



Essential Readings in Environmental Law
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COMMON BUT DIFFERENTIATED RESPONSIBILITY PRINCIPLE
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OVERVIEW OF KEY SCHOLARSHIPS

1. Magraw, B. D., “Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms”, (1990),1 Colorado Journal of International Environmental Law and Policy
2. Halvorsen, M. A., *Equality Among Unequals in International Environmental Law: Differential Treatment for Developing Countries* (Westview Press, 1999)
3. French, D., “Developing States and International Environmental Law: The Importance of Differentiated Responsibilities”, (2000) 49, ICLQ 35
4. Mickelson, K., “South, North, International Environmental Law, and International Environmental Lawyers”, (2000), 11 Yearbook of International Environmental Law 52
5. Cullet, P., *Differential Treatment in International Environmental Law* (Ashgate, 2003)
6. Stone, C., “Common but Differentiated Responsibilities in International Law”, (2004), 98 American Journal of International Law 276.
7. Lavanya, R., *Differential Treatment in International Environmental Law* (Oxford University Press, 2006).
8. Atapattu, S. *Emerging Principles of International Environmental Law* (Transnational Publishers, 2006)
9. Honkonen, T., *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Kluwer Law International, 2009)

Background

Given the rather recent origin of the common but differentiated responsibility principle (CBDR), the number of books and articles on it is impressive. Many of the leading textbooks on international environmental law discuss this principle in the context of principles of international environmental law but do not devote more than a few pages to it: **P. Sands** and **J. Peel**, “*Principles of International Environmental Law*” (3rd ed., 2012, CUP) note that CBDR developed from the application of equity in general international law and has two elements:

common responsibility of states and the need to take account of differing circumstances both in relation to the ability to prevent damage and the contribution of states to creating the problem. According to **D. Hunter, J. Salzman, and D. Zaelke**, “*International Environmental Law and Policy*” (4th ed., 2011, Foundation Press), the principle reflects core elements of equity and allows for ecological differences in addition to economic differences and “presents a conceptual framework for compromise and cooperation in meeting future environmental challenges” (p. 464).

Similarly, **P. Birnie, A. Boyle and C. Redgwell**, “*International Law & the Environment*” (3rd ed., 2009, OUP) discuss the CBDR in the context of rights and obligations of states in relation to the environment and note that it acknowledges the contextual differences among states. A legally significant framework principle, CBDR provides an equitable basis for cooperation between developing and developed states (p 135). **M.C. Cordonier Segger and A. Khalfan** in their book “*Sustainable Development Law: Principles, Practices, & Prospects*” (2004, OUP) argue that the CBDR evolved from the common heritage of mankind principle and is a manifestation of general principles of equity in international law. They identify the same two components of the principle as Sands and Peel and discuss their application in various legal regimes. Although the discussion of CBDR is brief, these texts discuss it with other principles of IEL and are, therefore, useful to study their interaction. .

According to these texts the CBDR principle comprises several components: first, it refers to the common responsibility of states to protect the environment; second, it refers to different contributions to global environmental problems by developing and developed countries; third, it acknowledges the greater pressures that northern countries place on the global environment; and finally, it refers to the capacity of northern countries to address global environmental problems due to their superior financial resources and technology.

In addition, many articles discuss the application of CBDR in relation to various legal regimes, most notably, climate change. The texts identified above are an important addition to the literature on the topic and while there is considerable overlap, each text has its own nuanced interpretation of the principle. They also discuss different legal regimes as examples of the application of CBDR.

General Texts

1. **D. B. Magraw’s** article *Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms* is one of the early pieces on this topic and is significant because it was written before the adoption of the Rio Declaration. The typology used by **Magraw** (using the three types of norms as identified here) has influenced later publications on the topic. The article identifies three types of international norms:

differential norms (norms that provide different standards for a particular group of states); contextual norms (norms that are identical on paper but their application requires taking into account other factors); and absolute norms (norms that provide identical treatment to all countries). Contextual norms, while being flexible, often lead to indeterminacy but they can be valuable in the face of scientific uncertainty. Absolute norms, on the other hand, while being predictable are not necessarily precise. The article discusses the new international economic order and international human rights in order to explore whether they offer any lessons for developing countries in the context of environmental protection. It proceeds to discuss customary international law principles relating to the environment followed by a discussion of conventional regimes governing transboundary environmental issues. The article concludes by pointing out that the three types of norms identified in the article have their own advantages and disadvantages. While absolute norms predominate, international law contains many differential and contextual norms: “Such a rich menu of possible approaches should be welcomed, as long as the underlying concern for the social, cultural, ecological, and economic well-being of present and future generations of individuals throughout the world—and in particular the absolute poor—is the predominant factor in choosing which approach is more appropriate for a particular situation” (p. 99).

2. One of the earlier texts on the topic, **A. M. Halvorsen’s** book *Equality Among Unequals in International Environmental Law: Differential Treatment for Developing Countries* discusses the CBDR principle in the context of sustainable development and the need to promote participation of developing countries in environmental treaty regimes. The author argues that international environmental agreements have moved from universally applicable norms to a recognized system of asymmetrical norms but notes that these norms should be temporary, enabling developing countries to “catch up” with developed countries. The book traces the history of international environmental law and devotes a chapter to sustainable development. It discusses how participation by developing countries has been facilitated and the various categories of norms found in international law (differential, contextual and absolute norms). She proceeds to discuss differential norms in various treaties, institutional structures supporting the implementation of environmental treaties, special funding mechanisms (global environmental facility, debt-for-nature swaps, tradable permits and international carbon tax) and the role of non-governmental organizations in promoting universal participation. She concludes that “differential treatment for developing countries is the most effective way to promote universal participation in the formation and implementation of international environmental agreements.... In order to make these incentives effective, international institutions should focus more on the goal of facilitating the participation of developing countries in international environmental agreements” (p. 184).

3. In his article titled, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, **D. French** posits that the endorsement by the international community of differentiated responsibilities as a means of achieving environmental protection and sustainable development is “one of the most conspicuous aspects” of the Rio Conference in 1992 (p. 35). After a brief discussion of the politics surrounding the adoption of the CBDR at the Rio Conference, this article discusses different types of differentiation adopting a typology similar to that proposed by **D. Magraw**: differential norms (norms that favor a particular group), contextual norms (norms that appear universal but permits leeway in implementing those norms by considering other factors) and provision of financial and technological assistance. The article discusses various differentiated standards in environmental treaties and notes that in addition to these, many texts make “explicit references to the situation, needs and concerns of developing States” (p. 40). Noting that international environmental law is adopting a more flexible approach to global environmental issues, the article refers to Article 3 of the *1992 UN Framework Convention on Climate Change* “as an excellent example of how a treaty can not only guide the future implementation of its own provisions, but also the subsequent development of future protocols” (p. 41). Being conscious that adopting differential norms could undermine efforts to unite the international community, the article emphasizes an often under-emphasized aspect of Principle 7—common responsibilities—and notes, relying on **Sands**, that while commonality of obligations ensures participation of all states, it is the differentiation that makes such obligations politically acceptable. The article concludes that differentiated responsibilities are inevitable and plays a very significant role in many international environmental regimes.

4. The article by **K. Mickelson** titled, *South, North, International Environmental Law, and International Environmental Lawyers*, evaluates, among other issues, the application of CBDR within the North-South divide and the evolution of international environmental law. It is an important piece of scholarship for those who are interested in North-South issues. Taking CBDR as an example of the way North-South issues are being articulated and framed, she notes: “What is striking about the principle of common but differentiated responsibilities is that depending on the perspective brought to bear on it, it can reflect totally different ways of thinking about the respective roles of South and North in addressing environmental degradation” (p. 70). On the one hand, it could simply be an acknowledgement of the superior wealth and resources of developed countries and, on the other, it could be an acknowledgement of historic responsibility for causing environmental problems. She poses the questions: “Is it a question of ability to pay or responsibility to pay?” (p. 70) and compares the version of Principle of 7 Rio proposed by G-77 and China with the final version that was adopted and notes that

Principle 7 does not really acknowledge historic responsibility and “ is far less accusatory in its tone” (p. 71).

5. **P. Cullet**'s book *Differential Treatment in International Environmental Law* is also placed within the context of international environmental law and sustainable development but it adopts a wider approach by addressing burden sharing as well as benefit sharing. Noting that differential treatment is a common feature of international environmental law today, the book discusses equality and equity as the conceptual framework for differential treatment. It notes that while international law is founded on the notion of legal equality of states, formal equality cannot lead to substantive equality in situations where members are not equal. The book notes that differential treatment is linked to the notion of equity and aims to wipe out inequality in fact and is, therefore, temporary in nature. The book traces differential treatment in international law as an exception to reciprocity. With regard to the legal status of CBDR, the book concludes that while it is clearly not part of customary law, “the increasing recognition of differentiated responsibilities in different contexts read together with the development of differential treatment generally may at some point in the future lead to the recognition of CBDR as a general principle of international environmental law” (p. 88). Chapter 4 discusses technology transfer and implementation aid, and chapter 5 discusses plant variety protection as a case study of differential treatment in practice. He notes that differential treatment is related to considerations of justice and thus grounded in equity, the need for which has been strongly felt predominantly since the end of the decolonization process. The book concludes that “while the future of differential treatment is fraught with uncertainty, its further development seems probable.” (p. 182).
6. Acknowledging that the wide appeal of the CBDR principle is unsurprising, **C. Stone** in his article *Common but Differentiated Responsibilities in International Law* states that the principle is neither universal nor self-evident and that the meaning of “differentiated” is problematic. In CBDR literature differentiation is reserved for multilateral agreements that have non-uniform obligations in the way they are verbalized, not in how they affect each party. The article points out that the practice of differentiating is not new and “the environment is emerging as the most fertile field for non-uniform obligations” (p. 278). The article points out that uniform norms remain the rule despite attempts at differentiation: “In fact, the real puzzle about differentiations is not why we have them, but why they emerged so late and appear no more frequently than they do” (p. 282). This article distinguishes between three versions of the CBDR principle: (a) rational bargaining CBDR (some uniformities should be expected and welcomed as natural outcomes of mutually beneficial negotiations); (b) equitable CBDR (introduces constraints on unbridled bargaining without departing from the commitment to Pareto-improve; and (c) inefficient CBDR (this goes one step further and advantages one group).

The article points out that taken together, Principles 6 and 7 of the Rio Declaration provide at least three arguments for differentiation: needs; pressures each country places on the environment; and the capabilities in terms of wealth and technology. The article concludes that while CBDR has put a fresh label on a longstanding practice, it has not been elevated to the status of a customary international law principle.

7. **R. Lavanya**'s book titled, *Differential Treatment in International Environmental Law*, provides a comprehensive discussion of the evolution of differential treatment in international law, the doctrinal basis for the adoption of the CBDR principle and its boundaries. It discusses its adoption in the context of environmental law, the politics surrounding its adoption at the Rio Conference on Environment and Development in 1992 and its specific application in the climate regime. The book places the principle within the context of the North-South divide. The author argues that even if the CBDR principle has not achieved the status of customary international law, "it may still possess a 'species of normativity' implying a certain legal gravitas" (p. 160). The book concludes: "The existence of manifest inequalities between states and groups on the one side and ecological and economic interdependence on the other is the complex reality of contemporary international society. As long as inequalities persist, the dialogue on ways of integrating diverse countries into international cooperative efforts will continue" (p. 255).
8. Chapter 5 of **Sumudu Atapattu**'s book *Emerging Principles of International Environmental Law* is devoted to the CBDR principle. The book is set within the context of sustainable development and CBDR is identified as a tool to achieve sustainable development. The book chapter notes that while most obligations at the international level are based on reciprocity deriving from the sovereign equality principle, differentiation constitutes an exception to it. The rationale for the adoption of CBDR is the principle of equity. After a discussion of various forms of differentiation, the chapter surveys international instruments that embody this principle. The chapter also discusses this principle in relation to other principles of IEL: sustainable development; the polluter pays principle; and the inter-generational equity principle. The chapter notes that "while universalism is the norm in relation to most treaties, in the field of environmental protection, differential norms have become increasingly common, as it is virtually impossible to have absolute norms for all parties, given the vast disparities of states" (p. 429). The chapter concludes that while differential treatment has become increasingly common, it is premature to consider CBDR as being part of customary international law. Moreover, given that it is temporary in nature, the chapter questions whether it can become generally applicable outside a treaty regime.

9. A later addition to literature, **T. Honkonen**'s book *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* notes that differentiation tries to reconcile two competing tensions: the need for universal participation; and the need to take into account the special needs of certain countries. The book adopts two frames to discuss this principle: sustainable development; and the north-south divide and notes that sustainable development must be seen as an overarching framework for international environmental policies (p. 11). Noting that "going beyond the veil of formal equality" (p. 36) is necessary, the book points out that in order to achieve substantive equality, it may become necessary to take extra-legal differences into account when designing obligations. The book discusses the new international economic order, the common heritage and common concern of mankind principles, contextualization of international law and its fragmentation, benefit sharing v. burden sharing, fairness in burden sharing and distributive justice, and how CBDR is being operationalized in multilateral environmental agreements. It also discusses how countries are categorized for differentiation.

Further recommended readings:

1. Halvorsen, A., "Common, but differentiated commitments in the Future – Climate Change Regime – Amending the Kyoto Protocol to include Annex C and the Annex C Mitigation Fund," (2007)18 Colorado J., Int'l Env't'l L. & Pol'y 247
2. Weisslitz, M., "Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context," (2002)13 Colorado J., Int'l Env't'l L. & Pol'y 473
3. Harris, P.G., "Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy," (1999)7 NYU Env'tl. L. J. 27
4. Rajamani, L., "The Principle of Common but Differentiated Responsibility and the Balance of Commitments in the Climate Regime," (2000) 9:2 RECIEL 120
5. Honkonen, T., "The Principle of Common but Differentiated Responsibility in Post-2012 Climate Negotiations," (2009) 18:3 RECIEL 257
6. Mickelson, K., "Beyond a Politics of the Possible? South-North Relations and Climate Justice," (2009)10 Melbourne J. Int'l L 411
7. Atapattu, S., "Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change" in Richardson *et al* (eds.) (Edward Elgar Publishers, 2009) p 37