

Abstract: Common in Durban but Differentiated in Paris: The Rise of a Subjective Interpretation of Common but Differentiated Responsibility

The new legal instrument will cover all the States, effectively removing the difference between developing and developed countries. The principle of 'common but differentiated responsibilities' already established in the Climate Change Convention will disappear.

- Pablo Solón, 2009-2011 Ambassador of the Plurinational State of Bolivia to the United Nations, December 2011.¹

Negotiations under the Durban Platform, charged with agreeing a new, universal agreement to address climate change risk reinterpreting and undercutting the principle of common but differentiated responsibility (CBDR) in international environmental law. This is shown by consideration both of the Durban Platform's context and detailed analysis of the negotiations since 2011.

CBDR is the principle that while all States share a common responsibility to address climate change, those States have differing responsibilities as some States have both greater capacity to address the problem and greater historical responsibility for it. Though arguably emerging as a norm of international environmental law, CBDR is expressly affirmed in the United Nations Framework Convention on Climate Change (UNFCCC).

Both the Berlin Mandate that led to the Kyoto Protocol and the Protocol itself implemented CBDR by imposing binding obligations only on those States listed in Annex One of the UNFCCC – the developed States. This annex system objectively differentiated between States.

The 2007 Bali Action Plan, which aimed to create a more universal treaty to sit alongside Kyoto, again expressly affirmed CBDR. Different conceptions of how the UNFCCC should implement common but differentiated responsibility caused many of the tensions that collapsed the 2009 Copenhagen negotiations.

In Durban two years later, and two nights overtime, the UNFCCC Parties launched a new negotiating track – the Durban Platform – and scheduled a new treaty to be agreed in December 2015. Importantly, the Durban Platform expressly mandated an 'protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties', with no reference to CBDR.²

Although some developing States' diplomats condemned the Durban Platform as abandoning CBDR outright,³ the real picture is more subtle. Negotiations since Durban have shown that the 2015 Paris agreement will differentiate between UNFCCC Parties. However, recent negotiations and the current Intended Nationally Determined Commitment (INDC) process suggest that this differentiation will be subjective self-differentiation: each Party will choose its own commitments based on its own assessment of its capacity and responsibility. If the 2015 Paris agreement does adopt this approach, it will reinterpret CBDR as subjective, not objective. In doing so, it will undercut a fundamental principle of international environmental law.

¹ Pablo Solón "The Durban Package: "Laisser faire, laisser passer"" (16 December 2011) *Hoy es Todavía* <<http://pablosolon.wordpress.com/2011/12/16/the-durban-package-laisser-faire-laisser-passer/>>.

² United Nations Framework Convention on Climate Change *Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011: Addendum: Part Two: Action taken by the Conference of the Parties at its seventeenth session* (FCCC /CP/2011/9/Add.1/, 15 March 2012) at [2].

³ See for example Solón, above n 1, as quoted above.