



## **DRAFT WORKING PAPER**

# **The Principle of Common but Differentiated Responsibilities**

*By Jarrod Hepburn and Imran Ahmad*

A Legal Working Paper in the CISDL “Recent Developments in International Law Related to Sustainable Development” Series<sup>1</sup>

**OPEN DRAFT FOR REVIEW**

**March 2005**  
**Montreal, Canada**

*With gratitude to Foreign Affairs Canada for their contribution which made this legal research possible.*

---

<sup>1</sup> This Legal Working Paper explores the development of a proposed principle in international law, in order to further academic and policy debate on these issues. The Legal Working Paper is part of a Series of Working Papers which investigate the International Law Association 2002 Principles of International Law Related to Sustainable Development, and is intended as a scholarly legal research initiative, not as specific legal advice for any country. The views expressed remain the views of the authors, and are not a position taken by the CISDL.

### *About the CISDL*

The mission of the Centre for International Sustainable Development Law (CISDL) is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

The CISDL is an independent legal research centre which collaborates with the McGill Law Faculty in engaging students and interested faculty members in sustainable development law research and scholarly initiatives. The CISDL also works in cooperation with a network of developing country faculties of law, and is developing closer ties with the Oxford University Faculty of Law and the Université de Montreal, as well as the Yale Law School and the Cambridge University Faculty of Law.

The CISDL is engaged in six primary areas of sustainable development law research, each of which is led by a CISDL Lead Counsel based at a developing or developed country law faculty or international organisation. These include trade, investment and competition law; sustainable developments in natural resources law; biodiversity law; climate change and vulnerability law; human rights and poverty eradication in sustainable development law; and health and hazards in sustainable development law. There are also two Lead Counsels responsible for cross-cutting sustainable development law issues. As a result of its ongoing legal scholarship and research, the CISDL publishes books, articles, working papers and legal briefs in English, Spanish and French. The CISDL hosts academic workshops, dialogue sessions, legal expert panels parallel to international negotiations, law courses and seminar series, and conferences to further its legal research agenda. It provides instructors, lecturers and capacity-building materials for developing country governments and international organisations in national and international law in the field of sustainable development, and works with countries to develop national laws to implement international treaties in these areas.

### *CISDL Location & Contact Information*

The CISDL is based at 3661 Peel St., Montreal, Quebec, Canada, H3A1X1 in offices lent to it by the McGill University Faculty of Law by reason of the involvement of students, graduates and faculty members in its activities. The CISDL also has subsidiary offices at the University of Oxford, the University of Costa Rica, and the University of Nairobi, Kenya.

Directors: Marie-Claire Cordonier Segger, [mcsegger@cisdl.org](mailto:mcsegger@cisdl.org) | Ashfaq Khalfan, [akhalfan@cisdl.org](mailto:akhalfan@cisdl.org)  
Centre for International Sustainable Development Law, 3661 Peel St. McGill Law Faculty, Montreal,  
Quebec H3A 1X1 Canada Tel: 001 514 398 8918 / Fax 001 514 398 8197  
[www.cisdl.org](http://www.cisdl.org)

# The Principle of Common but Differentiated Responsibilities

By Jarrod Hepburn and Imran Ahmad<sup>2</sup>

## 1. Definition of the Principle

Though the principle of “common but differentiated responsibility” has only emerged recently, it draws root from the notion of the “common heritage of mankind” and is a particular manifestation of general principles of equity in international law.<sup>3</sup> This principle acknowledges historical differences in the contributions of developed and developing States to global environmental problems, and addresses their respective economic and technical capacity to tackle these issues. In short, despite their common responsibilities, important differences can be noted between the stated responsibilities of developed and developing countries.<sup>4</sup>

Essentially, the principle of common but differentiated responsibility includes two fundamental components. The first one deals with the common responsibility of States for the protection of the environment, or parts of it, at the national, regional and global levels. It allows and may require all concerned States to participate in international response measures geared at addressing or resolving environmental issues. The second concerns the need to take into account the different circumstances, particularly in relation to each State’s contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat. By taking into consideration the historical contribution of developed and developing States and their respective economic and technical capabilities when it comes to questions pertaining to global environmental issues, the principle aims to provide a much more balanced approach. In fact, its application often leads to environmental standards that prescribe differing obligations on States. It should be noted that despite its recent emergence in the current formulation, the principle of common but differentiated responsibility finds its roots prior to United Nations Conference on Environment and Development (UNCED) and is supported by State practice at the regional and global levels.<sup>5</sup>

The notion of common but differentiated responsibility is comprised of two distinct yet interdependent components: (1) common responsibility and; (2) differentiated responsibility. The first represents the shared obligations of two or more States when the question of protection of a specific environmental resource is raised. Natural resources can be shared, subject to a common legal interest, or not be the property of any State. Common responsibility is likely to apply where the resource is not the property of, or under the exclusive jurisdiction of, a single State. As mentioned earlier, the concept of common responsibility evolved from the legal rules governing resources labelled “common heritage of mankind”.

The second relates to differentiated environmental standards which are articulated around numerous factors such as special needs and circumstances, future economic development of countries, and the

---

<sup>2</sup> Jarrod Hepburn, LL.B. Hons., B.E. Software Hons. (Melb), Legal Researcher, Centre for International Sustainable Development Law (CISDL), and Imran Ahmad, LL.B. (Montreal), LL.M. (Sherbrooke), President of Canadian Bar Association-Youth (Quebec), Clerk at the Federal Court of Canada; Assistant researcher at University of Montreal, Editor at the *Revue Quebecoise de Droit International*, are the authors of this working paper. The views expressed remain the views of the authors, and are not a position taken by the CISDL.

<sup>3</sup> P. Sands, *Principles of International Environmental Law: Frameworks, Standards and Implementation*, 1st edn. (Manchester: Manchester University Press, 1996) at 217.

<sup>4</sup> J.C. Dernbach, “Sustainable Development as a Framework for National Governance” (1998) 49 *Case W. Res.* 1. See also for an overview of this issue, D. French, “Developing States and International Environmental Law: The Importance of Differentiated Responsibilities” (2000) 49 *International & Comparative Law Quarterly* 35.

<sup>5</sup> Sands, *International Environmental Law*, supra note 1 at 155.

historic contribution of a country or group of countries to the creation of an environmental problem. The differentiated responsibility of States for the protection of the environment is a notion that has been widely accepted in treaty and other State practices. Indeed, it often translates into differentiated standards based on a variety of factors. Essentially, differential responsibility promotes substantive equality between developing and developed States within a regime, rather than striving for mere, formal equality. The main goal is to ensure that developing nations will comply with particular legal rules over a given time period, thereby strengthening the regime in the long term. In practical, however, differential responsibility does result in different legal obligations. The techniques available in differentiated responsibility include “grace periods” or delayed implementation, less stringent commitments and international assistance, including financial aid and technology transfer.

## 2. International Legal Meaning of the Principle

The World Summit on Sustainable Development (WSSD), held in Johannesburg, South Africa in September 2002 had the stated objective of having a mature debate on practical ways to understand and achieve progress in the field of sustainable development. In the *Johannesburg Plan of Implementation* (JPOI), the principle of common but differentiated responsibilities is mentioned six different times.<sup>6</sup> Notably, it is mentioned in the Introduction where governments agree to “undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, including the principle of common but differentiated responsibilities as set out in Principle 7 of the Rio Declaration on Environment and Development”.

The pursuit of sustainable development includes non-environmental goals such as equity, poverty eradication and development. The principle of common but differentiated responsibilities therefore can be said to apply not only to environmental goals but in social and economic fields as well. Such a broad interpretation of the principle is justified for two primary reasons. The first, as recognized since the UNCED, the environment cannot be protected in isolation from the social and economic context. Secondly, although the principle is grounded on the greater contribution of developed countries to global environmental degradation, environmental degradation often has negative social and economic effects. Remedial measures therefore need to be taken in each of the three pillars of sustainable development.

A broader interpretation of the principle is also supported by the International Legal Association’s 2002 *New Delhi Principles*.<sup>7</sup> The ILA describes the principle as entailing “a duty to co-operate in the achievement of global sustainable development,” and calls for recognition of “the special needs and interests of developing countries and of countries with economies in transition,” in particular those countries “affected adversely by environmental, social and developmental considerations.”<sup>8</sup> Further, the *Principles* encourage developed countries to “play a leading role and assume primary responsibility in matters of relevance to sustainable development.” These statements place the principle under all three pillars of sustainable development and give it a larger role than suggested by its environmental origins.

This being said, the principle of common but differentiated responsibilities is not identical to similar principles in human rights, labour and trade regimes. In fact, developed countries have not willingly accepted the idea that they hold greater responsibility for ensuring social protection and economic

---

<sup>6</sup> See M.-C. Cordonier Segger, A. Khalfan, M. Gehring, & M. Toering, “Prospects for Principles of International Sustainable Development Law after WSSD: Common but Differentiated Responsibilities, Precaution and Participation” (2003) RECIEL 12:3 at 54.

<sup>7</sup> International Law Association, *2002 New Delhi Declaration on Principles of International Law Relating to Sustainable Development* (London: ILA, 2002).

<sup>8</sup> *Ibid.*, paras. 3.1 and 3.3.

development.<sup>9</sup> On the other side of the debate, developing countries claim that developed countries should have greater responsibilities due to unequal benefits from the world economy, or as compensation for the effects of colonialism.<sup>10</sup> However, developed countries have been hesitant to join any international consensus on such interpretations. Keeping in mind the reality of inter-sectoral concerns, the principle of common but differentiated responsibilities should be used to interpret and strengthen other corresponding principles of sustainable development law in situations of overlap or conflict between social, economic and environmental regimes.

In short, it can be argued that the principle of common but differentiated responsibilities is part of international law. The principle has been recognized at the WSSD and in other soft law instruments; furthermore, it has been incorporated into various treaties, international judicial decisions and intergovernmental organizations. However, due to the asymmetrical legal responsibilities it entails for countries, there has been significant debate surrounding the interpretation of the principle. The primary casualty has been the principle which has been rendered somewhat fragile. Nonetheless, in the larger scheme of things, the principle has been strengthened and has greatly benefited from the WSSD and JPOI.

### 3. The Principle in International Treaties

As mentioned above, the concept of common responsibility evolved from the notion of “common heritage of mankind”. There are several examples in environmental treaties of how this idea evolved. The 1952 *Tuna Convention* set up a conservation regime in order to “best serve the common interest of mankind, and Article II(8) described tuna and other fish as being of “common concern” to the parties.<sup>11</sup> The *Outer Space Treaty* recognized outer space and the moon as being the “province of all mankind”.<sup>12</sup> Another example is the Preamble of the *Ramsar Convention* which highlights waterfowl as being an “international resource”.<sup>13</sup> The preamble to the *World Heritage Convention* speaks of the “world heritage of mankind as a whole,” and Article 6 recognizes a duty of the international community to cooperate to protect it.<sup>14</sup>

In later treaties, the notion of differentiated responsibility arises alongside the recognition of common responsibilities. The 1982 *UNCLOS* aims to create “a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries.”<sup>15</sup> Article 1 of the *International Undertaking on Plant Genetic Resources* of 1983 declares plant genetic resources to be a “heritage of mankind,” while Article 6 calls for international co-operation in “establishing or strengthening the capabilities of developing countries ... with respect to plant genetic resource activities.”<sup>16</sup>

---

<sup>9</sup> See M. Drumble, “Poverty, Wealth and Obligation in International Environmental Law” (2002) 76 Tul. L. Rev. 843 at 926 & 936.

<sup>10</sup> P. Alston and G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 Human Rights Quarterly 156, at 187–191.

<sup>11</sup> *International Convention for the High Seas Fisheries of the North Pacific Ocean*, 9 May 1952, United States-Canada-Japan, 4 U.S.T. 380, T.I.A.S. No. 2786.

<sup>12</sup> *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 Jan. 1967 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force 10 Oct. 1967), Article 1.

<sup>13</sup> *Convention on Wetlands of International Importance, Especially as Waterfowl Habitat*, 2 Feb. 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245, Art. 2(3), Preamble.

<sup>14</sup> *Convention Concerning Protection of World Cultural Property and Natural Heritage*, 23 Nov. 1972 U.S.T. 40.

<sup>15</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, UN Doc. A/CONF.62/122 21 ILM 1245 (entered into force 16 November 1994).

<sup>16</sup> Food and Agriculture Organization, *International Undertaking on Plant Genetic Resources* (1983), art. 1.

The 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer* acknowledges in its preamble that “special provision is required to meet the needs of developing countries, including the provision of additional financial resources and access to relevant technologies.” Article 5 deals solely with the “special situation of developing countries,” granting them a ten-year grace period for compliance and noting that their achievement of the goals set by the *Protocol* is dependent on financial co-operation and technology transfer from developed countries under Articles 10 and 10A.<sup>17</sup>

The *United Nations Framework Convention on Climate Change* of 1992 makes much use of the principle of common but differentiated responsibilities. It describes climate change as “a common concern of humankind”<sup>18</sup> but also recognizes the “special difficulties” and legitimate priority needs of developing countries for sustained economic growth and poverty eradication. The preamble refers to the principle directly, acknowledging that the problem “calls for the widest possible cooperation by all countries ... in accordance with their common but differentiated responsibilities.” Article 3(1) mentions the principle in the same terms again, encouraging Parties to protect the climate system “in accordance with their common but differentiated responsibilities and respective capacities.” It further calls on developed countries to take the lead in combating climate change. Article 3(2) sets out the principle mentioned in the preamble that the “specific needs and special circumstances of developing country Parties ... should be given full consideration.” The various commitments established by Article 4(1) are directed at all Parties but are all subject to the principle. Certain commitments in Article 4(2) are directed only at developed countries in light of their different “starting points and approaches, economic structures and resources bases.” These commitments include financial support for and technology transfer to developing countries. Article 12 further places developed countries under requirements to report on the specific measures they have taken to meet their obligations; developing countries are not subject to these requirements. An extra level of differentiation is recognised by Article 4(6) for several Eastern European countries “undergoing the process of transition to a market economy;” although considered developed, these countries are granted “a certain degree of flexibility” in meeting their obligations.

The 1997 *Kyoto Protocol to the Climate Change Convention* similarly implements the principle in its provisions. Article 10 refers to Parties’ common but differentiated responsibilities, and the *Protocol* refers back to the three-tier differentiation made in the *Convention* of developed, developing and developed but transitioning Parties. Developed nations make certain commitments to reduce greenhouse gas emissions, while transition nations have lesser commitments and developing nations make no commitments at all under the *Protocol*.<sup>19</sup>

In the Prologue of the *United Nations Convention to Combat Desertification* (UNCCD), Parties acknowledge that “desertification and drought are problems of global dimension in that they affect all regions of the world and that joint action of the international community is needed to combat desertification.”<sup>20</sup> One of the principles that guides the Parties, according to Article 3, is the “full consideration [of] the special needs and circumstances of affected developing country Parties, particularly the least developed among them.” Under Article 4(2)(b), Parties “shall give due attention ... to the situation of affected developing country Parties with regard to international trade, marketing arrangements and debt.” Article 4(3) states that developing countries are eligible for assistance in the implementation of the *Convention*. Article 5 sets out the common responsibilities of all affected country Parties (that is, those Parties to the *Convention* that are affected by desertification), while Article 6 sets out responsibilities imposed solely on

---

<sup>17</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 154 (entered into force 1 January 1989), as amended by the *London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, June 29, 1990, UNEP/OZ.L.Pro.2.3, art 5(1) [hereinafter *Montreal Protocol*].

<sup>18</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849, Preamble.

<sup>19</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, 37 I.L.M. 22 (1998), arts. 3(1) and (5) [hereinafter *Kyoto Protocol*].

<sup>20</sup> *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*, 17 June 1994, 33 I.L.M. 1328 [hereinafter *Desertification Convention*].

developed country Parties. These obligations include the provision of “substantial financial resources” from government sources to assist developing countries, the encouragement of financial support from private and non-governmental sources, and technology transfer to all other Parties but particularly to developing country Parties.<sup>21</sup> Obligations for research and development relevant to desertification and drought are imposed by Article 17, but only “according to [Parties’] respective capabilities.” Article 20 restates Parties’ financial obligations in more detail, and notes that “[t]he full implementation by affected developing country Parties, particularly those in Africa, of their obligations under the Convention will be greatly assisted by the fulfilment by developed country Parties of their obligations under the Convention, including in particular those regarding financial resources and transfer of technology.” The *Convention* also has a number of Annexes that provide for region-specific differentiated obligations – for example, in Annex I, Article 4 imposes certain obligations on African country Parties while Article 5 imposes obligations on developed country Parties to assist African country Parties.

The preamble of the *Convention on Biological Diversity* affirms that “conservation of biological diversity is a common concern of humankind,” while also acknowledging that “special provision is required to meet the needs of developing countries.”<sup>22</sup> All Parties are obliged to “cooperate in providing financial and other support ... particularly to developing countries” for in- and ex-situ conservation.<sup>23</sup> Article 16(2) states that Parties (in practice, developed country Parties) providing access to and transfer of technology to developing countries must do so under “fair and most favourable terms.” Article 20 contains a more clearly differentiated responsibility: developed countries must provide financial resources to developing countries to enable the latter to implement the *Convention*. Like the UNCCD, this *Convention* recognises in Article 20(4) that developing countries’ ability to meet their obligations depends on developed countries implementing their own commitments on financial resources and technology transfer.

In the preamble of the *International Treaty on Plant Genetic Resources for Food and Agriculture*, it is recognised that “plant genetic resources for food and agriculture are a common concern of all countries.”<sup>24</sup> Nevertheless, as with the conventions mentioned above, various responsibilities are imposed (at least in practice) on developed countries for the benefit of developing countries and transition countries. Article 7.2(a) calls for international cooperation to be directed to “establishing or strengthening the capabilities of developing countries and countries with economies in transition,” while Article 8 requires Parties to “promote the provision of technical assistance to Contracting Parties, especially those that are developing countries or countries with economies in transition.” Article 13.2(b)(iii) further requires that technology transfer to developing or transition countries happen “under fair and most favourable terms.” Scientific research is “preferably, and where possible,” to be carried out in developing and transition countries to develop capacity for such research in fields where it is needed.<sup>25</sup> It is again noted that “the extent to which Contracting Parties that are developing countries and Contracting Parties with economies in transition will effectively implement their commitments under this Treaty will depend on the effective allocation, particularly by the developed country Parties, of [financial] resources.”<sup>26</sup>

The *POPs Convention* notes in its preamble “the respective capabilities of developed and developing countries, as well as the common but differentiated responsibilities of States.”<sup>27</sup> It provides for exceptions from some obligations and requires that the Conference of the Parties “take due account of

<sup>21</sup> *Ibid.*, arts. 6(b), (d) and (e).

<sup>22</sup> *United Nations Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 822.

<sup>23</sup> *Ibid.*, arts. 8(m) and 9(e).

<sup>24</sup> *International Treaty on Plant Genetic Resources for Food and Agriculture*, November 2001 (entered into force 29 June 2004).

<sup>25</sup> *Ibid.*, art 13.2(c).

<sup>26</sup> *Ibid.*, art. 18.4(b).

<sup>27</sup> *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001 (entered into force 17 May 2004).

the special circumstances of the developing country Parties and Parties with economies in transition” in deciding whether to grant the exceptions.<sup>28</sup> Article 12(2) obliges Parties to provide “timely and appropriate technical assistance” to developing and transitioning countries to assist them to meet their obligations under the *Convention*; Article 13(2) sets out analogous requirements for financial assistance. The 1996 Protocol to the *London Convention* imposes another technology transfer obligation on developed country Parties for the benefit of “developing countries and countries in transition to market economies, on favourable terms.”<sup>29</sup>

When reading the passages from the conventions referred to above, each convention must be placed in its specific context. However, the idea of “commonality” to a shared consequence is evident. Despite each instrument being specific in its objectives and scope, it is clear that each State has a responsibility to prevent harm, in particular through the adoption of environmental standards and international environmental obligations. It should also be noted that the principle of common but differentiated responsibilities reinforces the integrative potential of international sustainable development by balancing global environmental problems with economic development.<sup>30</sup> Such an approach attempts to correlate the objective of poverty eradication to that of equity. The logic is that since developed nations have significantly contributed to most global environmental problems, they should be expected to take the lead due in part to their superior ability to address them both economically and technologically.

Many agreements under the WTO implement “special and differential treatment” provisions, which relieve both developed and developing countries from their common responsibilities of international trade in certain circumstances, for the benefit of developing countries. Some provisions grant developing countries longer time periods to implement commitments, while others allow developed countries to treat developing countries more favourably to increase their trading opportunities. Other provisions require technical assistance and technology transfer from developed to developing countries.

The “Enabling Clause” of the GATT, for example, sets up the Generalized System of Preferences under which “parties may accord differential and more favourable treatment to developing countries, without according that treatment to other contracting parties.”<sup>31</sup> Part IV of the GATT also reminds developing countries that when they grant concessions to developing countries they should not expect similar concessions to be granted in return by the developing countries.<sup>32</sup> The *TRIPS Agreement* granted extra time to developing countries before requiring implementation, although this time period has now expired.<sup>33</sup> For the least-developed countries, on the other hand, implementation is effectively delayed indefinitely – an initial delay of 10 years followed by extensions upon request to the TRIPS Council.<sup>34</sup> Article 66:2 of the *TRIPS Agreement* obliges developed countries to provide incentives to “enterprises and institutions in their territories” for technology transfer to developing countries “in order to enable them to create a sound and viable technological base.” Under the *SPS Agreement* developing countries may request time-limited exemptions from their obligations, and (developed) countries must also “consider providing” technical assistance to exporting developing countries to allow them to meet any SPS standards set by the importing developed country.<sup>35</sup> These “special and differential treatment” provisions can be viewed as an economic manifestation of the principle of common but differentiated responsibilities.

---

<sup>28</sup> *Ibid.*, art. 4(7).

<sup>29</sup> 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, Nov. 13, 1046 U.N.T.S. 120, 11 I.L.M. 1294 (1972), art. 13(1.5).

<sup>30</sup> S.R. Chowdhury, “Common but Differentiated State Responsibility in International Environmental Law: From Stockholm (1972) to Rio (1992)” in K. Ginther et al., *Sustainable Development and Good Governance* (The Hague: Martinus Nijhoff, 1995) at 322, 331.

<sup>31</sup> *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903, 28 November 1979, B.I.S.D. 203, para. 1.

<sup>32</sup> World Trade Organization, *General Agreement on Tariffs and Trade 1947*, art. XXXVI(8).

<sup>33</sup> World Trade Organization, *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, art. 65:2.

<sup>34</sup> *Ibid.*, art. 66:1.

<sup>35</sup> World Trade Organization, *Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)*, arts. 9.2 and 10.3.

The principle also informs Article 2(3) of the *International Covenant on Economic, Social and Cultural Rights*, which provides that “developing countries ... may determine to what extent they would guarantee the economic rights recognized in the present Convention to non-nationals.”<sup>36</sup>

## 4. The Principle in International Case Law and Acts of IGOs

Since the principle of common but differentiated responsibility is a relatively recent notion, it has yet to be applied in a widespread manner in international case law. However, there are various references, in both environmental and health contexts, in trade law jurisprudence.

In the *Shrimp/Turtle* case, the Appellate Body of the World Trade Organization did not refer explicitly to the principle but arguably made use of it in its reasoning. The United States had imposed an import ban on shrimp not caught with US-approved “Turtle Excluder Devices” (TEDs), ostensibly in order to protect certain species of sea turtle whose existence was being threatened by commercial shrimp harvesting. Several developing countries complained to the WTO that the ban was simply a protectionist measure, designed to support the American shrimp industry at the expense of the developing countries’ shrimp industry that could not afford the TEDs. The Appellate Body sympathized with the environmental intentions of the US, but agreed with the complainants that the import ban constituted unjustified discrimination. It noted: “We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”<sup>37</sup> Since the US had failed to negotiate effectively with developing countries on the transfer of the TED technology – or, in other words, since the US had failed to consider the differentiated responsibilities of developing countries – the import ban was struck down. The later WTO Compliance Panel decision in the same case reminded States of their “common but differentiated responsibilities to conserve and protect the environment.”<sup>38</sup>

The Appellate Body again hinted at the principle of common but differentiated responsibilities in the *Asbestos* case. In discussing whether a trade measure was “necessary” to meet a country’s health policy goals, it considered the meaning of “reasonably available alternatives,” and found that “an alternative measure which is impossible to implement is not ‘reasonably available.’”<sup>39</sup> Applying the Panel’s comments from the *Thailand – Cigarettes* case, the Appellate Body found further that reasonably available alternatives are measures that a country “could reasonably be expected to employ.”<sup>40</sup> From this it can be concluded that if a proposed alternative in some case is simply beyond the means of a developing country, that country is under no obligation to attempt to implement it but may adopt the trade measure in dispute as a “necessary” one. These statements from the Appellate Body suggest that the practical situations in which developing countries find themselves will affect their international responsibilities.

The Environment Fund established under the United Nations Environment Programme (UNEP) is one example of the practical implementation of differentiated responsibility by an IGO. The

---

<sup>36</sup> *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, (entered into force 3 January 1976), art. 2(3).

<sup>37</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 20 September 1999, WTO Doc. WT/DS58/AB/R (Appellate Body Report), para. 165.

<sup>38</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 15 June 2001, WTO Doc. WT/DS58/RW (Panel Report), para. 7.2.

<sup>39</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)*, 12 March 2001, WTO Doc.

WT/DS135/AB/R (Appellate Body Report), para. 169.

<sup>40</sup> *Ibid.*, para. 170.

Environment Fund was established in 1972 to finance environment programmes around the world, with projects proposed for 2005 in areas including Africa, Europe, Central Asia, West Asia and South America.<sup>41</sup> Countries' contributions to it from 1973 to 2005 reflect the different means at each country's disposal for meeting their environmental obligations – more than 95% of the Fund's contributions come from 20 developed countries.<sup>42</sup> The Global Environmental Facility (GEF) is a similar operation, designed to address several major global environmental issues and funded by developed countries (32 donor countries pledged US\$3 billion for the GEF's operations from 2002 to 2006). GEF Projects have been funded in 140 developing and transitioning countries.<sup>43</sup>

UNESCO and the World Heritage Fund operate on the same principles, with the 40 poorest countries contributing around 0.001% and Japan contributing around 25% of UNESCO's 2000 budget.<sup>44</sup> The Multilateral Fund for the Implementation of the Montreal Protocol is another example. Its contributors are exclusively developed countries, with its main goal being to assist certain developing country parties (in fact, 143 of the 189 parties) to comply with the control measures of the Montreal Protocol.<sup>45</sup>

## 5. The Principle in Soft Law

The recent WSSD conference has strengthened and broadened the principle of common but differentiated responsibility. In fact, in the JPOI, the references to the Rio Principles singled out the principle of common but differentiated responsibility. Furthermore, it was referred to specifically as a guiding principle when it came to efforts relating to: the enhancement of international cooperation;<sup>46</sup> unsustainable patterns of consumption and production;<sup>47</sup> transboundary air pollution;<sup>48</sup> and energy and climate change.<sup>49</sup> The importance of the principle is highlighted at paragraph 81 of the JPOI:

The implementation of Agenda 21 and the achievement of the internationally agreed development goals, including those contained in the Millennium Declaration as well as in the present plan of action, require a substantially increased effort, both by countries themselves and by the rest of the international community, based on the recognition that each country has primary responsibility for its own development and that the role of national policies and development strategies cannot be overemphasized, taking fully into account the Rio principles, including, in particular, the principle of common but differentiated responsibilities.<sup>50</sup>

Paragraph 81 explicitly recognizes the principle of common but differentiated responsibilities as a guiding principle in the implementation of *Agenda 21* and internationally agreed development goals. The above-mentioned passage would suggest that the principle would not only apply to environmental issues but could be extended to other spheres related to social development goals. Such a broad interpretation of the scope of the principle can be justified for two reasons. The first is that it is widely

---

<sup>41</sup> UNEP, List of Priority UNEP Project Proposals for Possible Funding by Donors: <<http://www.unep.org/rmu/en/projectlist.htm>>.

<sup>42</sup> UNEP, Resource Mobilization Unit: <[http://www.unep.org/rmu/en/Financing\\_environmentfund.htm](http://www.unep.org/rmu/en/Financing_environmentfund.htm)>.

<sup>43</sup> GEF, What is the GEF: <[http://www.gefweb.org/What\\_is\\_the\\_GEF/what\\_is\\_the\\_gef.html](http://www.gefweb.org/What_is_the_GEF/what_is_the_gef.html)>.

<sup>44</sup> UNESCO, Programme and Budget: <[http://portal.unesco.org/en/ev.php-URL\\_ID=3978&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=3978&URL_DO=DO_TOPIC&URL_SECTION=201.html)>.

<sup>45</sup> Multilateral Fund for the Implementation of the Montreal Protocol: <<http://www.multilateralfund.org>>.

<sup>46</sup> Johannesburg Declaration on Sustainable Development, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 Aug.–4 Sept. 2002, A/CONF.199/20 (New York: United Nations, 2002), paras. 2,4 and 81. See also Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 4 Sept. 2002, UN Doc. A/CONF.199/20: <[http://www.un.org/esa/sustdev/documents/WSSD\\_PoI\\_PD/English/POTTOC.htm](http://www.un.org/esa/sustdev/documents/WSSD_PoI_PD/English/POTTOC.htm)>.

<sup>47</sup> *Ibid.*, at para. 2.

<sup>48</sup> *Ibid.*, at para. 14.

<sup>49</sup> *Ibid.*, at para. 39.

<sup>50</sup> *Ibid.*, at para. 81.

accepted that the environment cannot be protected in isolation of the social and economic context. Secondly, due to the negative effects that environmental degradation can have on society and the economy, there is a real need to integrate remedial measures in order to include all three pillars of sustainable development.

The WSSD's earlier 1995 Copenhagen Declaration recognized that "the formulation, and implementation of strategies, policies, programmes and actions for social development are the responsibility of each country and should take into account the economic, social and environmental diversity of conditions in each country."<sup>51</sup> Many provisions of the Declaration call for all countries to support developing and transitioning countries in various ways going beyond environmental protection – for example, Commitment 5 requires "cooperation to assist developing countries, at their request, in their efforts to achieve equality and equity and the empowerment of women," while Commitment 7 requires support for "the domestic efforts of Africa and the least developed countries to implement economic reforms, programmes to increase food security, and commodity diversification."

The notion of differentiated responsibility of States, in regards to the protection of the environment, has been generally accepted in treaty and State practices. The consequential differentiated standards are justified on the basis of special needs and circumstances, future economic development of countries and historic contributions to the creation of a given environmental problem. To this end, Principle 23 of the 1972 *Stockholm Declaration* recognized special needs a State might have:

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the *applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.*<sup>52</sup>

The 1974 *Charter of Economic Rights and Duties of States* articulates the same principle in more precise terms:

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavor to establish their own environment and development policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment.<sup>53</sup>

Principle 6 of the *Rio Declaration* highlighted the obligation to keep in mind the special needs of developing nations:

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International

---

<sup>51</sup> *World Summit for Social Development Copenhagen Declaration*, U.N. Doc. A/CONF.166/9 (1995), para. 28.

<sup>52</sup> *Stockholm Declaration on the Human Environment*, UN Doc. A/C. 48/14 (1972), 11 ILM 1461 (1972) Principle 23.

<sup>53</sup> *Charter of Economic Rights and Duties of States*, UNGA Res. 3281 (XXIX) (12 Dec. 1974), Art. 30.

actions in the field of environment and development should also address the interests and needs of all countries.<sup>54</sup>

In essence, differential responsibility aims to achieve substantive equality between developing and developed States with a regime. The objective is to ensure that developing nations can comply with stated legal rules over a given timeframe. This will allow the overall strengthening of the regime.

The 1996 *Leipzig Declaration on Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture* confirms States' "common and individual responsibilities" for plant genetic resources.<sup>55</sup> It calls for access to and sharing of genetic resources and technologies to achieve food security, and notes that this access and sharing must take place on "fair and most favourable terms" to developing countries.<sup>56</sup> The associated *Global Plan of Action* encourages developed countries to give funding to developing and transitioning countries for its implementation.<sup>57</sup> The principle is also expressly reaffirmed in the 1996 *Istanbul Declaration on Human Settlements*.<sup>58</sup>

## 6. Potential Status of the Norm

The principle of common but differentiated responsibilities is certainly part of international law, following recognition in many major international legal instruments (including the *Climate Change Convention* and *Kyoto Protocol*, and several WTO Agreements, as well as several non-binding instruments such as the *Rio Declaration*), in WTO jurisprudence, and in the State practice of various global environmental funds. The international community also appears to acknowledge that its scope extends beyond the environment to permit differentiated responsibilities for developing countries in economic and social fields as well. Despite this, its *opinio juris* seems limited to the binding international laws in which the principle appears, and it is difficult to conclude that the principle has crystallized into a norm of customary international law.

The WSSD's application of the principle has and will continue to strengthen the notion. In fact, it will encourage coherence in the manner in which both developed and developing countries divide responsibilities in the environmental, economic and social spheres. It could be argued that the strength and weakness of the principles lies in the explicit recognition of greater responsibility by developed nations on the basis of greater contribution to global problem. It is precisely for this reason that developed nations have been somewhat reluctant to recognize the full potential of the principle which would, at the end of the day, require them to play a more active role in all three pillars of sustainable development. The United States, for example, issued the following statement at the UNCED:

The United States understands and accepts that Principle 7 of the Rio Declaration on Environment and Development highlights the special leadership role of the developed countries, based on their industrial development, experience with environmental protection policies and actions, and wealth, technical expertise and capabilities. The United States does not accept any interpretation of principle 7 that would imply a

<sup>54</sup> *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/6/Rev.1, (1992), 31 I.L.M. 874 (1992), Principle 6.

<sup>55</sup> *Leipzig Declaration on Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture*, 23 June 1996, para. 2.

<sup>56</sup> *Ibid.*, para. 7.

<sup>57</sup> FAO, *Implementation and Financing of the Global Plan of Action*. <<http://www.fao.org/ag/AGP/AGPS/GpaEN/gpaimpf.htm>>.

<sup>58</sup> *Istanbul Declaration on Human Settlements*, 1996, para. 10.

recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.<sup>59</sup>

In light of this, while international support for the principle of common but differentiated responsibilities is undoubtedly growing, it can perhaps best be viewed at present as a treaty norm with instances of practical implementation but not yet enshrined in customary international law.

---

<sup>59</sup> U.S. Department of State, U.S. Interpretive Statement on World Summit on Sustainable Development Declaration: <<http://www.state.gov/s/l/38717.htm>>.

## Appendix

### **World Summit on Social Development and Johannesburg Plan of Implementation**

[http://www.johannesburgsummit.org/html/documents/summit\\_docs.html](http://www.johannesburgsummit.org/html/documents/summit_docs.html)

### **Rio Declaration**

<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

### **New Delhi Principles**

<http://www.ila-hq.org/pdf/Sustainable%20Development/Sus%20Dev%20Resolution%20%2B%20Declaration%202002%20English.pdf>

### **International Convention for the High Seas Fisheries of the North Pacific Ocean**

<http://www.oceanlaw.net/texts/nphs.htm>

### ***Outer Space Treaty***

<http://www.oosa.unvienna.org/SpaceLaw/outersptxt.htm>

### ***Ramsar Convention***

[http://www.ramsar.org/key\\_conv\\_e.htm](http://www.ramsar.org/key_conv_e.htm)

### ***World Heritage Convention***

[http://whc.unesco.org/world\\_he.htm](http://whc.unesco.org/world_he.htm)

### ***United Nations Convention on the Law of the Sea***

[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)

### **International Undertaking on Plant Genetic Resources**

<ftp://ext-ftp.fao.org/ag/cgrfa/Res/C8-83E.pdf>

### **Montreal Protocol**

<http://www.unep.org/ozone/Montreal-Protocol/Montreal-Protocol2000.shtml>

### **Climate Change Convention**

[http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php)

### **Kyoto Protocol**

<http://unfccc.int/resource/docs/convkp/kpeng.html>

*United Nations Convention to Combat Desertification*

<http://www.unccd.int/convention/text/convention.php>

*Convention on Biological Diversity*

<http://www.biodiv.org/convention/articles.asp>

*International Treaty on Plant Genetic Resources for Food and Agriculture*

<ftp://ext-ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf>

*Stockholm Convention on Persistent Organic Pollutants (POPs Convention)*

[http://www.pops.int/documents/convtext/convtext\\_en.pdf](http://www.pops.int/documents/convtext/convtext_en.pdf)

### **Protocol to the London Convention**

<http://www.londonconvention.org/documents/lc72/PROTOCOL.pdf>

*GATT 1947*

[http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

*TRIPS Agreement*

[http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)

*Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*

[http://www.wto.org/english/docs\\_e/legal\\_e/15sps\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm)

*International Covenant on Economic, Social and Cultural Rights (ICESCR)*

[http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm)

*WTO US – Import Prohibition of Certain Shrimp and Shrimp Products (Appellate Body)*

<http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.doc>

### **WTO US – Import Prohibition of Certain Shrimp and Shrimp Products (Compliance Panel)**

<http://docsonline.wto.org/DDFDocuments/t/WT/DS/58RW.doc>

*WTO EC – Measures Affecting Asbestos and Asbestos-Containing Products*

<http://docsonline.wto.org/DDFDocuments/t/WT/DS/135ABR.doc>

### **1995 Copenhagen Declaration**

<http://www.un.org/esa/socdev/wssd/agreements/>

*Stockholm Declaration*

<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>

*Charter of Economic Rights and Duties of States*

<http://www.un.org/documents/ga/res/39/a39r163.htm>

**Leipzig Declaration**

<http://www.fao.org/ag/AGP/AGPS/GpaEN/leipzig.htm>

**Istanbul Declaration**

<http://www.unchs.org/unchs/english/hagenda/ist-dec.htm>