone (2004) 279.

reciprocity[387] to adopt a Declaration on the Establishment of a New International Economic Order (NIEO), with a Programme of Action and a Charter of Economic Rights and Duties of States. Two of the basic tools of the NIEO strategy were the principle of preferential treatment to the benefit of developing countries, and the principle of permanent sovereignty. Whereas the legal system generally was formulated as reciprocal obligations, the demise of the colonial system and the changes in strict legal equality led to the introduction of a preferential approach to the treatment of countries.

The New International Economic Order announced a radical and novel approach through the pursuit of equity and preferential treatment. The New International Economic Order resulted in the right to development which was also not accepted by developed states. The ecological crisis created the need for the acceptance of sustainable development which reconciles interests of developing and developed states. Sustainable development provides for differential treatment in particular through CBDRRC. This changed through a recognition of pragmatism and gave rise to the new approach in Paris.

The North-South Divide was characterised by enormous disparities between developing and developed states. The existing inequalities in the distribution of desired goods between states has resulted in demands by the developing countries that the formal sovereign equality of states must be extended to incorporate material equality through recourse to equitable measures.[388] Equity and fairness are the common themes that run like a golden tread through the emergence of differential treatment in the North-South divide in International Environmental Law.

In chapter 3 it is my finding and conclusion that differential treatment has progressively changed over the years into a strict binary principle through the adoption of a number of treaties and declarations. The Rio Declaration addresses these issues in its reference to "common but differentiated responsibilities" arising from "the different contributions to global environmental degradation, and in its concern with liability issues and the polluter pays approach in internalising environmental costs.

[387] Stalley P (2018) 12.
[388] Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) *'Environmental Law and Sustainability after Rio'* (2011) ch 8 119.

After the Rio Declaration, the first multilateral environmental agreement that dealt with the ‘common but differentiated responsibilities,’ was the United Nations Framework Convention on Climate Change (FCCC). In Article 3(1) it is stated that ‘Parties should protect the climate system ... on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.’

Under the Kyoto Protocol of 1997 the CBDRRC principle was adopted as an expression of differential treatment in the climate change regime which allowed for strict binary obligations between developed and developing states in relation to mitigation commitments.

In the design of the UNFCCC and the Kyoto Protocol elements of prescription is contained (for developed countries), leadership (of developed countries), and differentiation (in favour of developing countries). The nature and extent of differential treatment in the climate regime has remained contentious throughout the years. Although there was a shared understanding amongst states that a global climate regime is necessary, and that common but differentiated responsibilities in addressing climate change would be required, there was little agreement on how to achieve it.

It is my opinion that as a consequence of the strict binary differential treatment that was adopted under the Kyoto Protocol the North-South Divide has deepened even more.

The Paris Agreement is anchored in equity and there is a subtle change in the North-South dichotomy by providing for the principle of “common but differentiated responsibilities and respective capabilities, but with the emphasis in light of different national circumstances” (CBDRRC-NC). The Paris Agreement is 'nationally determined contributions' (NDCs) that each country intends to achieve. The Paris Agreement operationalises this principle through differentiation tailored to the demands of each issue area mitigation, adaptation, finance, capacity building, technology, and transparency.

The nature and extent of differentiation in the Paris Agreement, however, is distinct from that in the 1992 Framework Convention on Climate Change (FCCC) and its 1997 Kyoto Protocol. While the Agreement echoes the principle of CBDR-RC, it adds that it will be reflected 'in the light of different national circumstances'. Along with the

principles of progression and highest possible ambition, this allows a dynamic upward adjustment of parties' efforts in a manner that is recognisant of the unique and changing responsibilities, capacities and circumstances of 197 diverse states at each successive cycle of NDCs.

The articulation of the principles of CBDR-RC, progression and highest possible ambition at each successive NDC provides an innovative, comprehensive and dynamic way to match ambition with the overall aim of the Agreement, in a practical framework for combining effectiveness and fairness.[389]

A major change from the Kyoto Protocol was that the NDCs form part of a more bottom-up paradigm for international climate negotiations, involving voluntary commitments. Previously the negotiation process had been of a more top-down approach with a defined split between the Annex I and Non-Annex I parties accompanied by legally binding targets under the Kyoto Protocol. For the first time, the new process under the Paris Agreement includes voluntary commitments from all major global emitters, both developed and developing, including the US, China and India.[390] The bottom-up approach could potentially mark a paradigm shift in developing developed states relations as well as international environmental law.

The Paris Agreement provides that the global stock take that assesses "collective progress" towards the purpose of the Paris Agreement and its long term goals is to be undertaken "in the light of equity." Parties need to consider how equity can be operationalised, and in particular how the collective effort required to meet the purpose of the Paris Agreement can be fairly distributed.

The Paris Agreement lays down the broad template for a transparency framework, but its modalities, procedures and guidelines have to be fleshed out.[391] The Paris template envisages flexibility for those developing countries 'that need it in light of their capacities.' Parties will need to consider in this context issues including: how and on what basis some developing countries will be deemed to need flexibility and thus offered it; and what kind of flexibility such countries will be provided, and for how long.

[389] Voigt and Ferreira (2016) 303.
[390] Winning M Price J Ekins P Pye S et al 'Nationally Determined Contributions under the Paris Agreement and the Costs of Delayed Action' (2019) 19 (8) *Climate Policy* 948.
[391] Stavins RN and Stowe RC Eds. 2016 19-21.

For instance, even though equity and CBDRRC are strongly reaffirmed throughout the Agreement, they also take on a new meaning. Indeed, the Paris Agreement wording is different from the UNFCCC formula. In the preamble and in Article 2.2, the full expression of the 'principle of equity and common but differentiated responsibilities and respective capabilities', but compared to the previous climate treaties, there is the addition of 'in the light of different national circumstances'. Moving away from the original binary distinction was a major step forward.

The Paris Agreement must be understood and interpreted in the light of equity and the CBDRRC, cutting across all of its elements. Furthermore, most of its provisions open the door to fine-grained differentiation. From this perspective, like the UNFCCC and, in some cases, the Kyoto Protocol, the Paris Agreement uses the whole range of differentiation measures: softer, delayed and conditional central obligations, softer approaches to transparency and compliance with softer and delayed reporting, compliance schedules, financial and technical assistance.

But what is new is that the degree of differentiation varies according to the various elements and topics of the Paris Agreement, being more or less implicit, more or less stringent. The balance between what is common and what is differentiated has been carefully addressed, resulting in a much more nuanced picture than in the previous regime. As a result, each section of the Paris Agreement takes a different approach to differentiation. The Paris Agreement managed to move away from the strict binary burden sharing differentiation of the Kyoto Protocol to a more dynamic, nuanced and subtle approach of the application of differentiation.

The Paris Agreement clearly departed from the dichotomy expression of differential treatment in the climate change regime that allows for binary obligations between developed and developing states but in the Paris Agreement it now provides for mitigation commitments and obligations for all states in terms of national circumstances. Thus, is my view that the Paris Agreement furthermore managed to dilute the conflict between the developed and developing countries.

It is my recommendation that due to the success that was achieved to dilute the conflict between the North-South countries by the subtle and nuanced amendments in the Paris Agreement of the CBDRRC principle by the addition of 'in the light of different

national circumstances' that the use in i.e. other areas in future may be considered when conflict between the North and South countries may arise. The latter allows for a more practical application of differential treatment.

The Word Count is as follows: 29369

6. BIBLIOGRAPHY

Anand ‘Development and Environment: The Case of the Developing Countries’ (1980) 20 *Indian J Int L* 8.

Atapattu S ‘Climate Change, International Environmental Law Principles, and the North-South Divide’ (2017) 26 *Transnat'l L. & Contemp. Probs.* 247-261.

Atapattu S & Gonzalez CG 'The North–South Divide in International Environmental Law: Framing the Issues' (2012) *International Environmental Law and the Global South. Cambridge University Press* 1-10.

Amuzegar J 'The North-South Dialogue: From Conflict to Compromise' (1976) 54 *Foreign Aff* 547-562.

Banda ML 'The Bottom-up Alternative: The Mitigation Potential of Private Climate Governance after the Paris Agreement' (2018) *42 Harv. Envtl. L. Rev*. 325-389.

Bankobeza S 'Effectiveness of Multilateral Environmental Agreements: Introduction to General Aspects' in Lewis M, Honkonen T & Romppanen S Edt. International Environmental Law-making and Diplomacy Review *(2016) University of Eastern Finland – UNEP Course Series 16 Law School University of Eastern Finland Joensuu Campus* 1-192.

Benjamin L Thomas A Haynes R 'An ‘Islands COP? Loss and Damage at COP 23' (2018) *RECIEL* 1-9.

Beyerlin U & Holzer V 'Conservation of Natural Resources' (2013) *Max Planck Encyclopedia of Public International Law. Oxford University Press* 1-13.

Beyerlin U & Stoutenburg JG 'Environment. International Protection' (2013) *Max Planck Encyclopedia of Public International Law Oxford University Press* 1-20.

Beyerlin U 'Bridging the North-South Divide in International Environmental Law' (2006) *Max Planck Encyclopedia of Public International Law Oxford University Press* 259-296.

Bodansky D ‘The Paris Climate Change Agreement: A New Hope?' (2016) *American Journal of International Law* 1-46.

Bodansky D ‘The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections’ (2017) 49 *Arizona State Law Journal* 689-712.

Bothe M ‘International Climate Change Policy after Doha’ (2014) 44 *Envtl. Pol'y & L*. 110-116.

Bodle R Donat L Duwe M ‘The Paris Agreement: Analysis, Assessment and Outlook’ (2016*) CCLR* 5-22.

Boyle A 'Human Rights and the Environment: Where next?' (2012) 23 (3) *European Journal of International Law* 613-642.

Broberg M ‘Interpreting the UNFCCC’s Provisions on Mitigation and Adaptation in light of the Paris Agreement’s Provision on Loss and Damage’ (2020) 20 (5) *Climate Policy* 527-533.

Brown Weiss E ‘International Environmental Law: Contemporary Issues and the Emergence of a New World Order’ (1993) 81 *Geo. L.J.* 675-710.

Brown Weiss E ‘Common but Differentiated Responsibilities in Perspective’ (2002) 96 *Proceedings of the Annual Meeting (American Society of International Law) Cambridge University Press* 366-368.

Brown Weiss E ‘The Evolution of International Environmental Law’ (2011) 54 *Japanese Y.B. Int'l L*. 1-27.

Brunnée J & Streck C ‘The UNFCCC as a Negotiation Forum: Towards Common but more Differentiated Responsibilities’ (2013) 13 (5) *Climate Policy* 589-607.

Castro P 'Common but Differentiated Responsibilities beyond the Nation State: How is Differential Treatment Addressed in Transnational Climate Governance Initiatives?' (2016) 5 (2) *Transnational Environmental Law* 379-400.

Conway D ‘Loss and Damage in the Paris Agreement’ (2015) *Climate Focus* 1-5.

Craft B & Fisher S ‘Measuring the Adaptation Goal in the Global Stocktake of the Paris Agreement’ (2018) 18 (9) *Climate Policy* 1203-1209.

Cullet P 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' (1999) 10(3) *European Journal of International Law* 549-582.

Cullet P 'Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps' (2016) 5 (2) *Transnational Environmental Law* 305-328.

Cullet P & Stephan RM 'Introduction to Groundwater and Climate Change: Multi-level Law and Policy Perspectives' (2017) 42 (6) *Water International* 641-645.

Cuomo CJ 'Climate Change, Vulnerability, and Responsibility' (2011) 26 (4) *Hypatia Responsibility and Identity in Global Justice* 690-714.

Dambacher BMR Stilwell MT and McGee JS 'Clearing the Air: Avoiding Conflicts of Interest Within the United Nations Framework Convention on Climate Change' (2020) 32 *Journal of Environmental Law* 53–81.

De Jonge A 'From Unequal Treaties to Differential Treatment: Is There a Role for Equality in Treaty Relations?' (2014) 4 *AsianJIL* 125-151.

Deleuil T 'The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' (2012) 21 (3) *RECIEL* 271-281.

Doelle M 'The Paris Agreement, Historic Breakthrough or High Stakes Experiment?' (2016) *Dalhousie University Schulich School of Law* 1-17.

Djoghlaf A 'The Concept of Sustainable Development' (2006) 36 *Envtl. Pol'y & L.* 211-218.

Duyck S 'The Paris Climate Agreement and the Protection of Human Rights in a Changing Climate' (2015) 26 (1) *Yearbook of international Environmental Law* 3–45.

Ediboğlu E 'The Paris Agreement: Effectiveness Analysis of the New UN Climate Change Regime' (2017) 17 *U College Dublin L Rev* 164-201.

Falkner R 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92 (5) *International Affairs* 1107-1125.

French D & Rajamani L ‘Climate Change and International Environmental Law: Musings on a Journey to Somewhere’ (2013) 25 (3) *Journal of Environmental Law* 437-461.

Gonzalez CG 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32 *Pace Envtl. L. Rev*. 407-433.

Grigoroudis E Kanellos F Kouikoglou VS & Phillis YA ‘The Challenge of the Paris Agreement to Contain Climate Change’ (2017*) Intelligent Automation & Soft Computing* 1-12.

Gupta J 'International law and climate change: The Challenges Facing Developing Countries' (2006) 16 (1) *Yearbook of International Environmental Law* 119-153.

Held R & Roger C ‘Three Models of Global Climate Governance: From Kyoto to Paris and Beyond’ (2018) 9 (4) *Global Policy* 527-537.

Huang J ‘Climate Justice: Climate Justice and the Paris Agreement’ (2017) 9 *J. Animal & Envtl. L*. 23-59.

Huggins A & Saiful Karim MD 'Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime' (2016) 5 (2) *Transnational Environmental Law* 427-448.

Irish M ‘Special and Differential Treatment, Trade and Sustainable Development’ (2011) 4 *Law & Dev. Rev.* 72-98.

Iqbal I & Pierson CA 'North-South Struggle: Political and Economic Obstacles to Sustainable Development' (2016) 16 (2) *Sustainable Development Law & Policy* 16-47.

Kinley R ‘Climate Change after Paris: From Turning Point to Transformation’ (2017) 17 (1) *Climate Policy* 9-15.

Klinsky S et al. ‘Why Equity is Fundamental in Climate Change Policy Research’ (2016) *Global Environmental Change* 8-11.

Kreienkamp J & Vanhala L ‘Climate Change Loss and Damage’ (2017) *Global Governance Institute* 1-28.

Kuyper J Schroeder H & Linnér B ‘The Evolution of the UNFCCC’ (2018) 43 *The Annual Review of Environment and Resources* 343-368.

Kwarteng AH & Botchway TP ‘The North and South Divide in the Practice and Application of International Law: A Humanitarian and Human Right Law Perspective’ (2018) 11 (1) *Journal of Politics and Law* 79-87.

Lawrence P & Reder ‘M Equity and the Paris Agreement: Legal and Philosophical Perspectives’ (2019) 31 *Journal of Environmental Law* 511-531.

Lesnikowski A Ford J Biesbroek R et al ‘What does the Paris Agreement mean for Adaptation?’ (2017) 17 (7) *Climate Policy* 825-831.

Lyster R ‘Climate Justice, Adaptation and the Paris Agreement: A Recipe for Disasters*?’* (2017) 26 (3) *Environmental Politics* 438-458.

Mace MJ & Verheyen R ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ (2016) 25 (2) *RECIEL* 197-214.

Magraw DB 'Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms' (1990) 1 *Colo. J. Int'l Envtl. L. & Pol'y* 69-99.

Maguire R ‘The Role of Common but Differentiated Responsibility in the 2020 Climate Regime: Evolving a New Understanding of Differential Commitments’ (2013) 7 (4) *Carbon & Climate Law Review, Special Issue on Process, Principles and Architecture of the Post–2020 Climate Regime* 260-269.

Maljean-Dubois S ‘The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime’ (2016) 25 *Rev. Eur. Comp. & Int'l Envtl. L.* 151-160.

Maljean-Dubois S Wemaere M ‘The Paris Agreement: A Starting Point towards Achieving Climate Neutrality’ (2016) *CCLR* 1-4.

Marshall P ‘Whatever happened to the NIEO?’ (1994) 83 *The Round Table* 331-339.

Mcgee J & Steffek J 'The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law' (2016) 28 *Journal of Environmental Law* 37–63.

Michelson K 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 *Ybk Intl Envtl.L*. 52-81.

Mickelson K 'Beyond a Politics of the Possible: South-North Relations and Climate Justice' (2009) 10 *Melb. J. Int'l L.* 411-423.

Mickelson K 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997) 16 *Wis. Int'l L.J.* 353-419.

Morgera E 'The need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 (2) *The European Journal of International Law Oxford University Press* 353-383.

Morrow K 'Rio + 20, the Green Economy and Re-orienting Sustainable Development' (2012) 4 *Environmental Law Review* 279-298.

Mushkat R 'Environmental Sustainability: A Perspective from the Asia-Pacific Region' (1993) 27 *U. Brit. Colum. L. Rev*. 153-188.

Muylaert MS, Cohen C, Rosa LP & Pereira AS 'Equity, Responsibility and Climate Change' (2004) 28 (1) *Climate Research Inter-Research Science Center* 89-92.

Nhamo G & Nhamo S Paris (COP21) 'Agreement: Loss and Damage, Adaptation and Climate Finance Issues' (2016) 11 (2) *International Journal of African Renaissance Studies Multi Inter and Transdisciplinary* 118-138.

Ntambirweki J 'The Developing Countries in the Evolution of an International Environmental Law' (1991) 14 *Hastings Int'l & Comp. L. Rev* 905-928.

Okereke C and Coventry P 'Climate Justice and the International Regime: Before, During and After Paris' (2016) 7 (6) *Climate Change* 1-41.

Pauwelyn J 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes' (2013) 22(1) *Review of European Community & International Environmental Law (RECIEL)* 29-41.

Pauw WP Castro P Pickering J & Bhasin S 'Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel?' (2020) 20 (4) *Climate Policy* 468–484.

Pauw P Mbeva K & van Asselt H 'Subtle Differentiation of Countries' Responsibilities under the Paris Agreement' (2019) 5 (1) *Palgrave Communications* 1-7.

Pickering J McGee JS Stephens T & Karlsson-Vinkhuyzen SI 'The Impact of the US Retreat from the Paris Agreement: Kyoto Revisited*?'* (2018) 18 (1) *Climate Policy* 818-827.

Pogge T 'World Poverty and Human Rights' (2008) (2) *Polity Press Cambridge UK* 27.

Rajamani L 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 (1) *Int'l & Comp LQ* 493-514.

Rajamani L 'Differentiation in the Emerging Climate Regime' (2013) 14 (1) *Theor Inq L* 151-171.

Rajamani L 'From Berlin to Bali and beyond: Killing Kyoto softly' (2008) 57 (4) *International and Comparative Law Quarterly* 909-939.

Rajamani L 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 3 *International Affairs* 605-623.

Rajamani L 'The Nature, Promise, and Limits of Differential Treatment in the Climate Regime' (2006) 16 *Yearbook of International Environmental Law 81-118*.

Rajamani L 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *Journal of Environmental Law* 337-358.

Randeniya C 'Sharing the World's Resources: Equitable Distribution and the North-South Dialogue in the New Law of the Sea' (2003) 15 *Sri Lanka J. Int'l L.* 149-170.

Rangreji L ‘Reflections on the Sustainable Development Paradigm’ (2013) 43 *Envtl. Pol'y & L.* 306-320.

Reuven S & Avi-Yonah 'Bridging the North/South Divide: International Redistribution and Tax Competition' (2004) 26 *Mich. J. Int'l L*. 371. 388.

Romera BM & van Asselt H 'Reconciling Differential Treatment and the International Regulation of Aviation Emissions' (2015) 27 (2) *Journal of Environmental Law* 259–283.

Röser F Widerberg O Höhne N & Day T ‘Ambition in the Making: Analysing the Preparation and Implementation Process of the Nationally Determined Contributions under the Paris Agreement’ (2020) 20 (4) *Climate Policy* 415-429.

Salomon MC ‘From NIEO to Now and the Unfinishable Story of Economic Justice’ (2013) 62 *Int'l & Comp. L.Q.* 31-54.

Sanwal M 'Sustainable Development, the Rio Declaration and Multilateral Cooperation' (1993) 4 (1) *Colorado Journal of International Environmental Law and Policy* 44-68.

Savaresi A ‘The Paris Agreement: a New Beginning?’ (2016) 34 (1) *Journal of Energy & Natural Resources Law* 16-26.

Scholtz W 'Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism' (2008) 55 (3) *Netherlands International Law Review* 323-341.

Scholtz W 'Collective (Environmental) Security: The Yeast for the Refinement of International Law' (2009) 19 *Yearbook of International Environmental Law* 135-162.

Scholtz W ‘The Promotion of Sustainable Development Through Co-Operation: A Case for the Creation of a Global Environmental Organization?' (2006) 4 *TSAR* 651-664.

Scholtz W 'Human Rights and the Environment in the African Union Context' (2010) 10 *Afr. Hum. Rts. L.J.* 102-127.

Scholtz W ‘Equity as the Basis for a Future International Climate Change Agreement: Between Pragmatic Panacea and Idealistic Impediment. The Optimisation of the CBDR Principle via Realism (2009) 42 (2) *The Comparative and International Law Journal of Southern Africa* 166-182.

Scott S ‘The Securitization of Climate Change in World Politics: How close have we come and would full Securitization Enhance the Efficacy of Global Climate Change Policy?’ (2012) 21 (3) *RECIEL* 220-230.

Scott J & Rajamani L ‘EU Climate Change Unilateralism’ (2012) 23 (2) *The European Journal of International Law* 469-494.

Shan W 'From North-South Divide to Private- Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law’ (2007) 27 *Nw. J. Int'l L. & Bus.* 660-661.

Sharma A ‘Precaution and Post-Caution in the Paris Agreement: Adaptation, Loss and Damage and Finance’ (2017) 17 (1) *Climate Policy* 33-47.

Shelton D ‘Stockholm Declaration (1972) and Rio Declaration (1992)’ (2008) *Max Planck Encyclopedia of Public International Law. Oxford Public International Law* 1-9.

Sohn L ‘Stockholm Declaration on the Human Environment’ (1973) 14 (3) *Harvard international Law Journal* 473-515.

Stalley P ‘Norms from the Periphery: Tracing the Rise of the Common But Differentiated Principle in International Environmental Politics’ (2018) *Cambridge Review of International Affairs* 1-21.

Stavins RN and Stowe RC Eds. ‘The Paris Agreement and Beyond: International Climate Change Policy Post-2020’. Rajamani L Differentiation and Equity in the Post-Paris Negotiations (2016) *Cambridge, Mass.: Harvard Project on Climate Agreements* 19-21.

Stone CD ‘Common but Differentiated Responsibilities in International Law’ (2004) 98 (2) *The American Journal of International Law* 276-30.

Thérien JP ‘Beyond the North-South divide: The Two Tales of World Poverty’ (1999) 20 (4) *Third World Quarterly* 723-742.

Tladi D ‘What impact will the Kyoto Protocol have on Global Climate Change?’ (2005) 46 (1) *Codicillus Unisa Press* 42-49.

Van Asselt H ‘From UN-ity to Diversity - The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change’ (2007) 1 *CARBON & CLIMATE L. REV.* 17-28.

Van Asselt H ‘The Continuing Relevance of the Asia-Pacific Partnership (+) For International Law on Climate Change’ (2017) 3 *CCLR* 185.

Vaughan S ‘Trade and Environment: Some North-South Considerations’ (1994) 27 *Cornell Int'l L. J.* 591-606.

Viñuales JE ‘The Rise and Fall of Sustainable Development’ (2013) 22 *RECIEL* 1-20.

Voigt C ‘Equity in the 2015 Climate Agreement’ (2014) 4 (1-2) *Climate L* 50-69.

Voigt C & Ferreira F ‘Differentiation in the Paris Agreement’ (2016) 6 *Climate Law* 58-74.

Voigt C & Ferreira F ‘Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement’ (2016) 5 (2) *Transnational Environmental Law Cambridge University Press* 285–303.

Ward M D ‘Changing Patterns of Inequality in a Changing Global Order’ (1982) 35 *KYKLOS* 115-134.

Weikmans R Van Asselt H & Roberts JT ‘Transparency requirements under the Paris Agreement and their (un)likely Impact on Strengthening the Ambition of Nationally Determined Contributions (NDCs)’ (2020) 20 (4) *Climate Policy* 511-526.

Wiersema A ‘The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements’ (2009) 31 (1) *Michigan Journal of International Law* 231-287.

Weisslitz M ‘Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential versus Absolute Norms of Compliance and Contribution in the Global Climate Change’ (2002) 13 *Colo. J. Int'l Envtl. L. & Pol'y* 473 -509.

Winkler H ‘Putting Equity into Practice in the Global Stocktake under the Paris Agreement’ (2020) 20 (1) *Climate Policy* 124-132.

Winkler H Mantlana B & Letete T ‘Transparency of Action and Support in the Paris Agreement’ (2017) 17 (7) *Climate Policy* 853-872.

Winkler H & Dubash NK ‘Who Determines Transformational Change in Development and Climate Finance?’ (2016) 16 (6) *Climate Policy* 783-791.

Winkler H & Rajamani L ‘CBDR&RC in a Regime Applicable to All’ (2014) 14 (1) *Climate Policy* 102-121.

Winning M Price J Ekins P Pye S et al ‘Nationally Determined Contributions under the Paris Agreement and the Costs of Delayed Action’ (2019) 19 (8) *Climate Policy* 947-958.

Zahar A ‘Collective Obligation and Individual Ambition in the Paris Agreement’ (2020) 9 (1) *Transnational Environmental Law* 165–188.

Zaman ST ‘The Bottom-up Pledge and Review Approach of Nationally Determined Contributions (NDCs) in the Paris Agreement: A Historical Breakthrough or a Setback in New Climate Governance’ (2018) 5 (2) *IALS Student Law Review* 3-20.

Books

Bedjaoui M ‘Towards a New International Economic Order’ (1979) *Holmes & Meier Publishers Inc.* 1-287.

Birnie P & Boyle A et al *‘International Law & the Environment’* (2009) *Oxford University Press* ch 2 51.

Boyle AE ‘International Environmental Law’ in Boyle AE & Anderson MR (Eds) *Human Rights Approaches to Environmental Protection* First Reissue (2003) ch 3 *Oxford University Press*.

Cullet P Common but Differential Responsibilities in Viñuales JE (Ed) 'The Rio Declaration on Environment and Development *A Commentary'* (2015) *Oxford University Press* ch 11 229-244.

Hébié M 'Common but Differential Responsibilities' in Viñuales JE (Ed) 'The Rio Declaration on Environment and Development A Commentary' (2015) *Oxford University Press* ch 10 222/3

Nyerere 'At the receiving end of the North-South dialogue' in Hadjor (Ed) New perspectives in North-South dialogue: Essays in honour of Olof Palme (1988) 19.

Norton BG 'Intergenerational Equity' in Bosselmann K, Fogel DS & Ruhl JB 'The Law of Politics of Sustainability' (2011) 3 *Berkshire Encyclopedia of Sustainability* 326.

Sands P & Peel J et al 'Principles of International Environmental Law' (2012) *Cambridge University Press* ch 2 40.

Scholtz W 'A Sustainable and Legal Order' in Benidickson J, Boer B & Benjamin AH et al (Eds) 'Environmental Law and Sustainability after Rio' (2011) *Edward Elgar Publishing* ch 8 121.

Scholtz W 'Legal Protection of the Environment' in Strydom H (Edt) International Law (2017) *Oxford University Press* 512.

Viñuales JE 'The Rio Declaration on Environment and Development: Preliminary Study' in Viñuales JE (Ed) 'The Rio Declaration on Environment and Development A Commentary' (2015) *Oxford University Press* ch 1 1-60.

Declarations

Berlin Mandate United Nations (1995) FCCC/ CP/1995/7/Add.1.

Charter of Economic Rights and Duties of States UNGA Res 3281 UN GAOR (1974).

Charter of the United Nations and Statute of the International Court of Justice (1945).

Declaration on the Establishment of a New International Economic Order A/RES/3201(S-VI) (1974).

Paris Agreement (2016) United Nations FCCC/CP/2015/10/Add.1

UN General Assembly Permanent Sovereignty over Natural Resources (1973) A/RES/3171.

United Nations Framework Convention on Climate Change (UNFCCC). (2018a) 3/CMA.1 to 12/CMA.1. FCCC/PA/CMA/2018/3/Add.1. Katowice.

Stockholm Conference (1972) United Nations A/CONF.48/14/Rev 1.

The Rio Declaration on Environment and Development (1992) A/CONF.151/26 (Vol. I).

UN General Assembly Permanent Sovereignty over Natural Resources (1973) A/RES/3171.

United Nations Framework on Climate Change (1992) FCCC/INFORMAL/84 GE.05-62220 (E) 200705.

Internet

http://lasulawenvironmental.blogspot.co.za/2012/07/indira-gandhis-speech-at-stockholm.html accessed on 12/07/2016.

https://www.epa.gov/history/quotations-about-environment accessed on 18/06/2018

https://www.azquotes.com/quote/101029 accessed on 10/11/2018.