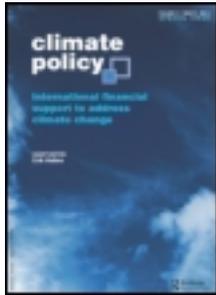


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### CBDR&RC in a regime applicable to all

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■ synthesis

## CBDR&RC in a regime applicable to all

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The principle of common, but differentiated, responsibilities and respective capabilities (CBDR&RC) is fundamental to the UNFCCC. Some options for a nuanced model of differentiation that addresses both responsibility and capability in a changing world are explored, such as new categories of countries, and some of the political issues that such a model might face are considered. The strengths and limitations of options for graduation based on 'objective' criteria such that countries could move between categories or 'graduate' – an option provided by the UNFCCC – are discussed. Countries could also choose to join another club (e.g. the G20), self-elect into categories or differentiate among themselves implicitly by accepting different commitments and actions. CBDR&RC will form part of the overall legally binding agreement, and must apply symmetry in some respects and differentiation in others to the commitments and actions contained therein. Some possible characteristics of CBDR&RC of relevance in a regime 'applicable to all' are outlined. These include promoting climate action and using mechanisms available in the UNFCCC to instil dynamism. Differentiation on mitigation must consider the distinctions between absolute and relative reductions, as well as commitments to outcomes and implementation. CBDR&RC should be applied to mitigation, adaptation, and the means of implementation.

### Policy relevance

In Durban, Parties agreed to negotiate a regime 'applicable to all', which sent a political signal that there should be greater symmetry between nations. The world has changed since the UNFCCC was negotiated in 1992. It is now less helpful to think only in terms of two groups of countries (e.g. Annex I and non-Annex I), and evident that there are significant differences between member states. This requires a more nuanced interpretation of the principles of equity and CBDR&RC, which is an integral part of the UNFCCC. The options for the different approaches outlined in this article might help in the construction of a more nuanced model. All must do more, while some must do more still than others. To achieve this, some defining characteristics of CBDR&RC in a regime applicable to all are suggested.

*Keywords:* capability; CBDR&RC; differentiation; Durban Platform; equity; responsibility

## 1. Introduction

Under the Durban Platform, Parties agreed 'to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties' (UNFCCC, 2012, par. 2). Although the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol are 'applicable to all', in that they apply to all the countries that have joined them, these instruments contain some common and different commitments for all Parties. The use of the term

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‘applicable to all’ therefore does not necessarily constitute a shift away from the UNFCCC and Kyoto models of differentiation of commitments between developed and developing country parties.

One of the central questions relating to the design of the future climate regime, scheduled to be completed by 2015, is how the future climate regime might address the contested issue of differentiation in an appropriate and equitable manner. In particular, how, in what form, and to what extent might differentiation play a role in a regime ‘applicable to all’?

The term ‘applicable to all’ was intensely debated at Durban, because it signals a political expectation that the climate regime must contain greater symmetry in the commitments undertaken by all Parties to the new agreement and, therefore, a more nuanced model of differentiation than has thus far been the case. ‘Applicable to all’ will be taken here to refer to this political signal and be in tension with differentiation. The tension between symmetry and differentiation is relevant both to the contents of the agreement and its overall legal form.

A regime must be widely perceived as equitable to be capable of generating agreement, broadening participation, and deepening efforts, which in turn might lead to a regime that is adequate and effective. Central to a regime’s fairness is its ability to differentiate between different actors and to tailor commitments to responsibilities and capacities. Fairness or equity is operationalized in the climate regime through the principle of ‘common but differentiated responsibilities and respective capabilities’ (CBDR&RC). 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. Yet significant differences remain between developed and developing countries, and it would thus not be fair to exclude a reasonable form of differentiation that is appropriate for the 21st century.

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 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 operationalize equity and help guide the fashioning of commitments in a regime ‘applicable to all’ under the UNFCCC.

The ways in which the principle CBDR&RC can be interpreted and applied are explored in this article, such that the principle is both faithful to its origins in the UNFCCC, yet relevant to the fashioning of the future of climate regime, one that is ‘applicable to all’. Note that equity and CBDR&RC in other fora or levels of action are not analysed.

## 2. Origins of CBDR&RC

### 2.1. Nature and content of CBDR&RC in the UNFCCC

The principle of CBDR&RC, which is fundamental to operationalizing the notion of equity, has its origins in the 1992 Rio Principles (which emerged from the United Nations Conference on Environment and Development [UNCED]) and the UNFCCC (which was negotiated in parallel at Rio). The Rio Principles, albeit soft law, guide not only the UNFCCC but also other multilateral environmental agreements launched at Rio and thereafter. Rio Principle 7, CBDR states that

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. (UNCED, 1992, italics added)

CBDR, as articulated in Rio Principle 7, is linked directly to the contributions to global environmental harm. Further, insofar as the last clause in Rio Principle 7 refers to finance and technology, it anticipates the concept of capability that finds expression in the UNFCCC. Article 3.1 of the UNFCCC (1992) operationalizes equity in the climate regime through the principle of ‘common but differentiated responsibilities and respective capabilities’ and reads

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. (italics added)

CBDR&RC is not limited to Article 3 of the UNFCCC, but permeates its balance of responsibilities between countries. CBDR&RC is reflected in the structure of Article 4 of the UNFCCC on commitments. Article 4.1 contains commitments by all Parties, while Article 4.2 adds additional and specific commitments by developed country Parties and others in Annex I. The UNFCCC also refers to CBDR in the chapeau of Article 4.1, which deals with commitments by all Parties. In this context, instead of ‘respective capabilities’ (as referred to in Article 3.1), it adds ‘and their specific national and regional development priorities, objectives and circumstances’. There are then further commitments to provide finance (Article 4.3), assist with costs of adaptation (Article 4.4) and of technology (Article 4.5). The balance of responsibilities as they were understood in 1992 in the UNFCCC is summarized in Article 4.7, which is frequently invoked by developing country negotiators. It states that ‘the extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments’. The UNFCCC also contains a number of specific commitments on adaptation that various categories of countries are to undertake (Articles 4.8 and 4.9), which have been seen by some as being ‘in keeping with the principle of common but differentiated responsibilities and respective capabilities’ (Ott et al., 2004).

Arguably, differentiation between countries based on CBDR&RC involves ‘two markers of differentiation: contribution to environmental degradation and capacity/resources to take response measures’ (Rajamani, 2008, p. 130). The use of the term ‘respective capabilities’ in addition to CBDR suggests that there are two bases for differentiation – one based on capability, and another that draws from Rio Principle 7 which contains a definition of CBDR based on the contribution to environmental harm (Rajamani, 2011). Both Rio and the UNFCCC strongly emphasize the ‘common’ responsibility that states share towards the chosen environmental goal. Read in conjunction with Article 2 of the UNFCCC (Objective), it is implied that differentiation must be in service of the common environmental goal, and if differentiation detracts from it, it will have gone too far (Rajamani, 2006, p. 162).

### 2.2. CBDR&RC in relation to mitigation and adaptation

Although CBDR&RC is raised most commonly in relation to mitigation, the UNFCCC envisages differentiation in relation to the provision of support as well. Capability is often linked to the provision of finance and technology, as outlined in Articles 4.3 to 4.7 (see above). Annex II lists those countries, a subset of Annex I Parties, which are required to provide support to developing countries. In the context of a more symmetrical regime that is applicable to all, it is an open question whether Annex II Parties should continue to provide finance to non-Annex I Parties, or whether a wider set of Parties – for instance, economies in transition (EITs) and some advanced developing countries – should be required to provide finance to others or at least for their own mitigation and adaptation needs.

Differentiation is less frequently applied to adaptation, despite the fact that the most vulnerable countries and communities have contributed least to the problem. Applying equity only to mitigation is unlikely to be fair to all. Article 3.1 introduces CBDR&RC as a principle in the context of ‘protecting the climate system’, but not explicitly as a principle for adaptation.

The UNFCCC includes adaptation in Article 3.3, which enjoins all Parties to take precautionary measures against the adverse effects of climate change, with a hint at differentiation by taking ‘into account different socio-economic contexts’. The commitments to address adaptation appear in Article 4.1, applying to all Parties, and encourage cooperation. Article 4.2 imposes no additional commitments for the developed country Parties on adaptation. The strongest link between CBDR&RC and adaptation is on funding of adaptation, with Article 4.4 using mandatory language to require developed countries to ‘assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation’. While there are clear differences, it is possible to apply differentiation to adaptation, an issue that has been explored in relation to various approaches for the future.

### 2.3. CBDR&RC criteria to guide differentiation: responsibility and capability

The term ‘responsibility’ has ethical and legal senses, and lends itself to interpretation. It could be construed as ‘responsibility for’ an act as in causal agency or as ‘responsibility to’ or duty towards another. Arguably, the CBDR&RC principle involves both these senses of responsibility. In relation to its ethical dimension, Henry Shue (2009, p. 1) explains ‘All over the world parents teach their children to clean up their own mess’, and that if one learns that one cannot walk away from the mess one has created, ‘one is given a strong negative incentive against making messes in the first place’. Cleaning up the ‘mess’ of climate change requires both that states take responsibility for past emissions that have caused the problem, and that they do not repeat the mistake. While it is clear that countries are ethically responsible for past emissions, it is not clear that they are on this basis legally responsible?

Responsibility in the CBDR&RC principle has clear temporal dimensions – it relates to both historical and future emissions. The UNFCCC notes in its preambular text that ‘the largest share of historical and current global emissions of greenhouse gases has originated in developed countries’, but does not go so far as to attribute ‘historical responsibility’ to developed countries. In operational text, it merely fleshes out the principle of CBDR&RC without explicitly referring to historical emissions. In Cancun, the Parties explicitly acknowledged that ‘owing to this historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof’ (UNFCCC, 2011, p. 8). This is a significant acknowledgment, albeit only in a Conference of the Parties (COP)

decision, as it is not often seen in negotiated texts. The Brazilian proposal, originally submitted to inform the Kyoto Protocol (Brazil, 1997), is based on historical responsibility and seeks to define the contributions of different developed countries to temperature increase. It has since been extended beyond developed countries (Höhne & Blok, 2005; La Rovere, Valente de Macedo, & Baumert, 2002).

Responsibility for future emissions is a different matter. The IPCC's last assessment report found that, across a range of scenarios, the projected energy CO<sub>2</sub> emissions will increase 45% to 110% between 2000 and 2030, with

[t]wo thirds to three quarters of this increase . . . projected to come from non-Annex I regions, with their average per capita energy CO<sub>2</sub> emissions being projected to remain substantially lower (2.8–5.1 tCO<sub>2</sub>/cap) than those in Annex I regions (9.6–15.1 tCO<sub>2</sub>/cap) by 2030. (IPCC, 2007b, p. 3)

This carefully balanced statement makes clear the increase in absolute emissions will come from developing regions. It is worth noting that most of the world's population is located in these regions.

There is an important difference between responsibility for historical and future emissions. Without trivializing the projected future emissions of developing countries, these are projections not certainties. The climate change problem requires developing countries to take some responsibility for projected emissions. The negotiations up to 2015 should clarify whether responsibility for such emissions is taken in the same way, perhaps with greater flexibility, as is responsibility for historical emissions by developed countries. Advanced developing countries with large projected emissions are being pressed to assume responsibility for higher emissions as they occur and for projected emissions as well, whereas the majority of developed countries emitted, with externalities for all, for decades before they agreed to undertake modest commitments to tackle these emissions.

Capability is an important criterion to guide differentiation, given that those who are able to deal with the problem should do more. Appropriate differentiation by capability could ensure better implementation, since those with the capacity would be forced to act. The capability of countries may, of course, change over time. Capability is commonly associated with income (gross domestic product [GDP] per capita). However, there are also other dimensions – socio-economic factors such as literacy, life expectancy, skills, abatement costs, and opportunity costs – as well as technology and institutional factors (Winkler, Baumert, Blanchard, Burch, & Robinson, 2007). When seeking to quantify the concepts, it is clear that responsibility and capability are not independent of each other. Increased capacity, if approximated by GDP per capita, is strongly associated with higher emissions, and indeed higher emissions per capita (a metric that is often used as a proxy for responsibility) (Aslam, 2002; CASS/DRC, 2011; Kanitkar et al., 2010).

It is worth considering the value of categorizing a concept or notion as a 'principle'. At its most basic 'when we say that a particular principle is a principle of law we mean that the principle is one which officials must take into account if it is relevant as a consideration' (Dworkin, 1977). While a principle may sway decision makers in a particular direction, it does not ensure that a particular action will occur. It is therefore open-ended (Bodansky, 1993). It is an open question whether Article 3.1 of the UNFCCC contains one principle (equity) or two (CBDR&RC). Is the principle referred to in Article 3 that of equity, CBDR&RC, or both? One approach is to consider them all as distinct principles; another is to consider the principle of CBDR&RC as an operationalization of the principle of equity.

It is also an open question what the actual legal status of this principle is. However, regardless of how such principles are counted, CBDR&RC is arguably ‘the overarching principle guiding the future development of the regime’ (Rajamani, 2011, p. 124), and it must therefore be taken into account.

### 3. Different approaches to CBDR&RC, responsibility, and capability

Ever since its inclusion in Rio, CBDR&RC has been interpreted in various ways, reflecting different views of the world. It will require an innovative interpretation in a climate regime that is applicable to all.

At one end of the spectrum, the world could be divided into two groups of countries – Annex I and non-Annex I (these are often used as synonymous with ‘developed’ and ‘developing’ countries, respectively). However, the Annex I and non-Annex I country categories have a clearly defined and agreed meaning, whereas there are several definitions (and hence interpretations) of what makes a country developed or developing. The UNFCCC – and in particular the Bali Action Plan (UNFCCC, 2008) – has been interpreted by the Africa Group (2009) as creating a ‘firewall’ between the developed and developing countries and particularly their mitigation commitments and actions, respectively.

Although it was perceived by some as a blocking tactic, the interpretation of CBDR&RC that uses the Annex I/non-Annex I distinction serves to promote solidarity among developing countries and help them defend common interests in negotiations with more powerful partners. There is, however, an emerging realization that it is in the interests of developing countries to have an effective regime. Ministers of the BASIC countries have stated that

[d]eveloping countries strongly support international legally binding agreements, as the lack of such agreements hurts developing countries more than developed countries’. (BASIC, 2010, para. 2)

Some developing country commentators have argued that

on balance, it is better for developing countries to have a strict and enforceable regime in which to bind the most powerful economies, rather than settling for a weak regime, which may appear superficially attractive. (Saran, 2010, p. 681)

An insistence on a continued binary division of countries may not be conducive to arriving at an effective regime. Many developing countries offer a more nuanced interpretation beyond such a division, recognizing both that ‘all countries should participate in an enhanced global effort’ and, in the same breath, CBDR&RC (BASIC, 2012, par. 12).

At the other end of the spectrum, some have questioned whether the principle of CBDR&RC is helpful at all. For example, Biniiaz (2002, p. 361) has argued that ‘the CDR principle is not necessary, and it is not helpful’ and that, operationally, differentiation can be better achieved by other means, e.g. differentiation of actions (see Section 5.4 below).

Developed countries have argued with increasing intensity that responsibility and capability should change as countries evolve. The US has argued that the post-2020 regime should take into account the ‘economic development and emissions realities for the time period in question’ (US, 2012a). Similar views have been expressed by Australia, Japan, and the EU. To these countries, the phrase ‘applicable

to all' signals a significant departure from the previous paradigm that seemingly created a 'firewall' between developed and developing countries. Often, issues regarding symmetry have focused on the legal form of the instrument (e.g. EIG, 2012), the commitments contained therein, proposed common accounting rules, comparability across all – not only developed countries – and other elements of 'common templates' for all.

A departure from a firewall between developed and developing countries need not necessarily result in the creation of a world of false equals. Indeed, there may be reasons to phase out certain variants of differential treatment when the time is right. Differential treatment should arguably 'cease to exist when the relevant differences cease to exist' (Rajamani, 2006, p. 162). A future climate regime sensitive to the evolving circumstances of countries need not require abandoning either the CBDR&RC principle or the structure of the UNFCCC because existing structures and mechanisms could be used to address any changes:

Any evaluation of the structure and continuing relevance of differentiated commitments in environmental treaties must be conducted through the existing review mechanisms; the review should be based on multilaterally agreed objective and rational criteria; and the results should be predictable and acceptable to the relevant parties. (Rajamani, 2006, p. 174)

Thus, it is evident that not only is there a wide range of interpretations of CBDR&RC – from binary to the homogenous views of the world – but also that the nature and trajectory of the principle is contested. A strictly binary or completely unitary structure for a climate agreement is not helpful: if the UNFCCC remains frozen in a world-view informed by earlier geopolitical conditions, it becomes irrelevant to developed countries; a unitary approach could be applied not to a single legal agreement, but to identical, symmetrical commitments for all within the UNFCCC, but then developing countries will not (be able to) implement it.

More nuanced interpretations of CBDR&RC are needed. The regime needs to be effective and adequate to the task, and CBDR&RC should be applied in pursuit of the common goal of more ambitious climate action. Inflexible divisions may well hinder the greater effort by countries that have evolved since such divisions were established. Being based on the UNFCCC does not signal inflexibility. Instead, it can promote dynamism. Other categories exist in the UNFCCC, notably that of Annex II with its operational significance given in terms of both mitigation and financial commitments. Categories such as EITs and LDCs are used, but countries not listed. The UNFCCC provides for movement among annexes. Graduation might broaden participation; but, unless this is followed by deeper efforts (Schmalensee, 1998), its objective will remain elusive. Appropriate differentiation should enable those who should and can act to do so. As will be suggested in Section 7, it should address both responsibility and capability, operationalize equity, apply CBDR&RC to mitigation, adaptation, and the means of implementation, and balance symmetry and differentiation.

#### **4. A changing world: not dual nor homogenous**

The world has evolved since the UNFCCC was negotiated over two decades ago. Even in 1992, the earlier sharp division into developed and developing countries was beginning to blur (Saran, 2010). Saran (2010, p. 679) has referred to the UNFCCC as an 'anachronism', and listed the reasons why

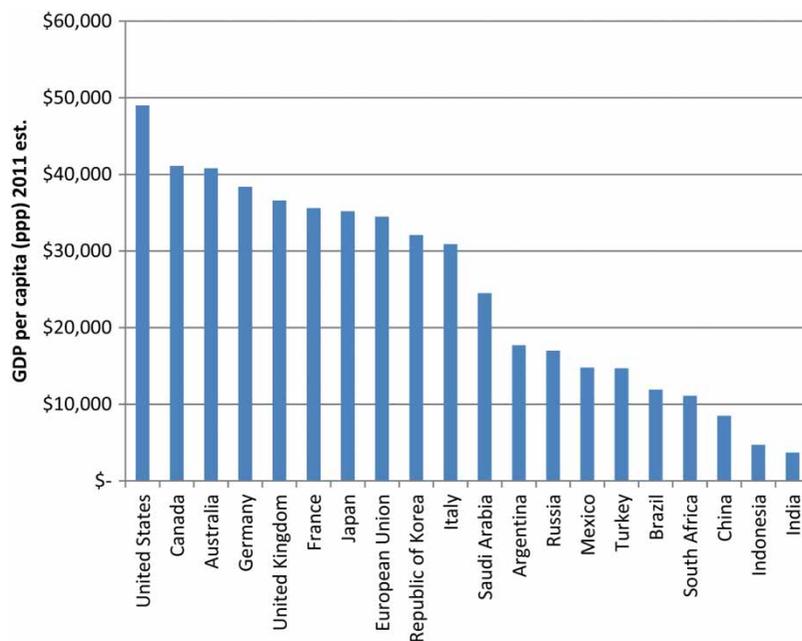
developing countries exhibit ‘fierce resistance’ against attempts to replace a template of historical responsibility with a reciprocity-based regime. Central among these reasons, despite their macro-economic strengths, is that ‘in terms of per capita income, social and welfare indicators, and poverty levels, developing countries still have a long way to go’ (Saran, 2010, pp. 680–681). Yet, the UNFCCC itself is a framework that is capable of evolution (Bodansky & Diringer, 2010).

Although a world of developed and developing countries no longer exists, there is a wide divergence between and among many developing and developed countries (Winkler, Brouns, & Kartha, 2006).

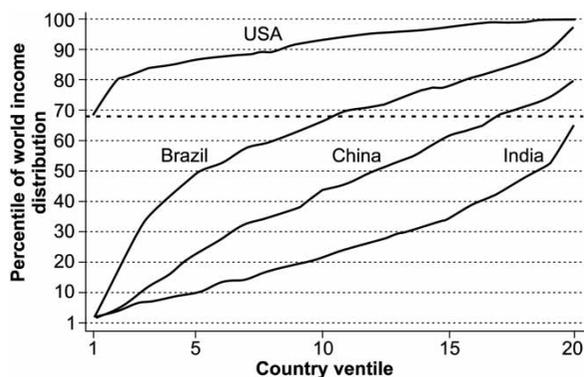
For example, there is a continuum of countries along indicators such as income (which is only one measure of well-being), but they are yet to all reach the same point. Despite the huge strides that ‘emerging economies’ such as Mexico, South Korea, Chile, Brazil, China, India, and others have made, these economies are not in the same position as countries whose economies were industrialized much earlier. Figure 1 shows that there are still significant differences in GDP per capita, even if market exchange rates are adjusted for power-purchasing parity.

These data make clear that US citizens’ income (\$49,000) is still 13 times that of India, almost six times that of China, and more than four times those of ‘average’ Brazilian or South Africans. Compared to the EU or Japan, the ratios are slightly lower, since the average incomes are \$34,500 and \$35,200 per person, respectively. Yet, the average income (per capita GDP) in Brazil is barely over one-third (34%) of the income of ‘average’ Japanese or European citizens.

Averages can hide wide differences. Income inequality exists within countries: in South Africa, for instance, inequality, as measured by cumulative income against cumulative population is particularly



**Figure 1** GDP per capita of G20 countries  
Source: Data from CIA World Factbook (2012).



**Figure 2** Inequality within and across countries  
 Source: Milanovic (2011).

high, with a Gini coefficient of 65%. Data presented by Milanovic (2011; see Figure 2) on inequality make a compelling case that incomes still diverge widely across the world.

Figure 2 shows inequality within countries in the context of global inequality. Populations are divided into 20 equally sized income groups (by household per capita income, in international dollars) or 'ventiles'. There is a spectrum in each country, but the bottom 5% of Americans earn about as much as the richest 5% of Indians. It is worth noting that while inequalities within countries are relevant to a better understanding of the constraints and drivers of national action, and are often used as rhetorical devices to spur action at the national level, such inequalities are not the appropriate subject of negotiations in the context of a climate treaty applicable to nation states. At this international level, differences between countries may be used to argue for 'objective' criteria for graduation, whether per capita emissions or income (this is explored further in Section 5.2).

The world has moved from a climate regime with two broad groups of countries (barely the case in 1992) to one in which there is a continuum. However, as the figures above demonstrate, not all countries are at the same point. How then might CBDR&RC be best applied to reflect this changing context and reality in the climate negotiations, in which the regime as a whole is to be applicable to all?

## 5. Exploring various options for differentiation in a regime applicable to all

If a more nuanced interpretation of CBDR&RC is to be found, a number of options for differentiation should be explored given the evolving context and a regime applicable to all Parties, under the UNFCCC. These options are not mutually exclusive, but may be combined in a number of ways. In particular, the options that address categories of countries can be combined with options that address the nature of commitments that particular countries might undertake.

### 5.1. Creating new categories of countries?

In principle, there is a good case for new categories of countries to be defined. As Rajamani (2006, p. 164) has argued

If the overriding philosophical rationale for the CBDR principle is the Aristotelian conception that justice requires the dissimilar to be treated dissimilarly, it would follow logically that the significant differences within the category of ‘developing countries’ constitute relevant differences to be taken into account in fashioning commitments under environmental treaty regimes.

The analysis of developing countries against many indicators in the previous section confirms that there is a wide range of developing countries. Some authors have argued that industrialized countries should be further differentiated based on their levels of potential and responsibility to mitigate GHG emissions (Brouns & Ott, 2005).

The UNFCCC provides for the possibility of amendments (Article 15) and specifically for new annexes (Article 16). Politically, however, there is likely to be resistance to defining any further country lists, beyond those defined by the category of Annex I and Annex II. Any amendments to this distinction are likely to be perceived by some countries as a fundamental alteration of the structure of the UNFCCC, and its balance of responsibilities, and as therefore undermining it (Brazil, 2009; China, 2012; India, 2012), rather than viewing it as working within and enhancing the UNFCCC.

### 5.2. Facilitating movement between categories of countries?

Another option is for countries to move between categories, for example, to ‘graduate’ into the Annex I or Annex II category. The annexes established in the UNFCCC would thereby become dynamic rather than static lists. In the lead up to the Copenhagen climate change conference in 2009, New Zealand (2008, p. 50, para. 12) advocated

[f]urther and more systematic reflection of the wide diversity of national circumstances among countries, and the significant changes in many countries since the Convention was agreed in 1992.

In this context, New Zealand suggested amending Annex II of the UNFCCC to create ‘a dynamic mechanism to enable adjustment as economies and national circumstances evolve’ (New Zealand, 2008, p. 50).

#### 5.2.1 Triggering graduation based on ‘objective’ criteria

Graduation could be triggered based on the application of a defined set of ‘objective’ criteria. There have been various proposals for such criteria, some of which have been modelled as thresholds that define more graduated approaches (Blanchard, 2002; Michaelowa, Butzengeiger, & Jung, 2005). Developed countries have proposed various ‘objective’ criteria, for example, income (GDP per capita), rates of economic growth or stage of economic development, or contribution to global emissions (Australia, 2008; Japan, 2008). These and several other quantitative indicators can be used to compare countries.

Objective criteria can provide a basis that is outside of pure political negotiation, in which the powerful tend to get their way. It is doubtful that there are objective graduation criteria: there are many

criteria for a single principle (e.g. responsibility), different quantitative indicators can be found, and countries will select the indicators that present the results they wish to see (not only for themselves, but also for other countries). It is likely that such ‘objective’ criteria will be subjectively selected and applied. Indicators quickly become politically-contested issues, and so are not objective in an absolute sense of the word.

However, should such ‘objective’ criteria be chosen multilaterally, the outcomes of calculations based on these criteria would be more acceptable than those selectively chosen by countries. Even then, a country is not likely to accept an automatic recategorization. An alternative could be that as a country reaches a threshold based on ‘objective’ criteria, a negotiation with the country about its movement into a new category is triggered.

Closely related to the issue of ‘objective’ criteria for graduation from one category to another is the issue of ‘objective’ criteria for the selection of mitigation targets, contributions, and pledges. Similar considerations apply here too. It seems fair to say that no country will accept a mitigation target as the outcome of a calculation based on ‘objective’ criteria *a priori*. However, the application of ‘objective’ criteria is likely to result in more objective results than the targets selected by countries as their pledges or contributions. A more objective reference framework – which has been called an ‘equity-based reference framework’ (Baer, Athanasiou, & Kartha, 2008; BASIC experts, 2011) – could thus provide a reference point that is based on what is required by science, is good for development, and is fair. The reference to fairness makes it clear that there would be a normative dimension to this framework. Such an equity-based reference framework is likely to demonstrate what countries should ideally do, and thereby create a tension between this and what they are currently willing to do as put forward in multilateral negotiations.

### 5.2.2. Triggering graduation through membership in another ‘club’

Another approach might be for membership of other ‘clubs’ to lead to graduation. Again, this would more likely trigger a discussion about graduation to another category rather than automatic graduation. Possibilities might include membership of the Organisation for Economic Co-operation and Development (OECD), the EU, G20, or other groupings.

Among the ‘other clubs’ that might be relevant in this context is the OECD. Although there are a few definitions of ‘developed country’ in international environmental agreements, many multilateral environmental agreements use membership in the OECD as a proxy for having acquired developed country status, and therefore include OECD members in the lists of developed countries. The Basel Convention Ban Amendment (which is yet to enter into force), for instance, bans the transboundary movement of all hazardous wastes from OECD to non-OECD states. The Kyoto Protocol’s Annex B also largely coincides with membership of OECD at the time. Membership in the OECD could be made contingent on a requirement to join Annex I of the UNFCCC or Annex B of the Kyoto Protocol and taking on the commitments required of the listed countries.

Membership in the G20, which is attended by Finance Ministers, is another possible ‘club’ that could trigger graduation in the climate regime. The rationale for working with the G20 is that the Finance Ministers that attend possess the means to deliver actions on the ground domestically as well as to catalyse international funding of adaptation and mitigation. The G20 includes all the members of the Major Economies Forum (MEF)<sup>1</sup>, plus Argentina, Saudi Arabia, and Turkey. As its full title indicates,

the MEF is focused on energy and climate, and primarily addresses mitigation. The differences in income levels across the G20 countries are shown in Figure 1.

Any definition of a group raises problems. If OECD membership were chosen, Mexico, South Korea, and others might argue that they are required to do more than, e.g. Qatar. If the G20 were chosen, developing country members of the G20 would argue against this being the reference. For the 'other club' approach, an additional legal question would be that differentiation defined in one context would be applied in another, which might be avoided if countries were to self-elect.

### **5.3. Encouraging self-election into categories of countries?**

The UNFCCC provides for voluntary graduation in respect of mitigation commitments. Article 4.2(g) provides that any non-Annex I Party may notify the Depository – and through it other Parties – of its intention to be bound by subparagraphs 4.2 (a) and (b), that is, the mitigation commitments specific to developed countries. This provision has been used once thus far by Kazakhstan (2002).

UNFCCC Articles 15 and 16 provide for amendments, including amendments to its annexes. Malta, among others, has used these provisions as a member of the EU to gain entry into Annex I. Malta sought to put itself in the same legal position as other members of the EU in relation to the UNFCCC (Malta, 2009). Similar provisions also exist in the Kyoto Protocol for entry into Annex B. Belarus gained admittance into Annex B using these provisions. These provisions are cumbersome and time-consuming, however. Following a protracted process, Belarus has proposed amendments to the Kyoto Protocol for a simplification of procedures for adoption and entry into force of amendments to Annex B (Belarus, 2009).

### **5.4. Encouraging differentiation of commitments and actions across countries?**

A further possibility is that of differentiation by action, rather than categorization, in the sense of listing countries. Biniarz (2002, p. 359) has outlined a softer version of differentiation:

When commitments differ, they can be expressly different. An agreement might say that article X commits these countries to do something, while article Y commits other countries to do something else.

If applied to all Parties, it might still be necessary to identify which countries are required to take on which type of commitments or actions.

A distinction between commitments and actions informed the political agreement on mitigation in Copenhagen, with developed countries taking on mitigation commitments (weakened to 'targets' in Cancun) and developing countries committing to actions. It could even be argued that developing countries have differentiated among themselves in submissions to the UNFCCC, with some submitting economy-wide Nationally Appropriate Mitigation Actions (expressed as deviations below business-as-usual or as reductions in carbon intensity of GDP), others submitting individual actions, and yet others not submitting actions at all. It should be added that some countries may be waiting for the Registry to be established, which links action and support.

This approach has gained traction since Copenhagen. There is a continuum of actions, rather than any strict categorization. In addition to actions that vary in scope (from sectors to economy-wide

pledges), there might also be flexibility in timing such that countries can take actions when ready and able to do so rather than in accord with a prescribed timeline.

However, without a clear context of annexes benchmarked to particular expectations, or an alternative reference framework that requires some countries to do more, there is a danger that this incremental approach will be ineffective. It could well broaden participation, but the ability to differentiate between as many countries as participate may not yield more than isolated domestic action. In order for an effective response to a problem of collective action, more is needed.

### **5.5. Differentiation across time by phasing of commitments?**

Commitments or actions can be differentiated, implemented immediately for some countries, or phased in for others. In the Montreal Protocol, developing countries are given a longer time than developed countries to phase out ozone-depleting substances. For climate change, various authors have explored phased commitments (Den Elzen, Lucas, Berk, Criqui, & Kitous, 2006; Gupta, 1998; Höhne, den Elzen, & Weiss, 2006; Winkler & Vorster, 2007). This approach has not been used in climate change. However, the negotiations on setting a time-frame for peaking of global and national GHG emissions explicitly recognized ‘that the time frame for peaking will be longer in developing countries’ due to poverty and development (UNFCCC, 2011, para. 6). This statement of vision of peaking of emissions has been agreed, but the relationship between peaking at global and national level will continue to be elaborated. The connection between peaking and mitigation commitments or actions is a close one in analytical terms, but requires further political agreement.

## **6. Legal form, symmetry, and differentiation: mitigation, adaptation, and means of implementation**

### **6.1. The issue of legal form**

Another dimension of CBDR&RC is the unresolved matter of legal form. Discussions since the Bali Action Plan (UNFCCC, 2008) have focused on whether the future climate regime should take the form of a legally binding agreement or something softer such as a COP decision, political declaration or other form (Rajamani, 2009). The Durban Platform is understood by some to have resolved the debate in favour of a legally binding agreement. However, the text of the decision and the politics surrounding its adoption make it clear that there are still a range of possibilities (Rajamani, 2009). Whatever the legal form of the overall agreement, the commitments and actions contained within this instrument can take on a different legal character, and can be symmetrical or differentiated across countries. Simply because Parties have agreed to an instrument ‘applicable to all’ does not imply that they have agreed to an instrument that imposes symmetrical commitments on all. Some have made it clear that universality of application does not translate into uniformity of application, even with regard to the legal character of commitments (India, 2012). The US, for instance, understands that the ‘new agreement will have legal force with respect to all Parties, developed and developing countries alike’ (US, 2012b).

In terms of mitigation commitments contained within the agreement, the key question is whether all countries should be bound to the same extent – in response to a demand for legal symmetry – or whether some should take legally binding commitments while others take voluntary actions.

Werksman (2010) has suggested disaggregating what had been treated as a single notion of 'legal form' in negotiations into four elements: (i) the legal form of the agreement; (ii) the legal effect of the commitments under the agreement; (iii) the specific and prescriptive nature of commitment; and (iv) the institutions, procedures, and mechanisms designed to hold Parties accountable for those commitments. Rather than an impossible choice between perfect symmetry or extreme differentiation in relation to a single question (legal form), Werksman's approach could provide more elements across which demands for symmetry and differentiation may be balanced. Whether these four elements are the correct ones to pursue is another matter, but the impossibility of applying symmetry and differentiation to a single item is avoided by having more choices. In addressing differentiation for the future, it is important to distinguish the overall legal form of the agreement from the commitments and actions contained therein.

### **6.2. Symmetry and differentiation applied to mitigation**

Although the demands for symmetry and differentiation appear mutually exclusive, this issue is more complex and requires some unpacking. A particular challenge relates to mitigation commitments and actions.

Firstly, two distinctions regarding mitigation were central to the political compromise in Copenhagen, which was formalized in the negotiating text in Cancun. In the first of these, developed countries take mitigation commitments or targets, while developing countries take actions. The latter is a 'commitment to act', rather than to the outcome. The second distinction is between absolute reductions against a historical base year level and reductions in relative terms. Relative reductions were defined as deviations below business-as-usual, drawing on the Fourth Assessment Report (IPCC 2007a, Box 13.7), and as reductions in the carbon intensity of GDP. Both allow growth in absolute emissions, at a slower pace than would have happened without mitigation action. The distinction between absolute and relative emissions seems to be of continued relevance for the future of the climate regime. The provision of the means of implementation for mitigation actions in developing countries is another important element, which is even more central for adaptation.

### **6.3. Differentiation in funding of adaptation**

If mitigation efforts remain inadequate, adaptation would unavoidably become more important over time. There is growing evidence of a large gap between what countries pledge and the mitigation commitments and actions that would be needed to keep the temperature increase below 2 °C above pre-industrial levels (UNEP, 2010, 2011). There is also a gap in finance, with no clarity on how the politically agreed \$100 billion per year (UNFCCC, 2010) would be mobilized, and who would pick up the remainder either in additional reductions or by payment (Winkler, Vorster, & Marquard, 2009). Differentiation, therefore, must encompass adaptation as well as mitigation and finance, if it is to be relevant to the majority of countries.

Differentiation has not been applied as consistently to adaptation as to mitigation. This seems appropriate to some extent, given the common responsibility for adaptation. All Parties should take responsibility for their citizens and have that duty of care in common. Within countries, and particularly those with high degrees of inequality, this would apply particularly to the poor, who have the lowest capacity to adapt despite their contributing least to the problem.

As outlined above, the UNFCCC places an emphasis on the responsibilities of all Parties to adapt to climate change, but not to the exclusion of support. Differentiation would apply to costs, and developed countries should continue to assist developing countries in providing the means of implementation, e.g. finance, technology and capacity-building, to the most vulnerable.

A key issue for the future of the post-2020 climate regime is the funding of adaptation. Political agreement on fast-start funding was pledged for the period 2010–2012 ‘with balanced allocation between adaptation and mitigation’ (UNFCCC, 2010, para. 8). Priority in funding for adaptation was explicitly given to the most vulnerable developing countries, such as LDCs, SIDS, and Africa. Neither the balance across mitigation and adaptation, nor the differentiation of recipients, was explicit for long-term finance. This poses two inter-related challenges for the future of the climate regime (Ott et al., 2004). First, a secure, adequate, and predictable funding stream must be developed for priority adaptation needs. Second, balance in funding both adaptation and mitigation should be achieved. One possible means is to link the financing of adaptation needs of developing countries to responsibility for the impacts of climate change.

## 7. Defining characteristics of CBDR&RC in a regime applicable to all

Interpreting and applying CBDR&RC for the future climate regime, one that is applicable to all Parties, is one of the central challenges for the climate change negotiations. Although it is difficult to predict where the negotiations will land, the discussion above suggests a set of characteristics that could help define how CBDR&RC may be applied in a regime applicable to all to be agreed no later than 2015 and implemented from 2020.

### 7.1. Promotion of climate action

Common action in service of the ultimate objective of the UNFCCC is at the heart of the principle of equity and CBDR&RC. Common responsibility should trigger broad participation. *Prima facie*, ‘applicable to all’ should mean just that: collective action is required to address the challenge of climate change. Broader participation will need to be followed by deeper participation. In sequence, it will need to take one of two courses: either broader participation, then deeper, or deeper participation for those willing to show leadership, then broader.

Differentiation is often perceived as a barrier to action – and if it is, it has gone too far. Yet, innovative forms of differentiation can promote action, so that differentiation acts in the service of the common environmental goal. CBDR&RC, and differentiation, should be used as a means to increase ambition, not as an excuse for inaction. It should raise the bar on both sides of the historical Annex I/non-Annex I divide. In short, all countries must do more, while some must do more still than others.

### 7.2. Based on the Convention

Strategies based on interpretations that seek to replace the UNFCCC, or those that are perceived to fundamentally alter its structure, are unlikely to succeed. While the UNFCCC is not delivering results fast enough to solve the problem, there is no alternative with the legitimacy of near-universal membership. In addition to the CBDR&RC itself, the UNFCCC remains critical as a central forum. CBDR&RC may have to be applied in an innovative fashion, and its role may need to be defined in relation to other actors in a much more ‘catalytic’ fashion (UNFCCC, 2008, 1(b)(vii) and 1(c)(v)).

### **7.3. Appropriate to current realities**

The context elaborated in Section 4 makes clear that the world is neither divided into two static groups of countries nor is homogenous. Both changes to old patterns and recognition of inequalities between and within countries need to be taken into account, in appropriate settings.

### **7.4. Using UNFCCC mechanisms for dynamism**

Existing mechanisms for review, multilaterally agreed objectives and a rational basis are well established in the UNFCCC and its decisions (see Rajamani, 2006). The review agreed for 2013–2015 provides an opportunity to consider these matters, informed by equity and a range of factors agreed in Cancun and reaffirmed in Durban.

### **7.5. Operationalize equity**

The principle of equity remains essential, both in terms of the fairness of substantive outcomes (on mitigation, adaptation, and the means of implementation), and procedurally. It was argued in Section 2.2 that a narrow focus on differentiation only in relation to mitigation is unlikely to be fair to all.

### **7.6. Applying CBDR&RC to mitigation, adaptation, and means of implementation**

CBDR&RC will need to be applied in creative ways to finance, technology, and capacity building (the means of implementation). It was suggested in Section 2 that ‘common but differentiated’ should apply to adaptation as well, albeit not in the same fashion as mitigation.

### **7.7. Addressing both responsibility and capability**

The two markers in the Rio Principles and the UNFCCC mean that any application must be based on both the contribution to environmental degradation and the capacity to take action. Responsibility should include both historical responsibility and responsibility for the future, albeit in different ways.

### **7.8. Balancing symmetry and differentiation**

As outlined in Section 6, satisfying requirements for both symmetry in some respects and differentiation in others is a key challenge for the negotiations. In terms of legal form, identifying multiple constituent elements provides greater space to achieve both. Symmetry and differentiation are particularly relevant for mitigation commitments and action. In that regard, distinctions between absolute and relative reductions, and commitments to outcomes and implementation, seem likely to remain valid.

## **8. Conclusion**

The contested issue of differentiation, which is *prima facie* in tension with an overall climate regime ‘applicable to all’, has been explored. The future of the regime will still be under the UNFCCC, and hence its principles will apply. The principles of equity and CBDR&RC, despite its absence from the Durban Platform, are central, and must be interpreted in a more nuanced fashion if they are to remain operational elements in the future climate regime.

In this changing context, a number of approaches to differentiation were explored. In principle, new categories of countries could be defined, but this is likely to face strong political resistance. Countries could move between categories ('graduate') according to various criteria – an option that the UNFCCC provides for; they could choose to join another club, such as the OECD or G20; or they could self-elect into categories or even differentiate among themselves implicitly by taking on different commitments and actions. All must do more, while some must do more still than others.

The overall legal form of the agreement should be distinguished from the commitments and actions contained therein. Differentiation on mitigation must consider the distinction between absolute and relative reductions, and commitments to outcomes and implementation. Responsibility and capability need to be applied not only in relation to mitigation but also in relation to adaptation and the means of implementation.

Some possible characteristics for a more nuanced interpretation of CBDR&RC were also offered. CBDR&RC should be applied in a manner that promotes climate action. The regime applicable to all should, as agreed, be based on the UNFCCC and the principle of CBDR&RC should address both responsibility and capability. To be appropriate to a changing world, mechanisms available in the UNFCCC can be used to instil dynamism.

## Note

1. Australia, Brazil, Canada, China, the EU, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, South Africa, the UK, and the USA. The Major Economies Forum was initiated by the Bush administration and was designed to include the major emitting countries on the basis that the mitigation challenge could be addressed among a smaller group on the basis that its members together account for about 80% of global emissions (Baumert, Herzog, & Pershing, 2005; Pew Center, 2005).

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