The Principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR&RC) and the Compliance Branch of the Paris Agreement

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Climate Change and the Paris Agreement

Multiple lines of evidence have shown that the climate is changing all over the world and this is largely due to anthropogenic greenhouse gas emissions\(^1\). This alteration is having an important impact on human development by increasing the severity of droughts, land degradation and desertification, the intensity of floods and tropical cyclones, the incidence of heat-related mortality; and decreasing water availability, crop yield and food security\(^2\).

The international community has identified climate change as a global problem and hence the field of international climate change law has evolved rapidly\(^3\). The UNFCCC\(^4\), as a framework instrument, is 'the focal point for the development of the norms and principles of international climate change law'\(^5\). In December 2011, the Parties to the UNFCCC decided to 'launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties'\(^6\). Following intensive

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\(^3\) Cinnamon P. Carlarne, The Oxford Handbook of International Climate Change Law, (Oxford University Press, 2016), pp. 3-25
\(^5\) Supra note 3
negotiations, in December 2015, Parties finally adopted the Paris Agreement (PA)⁷. Given its architecture, the PA represents an outstanding compromise⁸. It is often soft and mainly procedural. The PA serves as a balance between international legal certainty and national sovereignty (hybrid approach) as it provides for a rules-based regime under an international treaty (top-down), including nationally determined contributions (NDCs)⁹ elaborated by the Parties (bottom-up)¹⁰. An enhanced transparency framework was established in order to promote effective implementation¹¹. Moreover, a transparent, non-adversarial and non-punitive mechanism to promote compliance was also established¹². The PA is a legal agreement applicable to all, with no differentiation between developed and developing countries, but it is still based on the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC)¹³, thus it provides some flexibility to developing countries based on their national circumstances¹⁴.

**The Principle of Common but Differentiated Responsibilities and Respective Capabilities**

The principle of CBDR&RC has, from the beginning, underpinned the international efforts to address climate change¹⁵. The principle is a defining feature of the international climate change regime given that it recognizes that parties vary both in their levels of responsibility for climate change and in their capacities to cope with it. As a universally accepted principle, CBDR&RC provides a basis for differentiating among parties¹⁶. Its origin dates from 1990 at the Second World Climate Conference, where countries recognized ‘the principle of equity

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⁷ UNFCCC, Decision 1/CP.21, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/10/Add.1.
⁹ Paris Agreement Article 3
¹⁰ Supra note 8
¹¹ Paris Agreement Article 13
¹² Paris Agreement Article 15
¹³ Paris Agreement Article 2
¹⁴ Supra note 8
and the common but differentiated responsibility of countries at different levels of development’\textsuperscript{17}, and in the Rio Declaration of 1992; its Principle 7 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 to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.\textsuperscript{18}

CBDR, as articulated above, anticipates the concept of capability, when referring to finance and technology\textsuperscript{19}. Whilst, in parallel, the UNFCCC uses similar languages and includes explicitly the aforementioned concept; Article 3.1 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.\textsuperscript{20}

The CBDR&RC principle is also mentioned in Article 4.1 of the Convention; instead of ‘respective capabilities’ it adds ‘their specific national and regional development priorities, objectives and circumstances’ when referring to the commitments of the Parties\textsuperscript{21}. The addition of the term ‘respective capabilities’ infers that there are two bases for differentiation: one based on capability and another based on the contribution to environmental harm (Rio Principle 7)\textsuperscript{22}. The principle can also be found in numerous UNFCCC Conference of Parties (COP)\textsuperscript{23} decisions\textsuperscript{24}, including the Bali Action Plan\textsuperscript{25} of 2007, the Copenhagen Accord\textsuperscript{26} of 2009 and the Cancun Agreements\textsuperscript{27} of 2010. Also, an important

\begin{itemize}
  \item \textsuperscript{17} UNFCCC. (1993, May). ‘The Second World Climate Conference’ [WWW document] URL \url{https://unfccc.int/resource/ccsites/senegal/fact/fs221.htm} (visited 2017, February 7)
  \item \textsuperscript{19} Harald Winkler, Lavanya Rajamani, ‘CBDR&RC in a regime applicable to all’ Climate Policy, 14.1, (2013), pp. 102-121
  \item \textsuperscript{20} UNFCCC Article 3
  \item \textsuperscript{21} UNFCCC Article 4
  \item \textsuperscript{22} Supra note 19
  \item \textsuperscript{24} Supra note 15
  \item \textsuperscript{25} UNFCCC, Decision 1/CP.13, Bali Action Plan, UN Doc. FCCC/CP/2007/6/Add.1.
  \item \textsuperscript{26} UNFCCC, Decision 2/CP.15, Copenhagen Accord, UN Doc. FCCC/CP/2009/11/Add.1.
  \item \textsuperscript{27} UNFCCC, Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention. UN Doc. FCCC/CP/2010/7/Add.1.
\end{itemize}
remark is that the CBDR&RC principle was the basis for the burden-sharing disposition under the Kyoto Protocol\textsuperscript{28} of the Convention\textsuperscript{29}.

The CBDR&RC principle can be reflected in norms of different procedures\textsuperscript{30}. This article outlines a setting for the CBDR&RC principle to be reflected in the compliance stipulations of the Paris Agreement.

**CBDR&RC, Compliance and the Paris Agreement**

Article 15 of the PA establishes a ‘mechanism to facilitate implementation of and promote compliance’ which shall ‘function in a manner that is transparent, non-adversarial and non-punitive’ and ‘pay particular attention to the respective national capabilities and circumstances or Parties’. The mechanism shall consist of an expert-based committee\textsuperscript{31} with 12 members on the basis of equitable geographical representation\textsuperscript{32}. The modalities and function of this mechanism are yet to be decided. Before starting to design the mechanism’s details, is important to keep in mind the overall architecture of the PA. As mentioned above, the PA has no reference to developed and developing countries and is applicable to all, but it does not mean that it has to be applied symmetrically in all of its elements\textsuperscript{33}.

The PA contains a number of legally binding obligations for all parties, such as the preparation and communication of NDCs\textsuperscript{34}. However, these obligations are of a procedural nature only, whilst the essence of mitigation, adaptation and finance obligations is not legally binding and left to the willingness of each party. It has to be noted that compliance in its legal sense is only possible with provisions that are legally binding, that is, obligations to parties that require certain actions. The non-legally binding provisions can be implemented if they require domestic action or if they guide the design of the organizational structure of

\textsuperscript{29}Supra note 15
\textsuperscript{30}Supra note 15
\textsuperscript{31}Paris Agreement Article 15
\textsuperscript{32}Supra note 7, Decision 1/CP.21 Paragraph 102
\textsuperscript{33}Supra note 19
\textsuperscript{34}Paris Agreement Article 4
the regime, but they cannot be ‘complied with’35. According to Bodansky, implementation is reserved for situations ‘in which the relationship between an international rule and the behaviour it aims to change is more attenuated’36. Therefore, the mechanism should focus on both compliance and implementation. It should span the compliance promotion of parties with their legally binding obligations and the implementation of the provisions that are not legally binding under the PA. Thus, the mechanism could consist of a compliance branch and an implementation branch37. This article and its recommendations are going to focus on the compliance branch.

First, for the purpose of this mechanism, a new differentiation among the countries is going to be proposed and here is where the CBDR&RC principle is going to be reflected. The countries are going to be divided into 3 categories: Category 1, Category 2 and Category 3 (C1, C2 and C3, respectively). An index is going to be built and the countries are going to be allocated in the categories according to their rank in this index. The constitution of the index is going to be based on certain criteria of the countries related to their emissions, capacity and vulnerability, such as: total emissions, relative emissions, cumulative emissions, emissions per GDP, projected emissions, luxury/survival emissions, total GDP, GDP per capita, human development index, climate vulnerability and mitigation potential38. Consequently, countries with less need of assistance and more responsibility will be in C1, and countries with urgent need of assistance and less responsibility are going to be in C3. In C2 are going to be the countries ranked in the middle. Countries can request to be allocated in another category and this will be evaluated and decided by the committee. The details on how to build this index are going to be discussed in a further article. In a way, this index is going to ‘weigh’ the climate change burden of all countries based on the CBDR&RC principle.

The compliance branch is going to be tasked with determining whether parties are in compliance with their obligations and address cases where parties do not comply. Since its main goal is to promote parties’ compliance, the compliance branch should seek to identify

37 Supra note 35
38 Professor Harro van Asselt, Lecture on Adaptation and Equity, Strathclyde University, (Glasgow: 9 January 2017)
the reason for non-compliance and assist the party to correct the problem. The compliance branch should deal with the following obligations of the PA:\(^{39}\):

- ‘Each Party shall prepare, communicate and maintain successive nationally determined contributions’ (Article 4.2)
- ‘Parties shall pursue domestic measures mitigation measures, with the aim of achieving the objectives of such contributions’ (Article 4.2)
- ‘Each Party’s successive [NDC] will represent a progression beyond the Party’s then current [NDC] and reflect its highest possible level of ambition’ (Article 4.3)
- ‘... all Parties shall provide information necessary for clarity, transparency and understanding’ (Article 4.8)
- ‘Each Party shall communicate a [NDC] every five years ‘ (Article 4.9)
- ‘Parties shall account for their [NDCs]. In accounting... Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting’ (Article 4.13)
- ‘Each Party shall regularly provide the following information... A national inventory report... and information necessary to track progress made in implementing and achieving its [NDC]’ (Article 13.7)

The compliance branch should ask all countries information about their performance with regard to these obligations. This should be done on a regular basis: every year for C3 countries, every two years for C2 countries and every five years for C1 countries. In the case of C3 and C2 parties, if a non-compliance issue is detected, the compliance branch is going to ask information about their performance with regard to the obligation in question. With respect to C3 countries, the compliance branch along with the party, are going to identify the main causes for no compliance and look for solutions within bodies of the Convention (e.g. Financial or Technology mechanism). In an assumption that the branch considers that the C3 party is not presenting a progression, a declaration of non-compliance will be issued but this would have to be very rare since most cases of non-compliance are related to a lack of capacity\(^{40}\). For the case of C2 countries, the compliance branch is going to request a compliance action plan containing the following elements: (i) an analysis of the causes of non-compliance; (ii) a description of the measures to be taken in order to restore

\(^{39}\) Supra note 35

\(^{40}\) Supra note 36
compliance; and (iii) a timetable for the implementation of the measures, which must not exceed a given period. After this period, the branch could re-assess the state of compliance of the C2 party concerned and, in case of continued non-compliance, a declaration of non-compliance will be issued. C1 countries when assessed every five years, if non-compliance is perceived, a declaration of non-compliance will be issued at once. These processes could be coupled with hearings, written statements, assistance from the mechanism and if requested, review of such declaration. Financial support could provide a negative incentive that would hinder compliance, hence it is only granted to C3 parties. The compliance branch could ask a party at any time about its compliance performance if this is requested by a written submission of a party, group of parties or the UNFCCC Secretariat.

Next steps

The PA’s compliance branch is a very important element that can ensure the highest legal rigour on binding commitments. It should be designed in a manner that helps parties meet their goals and acknowledges lessons learnt from other multilateral agreements. There are many details yet to be decided but this article can give a general idea on how the CBDR&RC principle can be reflected in the compliance branch of the Paris Agreement.

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41 Supra note 35
42 Supra note 35
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