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# Untangling the Gordian knot: differentiation in the ICJ’s advisory opinion on climate change

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## Abstract

**This essay analyses the Advisory Opinion of the International Court of Justice (ICJ) on Climate Change to determine the extent to which the Court resolves contestations over the principle of common but differentiated responsibilities and the differentiation among States that flows from it. It argues that the Court, in seeking to untangle the Gordian knot of differentiation, resolves some outstanding issues and sidesteps others. Where it does resolve long-standing disputes, as for instance over the salience of historical responsibility for GHG emissions, the Court strengthens the normative framework of international climate change law. However, applying this strengthened normative framework will be challenging given the chasm between this framework and the structural (in)ability of the existing legal institutions to operationalize it.**

**Keywords** advisory opinion, International Court of Justice, climate change, principle of common but differentiated responsibilities

## 1. Introduction

The principle of common but differentiated responsibilities (CBDR), and the differentiation that flows from it, animates the entire corpus of international climate change law. Its core conceptual building blocks, however, are deeply contested. In the UN climate change regime—comprising the 1992 UN Framework Convention on Climate Change,<sup>1</sup> the 1997 Kyoto Protocol,<sup>2</sup>

1 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (‘UNFCCC’).

2 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (‘Kyoto Protocol’).

the 2015 Paris Agreement,<sup>3</sup> and decisions of Parties under these instruments –tenuous, carefully calibrated and hard-won compromises have been struck on the contested issues. This essay analyses the Advisory Opinion of the International Court of Justice (ICJ) on Climate Change<sup>4</sup> to determine the extent to which the Court resolves or sidesteps contestations, and how, if at all, the Court’s Opinion can influence the application of the CBDR principle.

This study argues that the Court, in seeking to untangle the Gordian knot of differentiation, resolves some outstanding issues and sidesteps others. Where it does resolve long-standing disputes, the Court strengthens the normative framework of international climate change law. However, applying this robust normative framework will be challenging given the chasm between this framework and the structural (in)ability of the existing legal institutions to operationalize it.

This analysis first defines the CBDR principle in Section 2, and then proceeds in Section 3 to consider the extent to which the ICJ offers guidance on the disputed legal nature of the CBDR principle. Section 4 discusses key issues that the ICJ resolves (or sidesteps) relating to the core content of the CBDR principle, in particular the basis for differentiation between States, and the categories of States between whom differentiation is to be applied. Section 5 considers the extent to which the architecture of the UN climate regime lends itself to application of the robust normative framework for differentiation, as interpreted by the ICJ. Section 6 concludes.

## 2. The CBDR principle

The CBDR principle was first articulated in Principle 7 of the 1992 Rio Declaration, which notes<sup>5</sup>:

[i]n 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.

Although this principle has been much cited and endorsed since, it is in the UN climate regime that the CBDR principle finds its full and distinct expression. In this regime, unlike in others, the CBDR principle is referred to in operational provisions of its legally binding treaties,<sup>6</sup> and differentiation cuts across the central obligations in these instruments. The CBDR principle is articulated as the principle of ‘common but differentiated responsibilities and respective capabilities’ (CBDRRC) in the UNFCCC.<sup>7</sup> UNFCCC Article 3 reads:

[t]he 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.

<sup>3</sup> Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 (‘Paris Agreement’).

<sup>4</sup> *Obligations of States in respect of Climate Change* (Advisory Opinion) 23 July 2025 <<https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf>> accessed 20 April 2026 (‘Advisory Opinion’).

<sup>5</sup> UN Conference on Environment and Development, ‘Rio Declaration on Environment and Development’ (14 June 1992) UN Doc A/CONF.151/26 Rev.1 (Vol. I) Annex I (‘Rio Declaration’), Principle 7.

<sup>6</sup> UNFCCC (n 1) art 3.

<sup>7</sup> *ibid.*

Article 3 proceeds to draw the conclusion that '[a]ccordingly, the developed country Parties should take the lead in combatting climate change and the adverse effects thereof'.<sup>8</sup> The Paris Agreement added a further clause to this principle 'in the light of different national circumstances'.<sup>9</sup> Paris Agreement Article 2.2 reads: '[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.<sup>10</sup> It is in this regime that the CBDR principle, and the differentiation it has birthed, have provoked the most controversy and conflict. States and scholars disagree on the legal nature of this principle, its content, and application.

### 3. Legal nature

States and scholars disagree on whether the CBDR principle is binding as a principle of customary international law or a general principle of law, or merely persuasive as a soft law principle of international environmental law.

Although the term 'principle' appears to signify a high level of legal authority, principles are of various kinds. If the principle takes the form of a custom or a general principle of law under Article 38(1) of the Statute of the ICJ, it is a binding source of law. But, if it takes the form of soft law, it may be influential but can only act to guide rather than bind States. Given the non-reciprocity that the CBDR principle legitimizes and engenders, some States have sought to circumscribe its legal effect. In the negotiations for UNFCCC Article 3,<sup>11</sup> the USA proposed numerous textual amendments. These amendments were intended to do the following. First, to emphasize that the notion of CBDR within the UNFCCC was included 'solely to guide the reader', and not as a binding legal principle.<sup>12</sup> Second, to couch the principle in discretionary and guiding, rather than prescriptive language. Third, to limit the principle's application to the UNFCCC only, and not provide a basis for its extension to custom.<sup>13</sup>

In its Advisory Opinion, the ICJ chose to remain tantalizingly vague on the legal nature of the CBDR principle. It identifies the CBDR principle as one of the 'principles that are part of the applicable law' for the purposes of the Advisory Opinion.<sup>14</sup> It discussed the CBDR principle in a section titled '[o]ther principles', which also includes a discussion of sustainable development, equity, intergenerational equity, precautionary approach or principle, and the polluter pays principle.<sup>15</sup> The Court concludes this section by finding that all but the polluter pays principle are 'applicable as guiding principles for the interpretation and application of the most directly relevant legal rules'.<sup>16</sup> The legal nature of each of these principles is distinct, not just from each other, but also in different legal contexts, yet the Court did not discuss whether one or other of these principles might play a more robust role based on its legal status. Indeed, on the CBDR principle, the Court flirts with the issue of legal nature but shies away from a conclusion. The ICJ acknowledges that 'the legal concept of equity is a general principle directly applicable as law',<sup>17</sup> underscoring the established view that equity is one of the general principles of law under Article 38(1) (c). Elsewhere, it notes that the

8 *ibid.*

9 Paris Agreement (n 3) arts 2.2, 4.3 and 4.19.

10 *ibid.*

11 Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *YJIL* 451, 502.

12 See UNFCCC (n 1) asterisk to art 1 ('Titles of Articles are included solely to guide the reader').

13 Bodansky (n 11).

14 Advisory Opinion (n 4) [146].

15 *ibid* 52, § 7.

16 *ibid* [161].

17 *ibid* [152].

CBDR principle is a ‘manifestation of the principle of equity’,<sup>18</sup> which arguably suggests that the CBDR principle has a similar legal nature. However, the Court held back from reaching this conclusion.<sup>19</sup>

The ICJ’s reluctance to ascribe a particular legal nature to the CBDR principle could be interpreted to support the argument that its legal status remains open, or that the principle does not have independent legal status as custom or a general principle of law. The latter interpretation might be more in line with the ICJ’s finding that the principle ‘does not establish new obligations but is relevant for the interpretation of treaties and the determination of rules of customary law relating to the environment’.<sup>20</sup>

Judges Yusuf, Sebutinde, and Xue in their Separate Opinions expressed disappointment with the Court’s tremulous approach to the CBDR principle, but they too held back from a robust analysis of the principle’s legal nature. Judge Yusuf characterizes the CBDR principle as an ‘equitable legal principle’<sup>21</sup> and Judge Sebutinde as a ‘cornerstone principle of international law’,<sup>22</sup> but neither of them takes a position on nor discusses the precise legal nature of this principle. Judge Sebutinde nevertheless argues that the principle should have resulted in ‘additional obligations’<sup>23</sup> for developed countries.<sup>24</sup> Judge Xue goes further than Judges Yusuf and Sebutinde and characterizes the CBDR principle as a ‘general principle directly applicable as law’, which has its own ‘substantive content’, but does not offer compelling (or any) legal reasoning for this position.<sup>25</sup>

Thus, while the ICJ chose not to resolve the dispute over the legal nature of the CBDR principle, the Separate Opinions of Judges Xue, Sebutinde, and Yusuf offer us a glimpse into the range of views and tensions underlying the ICJ’s choice not to do so.

## 4. Content

In addition to disagreeing over the legal nature of CBDR, States and scholars disagree on the precise content of the CBDR principle. In particular, they disagree on the basis for differentiation between States, and the categories of States between whom differentiation is to be applied.<sup>26</sup>

### 4.1. Basis for differentiation between States

Although the term ‘differentiated’ in the CBDR principle signals the need for differentiation between States, the basis for such differentiation is not universally agreed. There is disagreement on whether differentiation should be based on differences between States in relation to their contributions to climate harm or their capabilities or both, and also on whether other bases for differentiation should be considered, such as vulnerabilities to climate impacts.

<sup>18</sup> *ibid* [151].

<sup>19</sup> Intriguingly, in her Separate opinion, Vice President Sebutinde notes: ‘In particular, the Advisory Opinion downplays the importance of the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) by equating it to “equity”.’ Separate Opinion of Vice-President Sebutinde, [148]–[51].

<sup>20</sup> Advisory Opinion (n 4) [151].

<sup>21</sup> Separate Opinion of Judge Yusuf, [26]–[27].

<sup>22</sup> Separate Opinion of Vice-President Sebutinde, [9].

<sup>23</sup> *ibid* [11].

<sup>24</sup> *ibid*.

<sup>25</sup> Separate Opinion of Judge Xue [3].

<sup>26</sup> This article addresses the contentious elements of the CBDR principle that the ICJ explicitly addressed, not all elements of the principle, as for instance, the ‘common’ responsibility that States share or the notion of ‘responsibility’. These aspects have been covered extensively in the scholarship.

There are vast disparities and asymmetries between and within countries in relation to income levels, contributions to climate harm, and vulnerabilities. Even a cursory glance at the United Nations Development Programme (UNDP) Human Development Index (HDI) illustrates the stark income differences between States.<sup>27</sup> Gross national income per capita ranges from US\$69,117 in Iceland to US\$688 in South Sudan.<sup>28</sup> There are also significant differences in the contributions of different countries and groups of countries over time to climate harms. Developed countries account for the majority of cumulative CO<sub>2</sub> emissions. The Court, quoting from the IPCC's AR6 Report, notes that, 'the three developing regions together contributed 28 per cent to cumulative CO<sub>2</sub>-FFI emissions between 1850 and 2019, whereas Developed Countries contributed 57 per cent and Least-Developed Countries contributed 0.4 per cent'.<sup>29</sup> There are also immense differences in the vulnerabilities across different countries and regions. Coastal systems, low lying areas, and drought-prone regions, among others, are projected to suffer the worst impacts of climate change. Many of these vulnerable regions occur in the world's poorest and least resourced countries. Risks of climate change are unevenly distributed, with disadvantaged people and communities in all countries facing the worst impacts.<sup>30</sup> Low levels of development as well as lack of infrastructure and adaptation planning exacerbate vulnerabilities and existing inequalities.

#### **4.1.1. Contribution to environmental harm**

Notwithstanding stark disparities between States, the basis for differentiation between States in relation to climate change is contested. Rio Principle 7 explicitly assigns a leadership role to developed countries based on their enhanced contribution to environmental harm.<sup>31</sup> The terms of UNFCCC Article 3, negotiated in parallel, are, however, less clear. UNFCCC Article 3, unlike Rio Principle 7, contains no reference to the enhanced contributions of developed countries to global environmental harm. This distinction between the terms of Rio Principle 7 and UNFCCC Article 3 can be explained by the greater negotiator scrutiny and caution that States brought to bear on the operational terms of the UNFCCC, a legally binding treaty, relative to the terms of the Rio Declaration, a soft law agreement.

The Court, however, in a significant move, decisively resolves the disagreement over the basis for differentiation between States in the CBDR principle. In the Court's view the CBDR principle<sup>32</sup>:

reflects the need to distribute equitably the burdens of the obligations in respect of climate change, taking into account, inter alia, States historical and current contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social development.

The ICJ engaged in careful 'word work' in this crucial sentence.<sup>33</sup> The words 'distribute' and 'burdens', while seemingly intuitive and often used in scholarly literature on climate change, do not occur in the UNFCCC, the Kyoto Protocol, or the Paris Agreement. The use of the term

<sup>27</sup> UNDP, 'Human Development Reports: 2025' (6 May 2025) <[https://hdr.undp.org/sites/default/files/2025\\_HDR/HDR25\\_Statistical\\_Annex\\_HDI\\_Table.pdf](https://hdr.undp.org/sites/default/files/2025_HDR/HDR25_Statistical_Annex_HDI_Table.pdf)> accessed 20 April 2026.

<sup>28</sup> *ibid.*

<sup>29</sup> Advisory Opinion (n 4) [80], citing from IPCC, 'Climate Change 2022: Mitigation of Climate Change' <[https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC\\_AR6\\_WGIII\\_FullReport.pdf](https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf)> accessed 20 April 2026, 218.

<sup>30</sup> IPCC, 'Summary for Policy Makers' in 'Climate Change 2023: Synthesis Report' <<https://www.ipcc.ch/report/sixth-assessment-report-cycle/>> accessed 20 April 2026, statement A.2.

<sup>31</sup> Rio Declaration (n 5).

<sup>32</sup> Advisory Opinion (n 4) [148].

<sup>33</sup> Liz Fisher and Sonam Gordhan, 'Five Lessons from the ICJ's Advisory Opinion on Climate Change', in this issue.

‘distribute’ suggests sharing, which reinforces the spirit of solidarity and cooperation expected of States. The term ‘burdens’ acknowledges that while there may be economic and social opportunities to be harnessed in the transition to a low-carbon sustainable economy, there will also be pain, which will likely be disproportionately borne by some. That the distribution of these burdens should be ‘equitabl[e]’ is in line with the ICJ’s finding that the CBDR principle is a manifestation of the principle of equity.<sup>34</sup> The term, ‘inter alia’ suggests that the list of criteria on the basis of which differentiation is to be applied between States is illustrative, not exhaustive, and potentially dynamic and evolutive.<sup>35</sup> It is in the criteria the ICJ highlights, however, that the real advances lie, especially in the fact that the ICJ identifies ‘States historical and current contributions to cumulative GHG emissions’ as a criterion for differentiation.

**4.1.1.1. Contribution to environmental harm in the UN climate regime.** At the tortured heart of the conflict among States on whether the CBDR principle, as defined in UNFCCC Article 3, does or does not include contributions to climate harm, is the fundamentally contested issue of historical responsibility for GHG emissions. Although there is an acknowledgment in the preamble to the UNFCCC that ‘the largest share of historical and current global emissions of greenhouse gases has originated in developed countries’,<sup>36</sup> this is deliberately not linked to *responsibility* for such emissions. There is no reference to historical emissions or responsibility in either the Kyoto Protocol or the Paris Agreement. The only reference to historical responsibility in the decisions of Parties under the UN climate treaties occurs in a preambular recital in the 2010 Cancun Agreements.<sup>37</sup> This solitary reference to ‘historical responsibility’ in the UN climate instruments can be explained by the fact that the final text of the Cancun Agreements containing these words was not negotiated by States. After days of wrangling over text, the Mexican Presidency drafted these Agreements and presented them to Parties in the final hours of the conference as a ‘take it or leave it’ text.<sup>38</sup> Parties, still bruised from the spectacular failure of the 2009 Copenhagen conference, reluctantly took the text. Had these Agreements been subject to negotiation, the term ‘historical responsibility’ would likely not have survived, given the staunch refusal of some Parties before and after Cancun to include the notion of ‘historical responsibility’ in decisions of Parties. In any case, the ICJ did not refer to this stray nod to ‘historical responsibility’ to support its finding. And, despite the absence of any compelling textual evidence that the Parties to the UNFCCC, Kyoto Protocol or Paris Agreement had agreed to base differentiation on historical GHG contributions, the ICJ interpreted the UNFCCC and the Paris Agreement as recognizing that ‘obligations may differ depending on parties economic situations, their historic contributions to anthropogenic GHG emissions and their capabilities to adapt to and mitigate the adverse impacts of climate change’.<sup>39</sup> Thus, both in the context of the CBDR principle in general, and in the context of the principle in the UN climate regime, the ICJ identifies historical GHG emissions as a relevant basis for differentiation between States.

34 Advisory Opinion (n 4) [151].

35 The Court also makes this clear in the context of the standard of due diligence, that it is ‘multifactorial and evolutive’, see Advisory Opinion (n 4) [292].

36 UNFCCC (n 1) preambular recital 3.

37 It reads: ‘*Acknowledging* that the largest share of historical global emissions of greenhouse gases originated in developed countries and that, owing to this historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof.’ 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’ (10–11 December 2010) FCCC/CP/2010/7/Add.1.

38 See for a full discussion of the Cancun conference Lavanya Rajamani, ‘The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves’ (2011) 60 ICLQ 499.

39 Advisory Opinion (n 4) [179].

**4.1.1.2. Contribution to environmental harm in customary law.** The ICJ, however, takes a seemingly ambivalent approach to the extent to which contributions to climate harm should guide the interpretation of the applicable customary rules, namely, the duty to prevent significant harm to the environment and the duty to cooperate for the protection of the environment. The ICJ clarifies that the CBDR principle guides the ‘interpretation of obligations under international environmental law beyond its express articulation in different treaties’.<sup>40</sup> But in interpreting such obligations in light of the CBDR principle, the ICJ skirts around key issues.

In the context of setting the standard of due diligence that attaches to the customary duty to prevent significant harm to the environment, the ICJ references the CBDR principle but focuses primarily on ‘different capabilities’.<sup>41</sup> It finds that ‘capabilities of a State are a key factor, as reflected in the principle of common but differentiated responsibilities and respective capabilities, for the determination of the standard of due diligence in a particular situation’.<sup>42</sup> It recognizes that developed states:<sup>43</sup>

must take more demanding measures to prevent environmental harm and must satisfy a more demanding standard of conduct, the standard required in each case ultimately depends on ‘the specific situation of each State, namely “all the means at its disposal”’.

The ICJ does not discuss whether and if so to what extent, contributions to GHG emissions, identified firmly as a basis for differentiation between States in its robust interpretation of the CBDR principle, could determine the standard of due diligence that attaches to the harm prevention principle. This exclusion is telling. While it is possible to argue that the reference to the CBDR principle is sufficient to read contributions to environmental harm into the standard of due diligence, this would raise more questions than it would answer. First, if indeed contributions to environmental harm are a relevant criterion for differentiation between States in the context of the harm prevention principle, does it only apply in the context of harms to the global commons, or does it also apply in a bilateral transboundary context? Second, is this criterion only applicable in the context of climate harms, or is it applicable to all environmental harms? Third, whether this criterion only applies to harms to the global commons or also to bilateral transboundary harms, and whether it applies only to climate harms or also to others, are there limits on its application, and if yes, on what principled basis, and what are these limits?

In the context of the customary duty to cooperate to protect the environment, the Court strikes a similarly ambivalent note. Although it repeatedly references the CBDR principle, it stops short of specifying the role that contribution to environmental harm plays in setting the standard for ‘cooperating with the required level of due diligence’.<sup>44</sup> The Court considers the principles it had interpreted as part of the applicable law, including the CBDR principle, as ‘relevant in giving substance to the duty to cooperate’.<sup>45</sup> And, in imparting such substance to this duty, in light of the collective temperature goal,<sup>46</sup> the Court holds that ‘States must cooperate to achieve concrete emission reduction targets or a methodology for determining contributions of individual States, although its level may vary depending on additional

40 *ibid* [151].

41 *ibid* 90, side-heading prefacing [290]–[92]. Reference to the CBDR principle also occurs in [137], [283] and [457(3)(A)(e)].

42 *ibid* [290].

43 *ibid* [292].

44 *ibid* [306].

45 *ibid* [303].

46 *ibid* [224]–[229].

criteria, first and foremost the common but differentiated responsibilities and respective capabilities principle'.<sup>47</sup> The Court also holds that the duty to cooperate requires<sup>48</sup>

States to continuously develop, maintain and implement a collective climate policy that is based on an equitable distribution of burdens and in accordance with the principle of common but differentiated responsibilities and respective capabilities.

The Court's interpretation of the duty to cooperate as requiring States to set 'concrete emission reduction targets or a methodology for determining contributions of individual States' is surprisingly prescriptive yet delightfully vague. States have already experimented with and stepped away from 'concrete emission reduction targets' based on a particular reflection of the CBDR principle in the Kyoto Protocol.<sup>49</sup> In the last three decades, States have also discussed methodologies and criteria for determining the contributions of individual States, and have reached little agreement on either. The determination of national 'fair shares', which is both intuitively necessary in the context of a global collective action problem, in the absence of a multilateral burden-sharing agreement, is being raised in national and regional courts.<sup>50</sup> In this context, the Courts endorsement of 'concrete emissions reduction targets or a methodology for determining contributions of individual States' appears surprisingly prescriptive, and at least in the context of the climate change treaties, unachievable. If there were momentum behind reaching an agreement on targets or a methodology for determining them, each State's fair share would need to be determined at least partly based on its contribution to climate harm. Each State's fair share of the collective effort is fundamentally, although not exclusively, linked to its contribution to cumulative GHG emissions, and thus its depletion of the global carbon budget.<sup>51</sup> Given this, the Court's reluctance to connect the dots and explicitly link concrete emissions targets to GHG emissions, and even historical GHG emissions, as it did in the discussion on the CBDR principle, reflects a timidity that is not in evidence elsewhere in the Advisory Opinion.

In conclusion, on 'contributions to environmental harm' as a basis for differentiation, the Court unequivocally establishes its relevance, but hesitates to take it further, especially in relation to the customary duties of harm prevention and cooperation to protect the environment. A hesitation picked apart by Judges Sebutinde, Xue, and Yusuf in their respective Separate Opinions. Vice President Sebutinde chastises the Court for failing to 'boldly articulate' these aspects of the CBDR principle.<sup>52</sup> Judge Xue expresses disappointment that the Court stopped short of analysing this principle to determine 'in which way they provide guidance to the interpretation of the treaties', thus rendering it of 'nominal effect'.<sup>53</sup> Judge Yusuf

47 *ibid* [305].

48 *ibid* [306].

49 The Court acknowledges that the burden sharing arrangement in the Kyoto Protocol requiring emission reduction targets from developed countries but not developing ones is an application of the CBDR principle: *ibid* [179].

50 See *Urgenda Foundation v The Netherlands (Ministry of Economic Affairs and Climate)*, ECLI:NL:HR:2019:2006, Hoge Raad, 19/00135; *VZW Klimaatzaak v Kingdom of Belgium and Others* [2023] 2021/AR/1589, 2022/AR/737, 2022/AR/891 (Cour d'appel de Bruxelles); *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] App No 53600/20 (ECtHR, 9 April 2024); *Do-Hyun Kim et al v South Korea*, Constitutional Court 2020Hun-Ma389, Aug 29, 2024; *Greenpeace Netherlands and 8 citizens of Bonaire v The Netherlands*, ECLI:NL:RBDHA:2026:1344, Rechtbank Den Haag, C/09/659832 / HA ZA 24-53; *Notre Affaire à Tous, 'Climate: France Once Again Taken to Court for Failing to Respect Its "Fair Share" in the Global Effort' (4 December 2025) <<https://notreaffaireatous.org/wp-content/uploads/2025/12/Press-Release-Fair-Share-Trial-12.2025.pdf>> accessed 20 April 2026.*

51 See for a full discussion Lavanya Rajamani and others, 'National "Fair Shares" in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law' (2021) 21 *Climate Policy* 983; Mark M Dekker and others, 'Navigating the Black Box of Fair National Emissions Targets' (2025) 15 *Nature Climate Change* 752.

52 Separate Opinion of Vice-President Sebutinde [11].

53 Separate Opinion of Judge Xue [1].

accuses the Court of trying to ‘draw a formalistic veil’ over disparities in historical and current contributions of States to climate change,<sup>54</sup> and argues that ‘this equitable legal principle of common but differentiated responsibilities is intended not only to address historical disparities, but also to account for present and future inequities’.<sup>55</sup> This was clearly a step too far for the Court.

#### 4.1.2. *Respective capabilities*

There is universal acknowledgment that differentiation in the CBDR principle is based (even if not solely) on differences in resources and capabilities between States. Rio Principle 7 identifies the ‘technologies and financial resources they [developed countries] command’ as one of the bases for differentiation between States. UNFCCC Article 3 articulates this basis for differentiation in the language of ‘respective capabilities’ and accordingly assigns a leadership role to developed countries.<sup>56</sup> The Court underscores the importance of ‘respective capabilities’ as a basis for differentiation between States with multiple references to this term across the Advisory Opinion. Perhaps the most significant position it takes in this respect, however, is one that is hiding in plain sight. The Court seamlessly extended the climate regime specific expression of this principle—the principle of common but differentiated responsibilities *and respective capabilities*—beyond the climate treaties. In the section titled ‘Other principles’, which includes principles both within and outside the UNFCCC, the Court used the term ‘Common but differentiated responsibilities *and respective capabilities*’ to identify this principle.<sup>57</sup> Within this section, the Court found that the ‘principle of common but differentiated responsibilities *and respective capabilities*’ is ‘relevant for the interpretation of treaties and the determination of rules of customary law relating to the environment’.<sup>58</sup> As discussed above, the principle of common but differentiated responsibilities as articulated in Rio Principle 7 (which does not contain a reference to ‘respective capabilities’) is a more expansive and less caveated expression of this principle than the heavily negotiated and more circumscribed expression of this principle in UNFCCC Article 3 (which does contain a reference to ‘respective capabilities’).<sup>59</sup> It is perhaps a reflection of the balance the Court strikes that while it extends the circumscribed expression of this principle beyond the climate treaties, it resolves one of the principal disputes underlying this circumscribed expression, namely, that contributions to environmental harm are a basis for differentiation between States. That this runs deeper than fanciful quibbling over nomenclature is evident in Judges Yusuf’s Separate Opinion. He is scathing about the Court’s treatment of the CBDR principle, to which he does not add the term ‘respective capabilities’.<sup>60</sup> The Joint Declaration of Judges Bhandari and Cleveland consistently attaches the term ‘respective capabilities’ to their references to the CBDR principle and shifts the focus away from burden sharing and contributions to GHG emissions and towards ‘different capabilities and national circumstances of States’.<sup>61</sup> The Joint Declaration also cautions that the differentiation flowing from the CBDR principle is not a ‘get-out-of-jail card’.<sup>62</sup>

54 Separate Opinion of Judge Yusuf [20].

55 *Ibid* [27].

56 UNFCCC (n 1) art 3.

57 Advisory Opinion (n 4) 52, § 7(b) (emphasis added).

58 *ibid* [151] (emphasis added).

59 See text accompanying (n 5–7).

60 Separate Opinion of Judge Yusuf.

61 In para 24, Judges Bhandari and Cleveland refer to para 148 of the Opinion that interprets the CBDRRRC principle to include both contributions and capabilities as the basis for differentiation, but selectively extract and privilege ‘different [current] capabilities’ and ‘national circumstances’ in their interpretation of the CBDRRRC principle. Joint Declaration of Judges Bhandari and Cleveland, [24].

62 *ibid* [27].

### 4.1.3. Vulnerabilities

Although there is a palpable concern for the needs of vulnerable States running through the AO and several Separate Opinions, the Court did not expressly consider vulnerabilities as a basis for differentiation in its discussion of the CBDR principle.<sup>63</sup> In particular it did not clarify whether, and if yes, how, differences in vulnerabilities offer a basis for differentiation between States in the context of the CBDR principle. It is well recognized, however, that differences in vulnerabilities arise not just from geographical factors, but also from ‘lack of capacity to cope and adapt’.<sup>64</sup> The IPCC has found that those who are development-constrained, poor, in the midst of violent conflict, face governance challenges, and lack access to basic services and resources are far more vulnerable to climate impacts.<sup>65</sup> There is thus an inextricable link between ‘respective capabilities’ in the CBDR principle and vulnerabilities, offering, by extension, an additional basis for differentiation between States. This is evident in the climate change treaties. In the UNFCCC the CBDR principle is complemented by a provision requiring States to give ‘full consideration’ to the ‘specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change’.<sup>66</sup> Many provisions of the climate change treaties offer such consideration, in particular to Least Developed Countries (LDCs) and Small Island Developing States (SIDS), including in the context of reporting,<sup>67</sup> financial assistance,<sup>68</sup> and capacity building.<sup>69</sup>

Judges Yusuf and Xue in their Separate Opinions envisage a more robust role for the CBDR principle in achieving ‘climate justice’ and addressing the inequity at the core of the climate crisis, namely, that those who have contributed the least to climate change are also the most affected. Judge Xue notes that to ‘achieve climate justice, the specific needs and circumstances of these vulnerable groups of States and people must be addressed in accordance with the principle of common but differentiated responsibilities’.<sup>70</sup> Judge Yusuf in his Separate Opinion argues that the CBDR principle was incorporated into the climate change regime as an ‘equitable legal principle designed to address the disparities identified by science in the contributions of different countries to global warming *and the different ways in which they suffer its impact*’.<sup>71</sup> He notes further that a ‘full engagement of the CBDR principle’ would ‘underscore the distinction between those States that have caused significant harm to the climate system and those States that are injured or specially affected by or particularly vulnerable to the adverse effects of climate change, as well as peoples and individuals of the present and future generations affected by the adverse effects of climate change’.<sup>72</sup>

Although the Court’s interpretation of the CBDR principle did resolve some long-standing disputes, it did not attempt to address wider issues of climate justice. Its reluctance to engage with the full spectrum of issues relating to vulnerability is also evident in the approach it took to the second question posed by the General Assembly on legal consequences with respect to

63 Advisory Opinion (n 4) [148]–[51].

64 IPCC, ‘Glossary’ in ‘Climate Change 2022: Impacts, Adaptation and Vulnerability’, <[https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_FullReport.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf) 2927> accessed 20 April 2026. The Court recognizes that certain States, in particular small island developing States face ‘greater levels of climate change-related harm’: *ibid* [110].

65 IPCC, ‘Summary for Policy Makers’ in ‘Climate Change 2022: Impacts, Adaptation and Vulnerability’ <[https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_FullReport.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf)> 12, statement B.2.4 accessed 20 April 2026.

66 UNFCCC (n 1) art 3.2. See also arts 4.8 and 4.9.

67 *ibid*, art 12.5; Paris Agreement (n 3) arts 4.6 and 13.3.

68 Paris Agreement (n 3) arts 9.4 and 9.9.

69 *ibid*, art 11.1.

70 Separate Opinion of Judge Xue.

71 Separate Opinion of Judge Yusuf [26].

72 *ibid* [28].

States that are ‘specially affected’ or ‘are particularly vulnerable’.<sup>73</sup> The Court notes that the application of the rules on State responsibility does not differ based on the status of an injured State, and accordingly declines to determine any specific legal consequences with respect to such States.<sup>74</sup> Both Judge Yusuf and Vice President Sebutinde—the former in a blistering passage of his Separate Opinion<sup>75</sup> and the latter in a more measured tone<sup>76</sup>—criticize the Court’s narrow approach to the question that sidesteps the underlying concerns of the vulnerable States that had brought the case to the Court.

## 4.2. Categories of States between whom differentiation is to be applied

In addition to disagreement on the basis for differentiation in the CBDR principle, there is also disagreement on the categories of States between whom differentiation is to be applied. There are disagreements over whether differentiation should be applied between categories of States, if yes, what these categories should be, how they should be populated, based on what criteria, and finally, how dynamic these categories should be. These disagreements relate to how the CBDR principle is articulated and applied. The Paris Agreement resolved these disagreements with constructive ambiguity which the Court sought to dispel in its Opinion.

On the articulation of the CBDR principle, in the years leading up to the Paris Agreement, developed countries had sought to tweak the language of UNFCCC Article 3 to signal that the principle must be interpreted in the light of contemporary economic realities, but this did not find favour with developing countries. In the absence of agreement, the Durban Platform that launched the negotiations towards the Paris agreement contained no reference to CBDR.<sup>77</sup> The decision was drafted to indicate that the 2015 agreement would be ‘under the Convention’,<sup>78</sup> thereby implicitly engaging its principles, including CBDR. The Doha and Warsaw decisions in 2012 and 2013, continuing this impasse, contained a general reference to ‘principles’ of the Convention, but no specific reference to the CBDR principle.<sup>79</sup> It was only in the 2014 Lima Call for Climate Action, which arrived hot on the heels of a US–China bilateral statement, that an explicit reference to the CBDR principle, albeit ‘in the light of different national circumstances’, was reintroduced in the climate process,<sup>80</sup> and it made its way into the Paris Agreement.<sup>81</sup> The ambiguity in this phrase allowed developing countries, such as China and India, to argue that this phrase made no meaningful difference to the CBDR principle or to the categorization of Parties that flows from it as the principle was already tied to ‘respective capabilities’ which continually evolve. It allowed developed countries, such as the USA, to argue that this phrase introduced an element of dynamism into the CBDR principle and the categorization of Parties that flows from it. The Court, however, dispels the ambiguity in the use of this phrase. The Court reads this phrase as adding ‘nuance to the principle by recognizing that the status of a State as developed or developing is not static’ but ‘depends on an assessment of the current circumstances of the State concerned’.<sup>82</sup>

73 Advisory Opinion (n 4) [88].

74 *ibid* [109].

75 Separate Opinion of Judge Yusuf [6].

76 Separate Opinion of Vice-President Sebutinde [5].

77 Decision 1/CP.17, ‘Establishment of an *Ad Hoc* Working Group on the Durban Platform for Enhanced Action’ (11 December 2011) FCCC/CP/2011/9/Add.1.

78 *ibid* [2].

79 See Decision 1/CP.18, ‘Agreed Outcome Pursuant to the Bali Action Plan’ (8 December 2012) FCCC/CP/2012/8/Add.1, preambular recital 7; Decision 1/CP.19, ‘Further Advancing the Durban Platform’ (23 November 2013) FCCC/CP/2013/10/Add.1, preambular recital 9.

80 Decision 1/CP.20, ‘Lima Call for Climate Action’ (14 December 2014) FCCC/CP/2014/10/Add.1, [3].

81 Paris Agreement (n 3) art 2.2.

82 Advisory Opinion (n 4) [226].

On the application of the CBDR principle, the UNFCCC and Kyoto Protocol reflect a burden sharing arrangement that rests on the categories of ‘developed country Parties’ and ‘developing country Parties’ being matched to specific categories of commitments,<sup>83</sup> with more onerous GHG mitigation commitments being reserved for developed countries listed in Annexes to these instruments.<sup>84</sup> Developed countries were insistent that this form of differentiation—matching categories of Parties (listed in Annexes) to categories of commitments—could not continue in the Paris Agreement, while developing countries, especially the major emitters among them, were reluctant to cede the ground they had in the UNFCCC and Kyoto Protocol. Parties addressed this disagreement by sleight of hand—the Paris Agreement neither included an Annex nor contained any reference to the UNFCCC or Kyoto Annexes. This tenuous compromise rests on the ambiguity now attached, in the absence of Annexes, to the terms developed and developing country Parties, and the space it thus creates for Parties to self-identify as a developed or developing country. The Court, however, set the cat among the pigeons by seeking to dispel the ambiguity attaching to these categorizations of States.<sup>85</sup> The Court noted that there is a ‘spectrum’ of States with developed States at one end and LDCs at the other, and ‘in between’ are ‘States that have progressed considerably in their development since the conclusion of the UNFCCC in 1992 [...] and some of which now contribute significantly to global GHG emissions and possess the capacity to engage in meaningful mitigation and other efforts’.<sup>86</sup> Admittedly, the Court is stating the obvious here, but the compromise in the Paris Agreement is premised on skirting around the obvious.

The ‘in between’ category, Judge Xue points out in her Separate Opinion, includes 110 developing States, with 40 developed States at one end and 44 LDCs at the other.<sup>87</sup> She argues that ‘[w]ithout any specific and credible criteria’ this new category of developing countries has ‘no legal basis in the treaties’ and ‘may be perceived as a deviation from the current burden sharing of obligations’ in these treaties.<sup>88</sup> She is correct that there are no ‘specific and credible’ criteria to identify these ‘in between’ developing countries; however, there are no specific or credible criteria to identify any category of States identified in the climate treaties. The UNFCCC and the Kyoto Protocol used their Annexes to list developed country Parties, and countries that did not feature in the Annexes were considered developing country Parties. UNFCCC Annex I and Kyoto Annex B correlate broadly with then-membership in the OECD, but these lists were populated through self-identification by Parties and not prescriptively assigned based on predetermined criteria. The Paris Agreement neither defines nor lists categories of Parties. Whether the Courts interpretation will skew the current burden sharing in the climate treaties remains to be seen, but given, as the next section will discuss, the architecture of the Paris Agreement is facilitative rather than prescriptive, and privileges national determination over international regulation, there are built-in limits to the application of the Court’s robust interpretation of the normative framework.

## 5. Application

At the outset, it is worth noting that the Court did not explore, discuss, or illustrate how its interpretation of differentiation could be concretely applied in the UN climate regime or

<sup>83</sup> For a full discussion see Lavanya Rajamani, ‘Innovation and Experimentation in the International Climate Change Regime’ (2020) 404 *Recueil des Cours* 9, Ch IV.

<sup>84</sup> UNFCCC (n 1) arts 4.2 (a) and (b), and Annex I and II; Article 3, Kyoto Protocol (n 2), art 3 and Annex B.

<sup>85</sup> Advisory Opinion (n 4) [150].

<sup>86</sup> *ibid.*

<sup>87</sup> Drawing on IMF and World Bank criteria, Separate Opinion of Judge Xue [64].

<sup>88</sup> *ibid.*

beyond. While some States will likely premise their positions on the ICJ's interpretation of differentiation, its operational impact may will be limited by the design of the Agreement.

States have, over the years, navigated the contestations at the heart of the CBDR principle, discussed above, by experimenting with different forms of differentiation across the UN climate treaties. The UNFCCC and the Kyoto Protocol applied the CBDR principle by matching categories of Parties to categories of commitments, and thus by prescribing GHG mitigation targets for developed countries.<sup>89</sup> This form of differentiation proved unpalatable and led to the demise of the Kyoto Protocol. The Paris Agreement, in a step change from the Kyoto Protocol, applied the CBDR principle, not by matching categories of Parties to categories of commitments, but by tailoring differentiation to the specificities of each of the areas of regulation—mitigation, adaptation, finance, technology, capacity-building, and transparency.<sup>90</sup> In mitigation, the Paris Agreement adopted a 'self-differentiation' model.<sup>91</sup> It requires *all* Parties to 'prepare, communicate and maintain nationally determined contributions', leaving the content of these to be self-selected by States.<sup>92</sup> As States tailor their contributions to national circumstances, they effectively differentiate themselves from each other. States embraced this model in part to sidestep the perpetually irresolvable issue of burden sharing among States, effectively leaving the fairness of each State's contribution to be self-determined, but also in line with the Paris Agreement's facilitative architecture that privileges national determination. States limited, therefore, avenues in the Paris Agreement for a multilateral consideration of equity and fairness.

Although the Paris Agreement sets differentiated normative expectations for States in relation to mitigation,<sup>93</sup> there are limited multilateral avenues for equitable burden sharing in mitigation to be considered, and no dedicated mechanisms for these to be operationalized. First, Parties are required, while submitting their NDCs, to explain how these are 'fair and ambitious'.<sup>94</sup> Parties' claims that their NDCs are fair and equitable are fundamentally self-determined and so lend themselves to subjectively chosen indicators that are largely self-serving.<sup>95</sup> Second, in the global stock-take that is to occur every five years, States are tasked with taking 'stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals', and to do so 'in the light of equity'.<sup>96</sup> The stocktake, however, is only authorized to assess 'collective progress', not individual, and as such it does not readily lend itself to a determination of relative fair shares of Parties without which it would be impossible to determine let alone operationalize an equitable sharing of the burden.<sup>97</sup> Further, while equity and fairness are taken into account in the sources of inputs and modalities of the stocktake,<sup>98</sup> Parties determine how and to what extent the outcome of the stocktake will be reflected in their NDCs.<sup>99</sup>

<sup>89</sup> Kyoto Protocol (n 2) art 3 and Annex B.

<sup>90</sup> See for a full discussion Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 ICLQ 493; and Christina Voigt and Felipe Ferreira, "Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 TEL 285.

<sup>91</sup> *Ibid.*

<sup>92</sup> Paris Agreement (n 3) art 4.2.

<sup>93</sup> Paris Agreement (n 3) art 4.3 and 4.4.

<sup>94</sup> *ibid* art 4.8; Decision 4/CMA.1, 'Further guidance in relation to the mitigation section of decision 1/CP.21' (15 December 2018) FCCC/PA/CMA/2018/3/Add.1.

<sup>95</sup> Rajamani and others (n 51); Harald Winkler and others, 'Countries Start to Explain How their Climate Contributions are Fair: More Rigour Needed' (2018) 18 International Environmental Agreements: Politics, Law and Economics 99.

<sup>96</sup> Paris Agreement (n 3) art 14.

<sup>97</sup> See Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement' (n 90) 183–84.

<sup>98</sup> See Harald Winkler, 'Putting Equity into Practice in the Global Stocktake Under the Paris Agreement', (2020) 20 Climate Policy 124.

<sup>99</sup> Paris Agreement (n 3) art 14(3) provides that the 'outcome of the global stocktake shall *inform* Parties in updating and enhancing, in a *nationally determined manner*' their climate action (emphasis added).

It is in this constrained regulatory context, which privileges national determination over international regulation, that the normative framework of differentiation, as interpreted by the Court, will need to be applied. Although the Court resolves the ambiguity in the CBDR principle and identifies historical contributions to GHG as relevant as a basis for differentiation, it is for States to raise and address this criterion in determining that their contributions are ‘fair and ambitious’. Similarly, although the Court recognizes a ‘spectrum’ of States and identifies an ‘in between’ category of States from whom ‘meaningful action’ is to be expected, it is for States to determine that they fall into this category, determine what action is ‘meaningful’ and take it. This is not to suggest that the Court’s strengthened interpretation of the CBDR principle is without import. Nevertheless, caution is needed; the facilitative architecture of the UN climate regime, and its privileging of national determination, does not readily lend itself to effective application of the Court’s interpretation of differentiation.

The Court’s strengthened interpretation of differentiation—in particular requiring States with high historic responsibility, and those that are ‘in between’ States to do more—clarifies and strengthens the standard of due diligence as well as the normative expectations placed on these States. And, to the extent that such States do not reference these criteria in the narrative accompanying their nationally determined contributions and make their best efforts to conform to the normative expectations placed on them, they can be taken to task, if not within the UN climate regime, outside.

## 6. Conclusion

In its pathbreaking Advisory Opinion on Climate Change, the ICJ set out to systematically untangle the Gordian knot of differentiation at the undeniable core of international climate change law. Working from first principles, and with intuitive good sense, which is all too often missing in the UN climate negotiations, the Court resolved fiercely contested issues such as historic responsibility for climate change, and the need for large rapidly developing countries to take meaningful action. In doing so, the Court strengthened the normative framework of international climate change law and shifted the focus away from perpetually irresolvable contestations and towards action and application. While such strengthening is invaluable and already being used to good effect in national climate litigation,<sup>100</sup> it remains to be seen how responsive the UN climate regime will be to these strengthened normative expectations, given that the Paris Agreement, and its institutional architecture, is premised on considerable (even if not unfettered) national determination.

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100 See *Greenpeace Netherlands and 8 citizens of Bonaire v The Netherlands*, ECLI:NL:RBDHA:2026.