

## The “Common but Differentiated Responsibility” viewed as a soft law instrument and its reflection in some international environmental acts

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**Abstract.** The principle of Common but Differentiated Responsibility (CBDR) has emerged as a principle of International Environmental Law. CBDR is a guiding principle of international cooperation and solidarity. The paper argues soft law character of this principle, therefore the CBDR does not represent a legal obligation, but it has provided the legal and philosophical basis for the existing legal obligations including the instruments designed to achieve various objectives through international environmental acts, facilitating the initial agreement in certain areas that are difficult to be accepted, being more flexible in making States to accept changes.

**Key Words:** responsibility, law, environment, principle.

**About international environmental law principles. A focus on “Common but Differentiated Responsibility”.** It is considered principles are more widely used in international environmental law than in other field of international law. They can indicate the essential characteristics of legal institutions, designate fundamental legal norms, or fill gaps in positive law (Kiss & Shelton 2007). The principle of Common but Differentiated Responsibility (CBDR) is one of the cornerstones of sustainable development; it is a guiding principle of international cooperation and solidarity. It reflects the core elements of equity, placing more responsibility on wealthier countries and those more responsible for causing specific global problems. Perhaps more importantly, the principle also presents a conceptual framework for compromise and cooperation in effectively meeting environmental challenges (CISDL 2002). The principle of common but differentiated responsibility includes two fundamental elements. The first is the common responsibility, which arises from the concept of common heritage of humanity and therefore, common responsibility is likely to apply where the resource is shared, under the control of no state, being subject to a common legal interest. The second element is the differentiated responsibility. It concerns the need to take into account the different circumstances, particularly each State’s contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat (CISDL 2002). Differentiated responsibility involves special needs and circumstances, future economic development of countries, and historic contributions to the creation of an environmental problem.

The CBDR has emerged as a principle of International Environmental Law and has been explicitly formulated in the context of the 1992 Rio Earth Summit. The Rio Declaration provides the first formulation of the CBDR as a principle, stating that (Principle 7): “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.” Nevertheless, the 1972

Stockholm Declaration anticipated the coagulation of this principle, stating in principle 12 that "Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose." The principle was also present in nascent form in the 1987 Montreal Protocol, which acknowledged the "special situation" of developing countries by allowing them to delay their compliance with Protocol control measures for ten years (Bortscheller 2010). As we have seen before, the CBDR does not have a strictly fixed content, which leaves room for interpretations often controversial.

**The legal status of the "Common but Differentiated Responsibility" environmental principle. The Common but Differentiated Responsibility viewed as a soft law instrument and its reflection in some international environmental acts.** The principles and rules of international environmental law are set forth or reflected in thousands of acts adopted at national, bilateral, regional, global level. In the context of international law, the term "soft law" covers also the principles. Many scholars define soft law as those agreements that are not legally binding, definition that focuses on an analytically clear and tractable distinction between hard and soft law (Borgen 2005). Soft legal agreements are those agreements that are not themselves legally binding but are created with the expectation that they will be given the force of law through either domestic law or binding international agreements (Meyer 2009). As for the legal status of the principle, the CBDR is a recognized principle of International Environmental Law; however the belief that such practice is determined by a legal obligation (*opinio iuris*) is lacking in at least some members of the international community (De Lucia 2007).

As we have pointed before, the "common but differentiated responsibility" does not represent a legal obligation, but it has provided the legal and philosophical basis for the existing legal obligations including the instruments designed to achieve the objectives through various international environmental acts (McManus 2009). This is demonstrated including the forms of verbs ("shall cooperate", "shall be given special priority") used in various official documents that exclude the mandatory character. We found this principle in normative texts such as Rio Declaration, Agenda 21, Convention on Biological Diversity, which are not legally binding, having a merely recommendatory value. We will refer to some of these documents in the following. Principle 6 of the Rio Declaration underlines "The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, *shall be given special priority*. International actions in the field of environment and development *should also address* the interests and needs of all countries and Principle 7 of the Rio Declaration: "States *shall cooperate* in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command". The principle was controversial, and the United States issued an interpretive statement indicating its view that the principle does not "imply a recognition... of any international obligations " (UN Conference on Environment and development, UN Doc. A/CONF. 151/26 (Vol.IV) (1992).

The CBDR however speaks not of historical responsibility but rather of the responsibility of developed countries for the present and future pursuit of sustainable development in view of the pressures their societies are placing on the global environment and on the resources they command (Kiss & Shelton 2007). Article 3 (Principles), paragraph 1 of the United Nations Convention on Climate Change, 1992, says that: "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*". Article 20, alignment 4 of the Convention on Biological Diversity without using the terminology of common but differentiated responsibilities, it is based on the same idea: "The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties".

Those who see a positive legal and environmental dynamic of the soft law instruments, stress that they facilitate the initial agreement in certain areas that are difficult to be accepted, being more flexible in making States to accept changes, invigorating the scientific understanding, promoting cooperation and facilitating later development of hard environmental instruments (Drnas de Clément 2010). In order to give impetus to agreements with statements of soft law, many multilateral environmental arrangements are configured as framework agreements, setting general goals, which can only be achieved through policy making, lacking of precise rules or operational instructions.

The practical advantage of soft law is its discretionary character, without binding the parties. It is thus generally understood that "soft" law creates and delineates goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations. Soft law can overcome deadlocks in the relations of States that result from economic or political differences among them, when efforts at firmer solutions have been unavailing. A substantial amount of soft law can be attributed to differences in the economic structures and economic interests of developed, as opposed to developing, countries. Soft law can create a specific type of flexibility that can lead to the evolution of international law in response to changing political circumstances (Petrescu-Mag 2011; Oroian & Petrescu-Mag 2011).

**Conclusions.** The CBDR could represent a formula for balancing performance by developing countries with the technological and financial assistance made available to them, or it could represent an opportunity to extract the maximum possible transfer of wealth, without regard to the economics of the situation, as a precondition for accepting a share of responsibility in protecting the global environment (Honkonen 2009). Nevertheless, regarding the inclusion of the principle of CBDR itself in international environmental legal texts, we see that industrialized countries are very reluctant to assume primary responsibility for the current environmental problems, as this implies that they have a greater responsibility, choosing rather the obligation to offer financial and technological help for developing countries. The CBDR reflects how the international law it is adapting itself to the new realities international community is facing with. It may be difficult at present to characterize the principle of common but differentiated responsibilities to be a customary norm of international law, it is surely a basic principle of international law, and as such, may operate as a guiding principle for law-making, as well as for the interpretation and application of conventions in the field of environment and development (Matsui 2002).

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