

Principles of International Environmental Law, including CBDR

Importantly, the Court determines that a number of inter-related principles familiar to international environmental lawyers form part of the applicable law for the purposes of the Advisory Opinion. These principles guide both the interpretation and application of treaties and the determination and application of customary international law obligations.¹ All of the applicable principles are also found specifically within the climate treaty regime.²

The overarching principle of sustainable development is first on the list, noting that the Court adopts the articulation of this principle from the *Gabčíkovo-Nagymaros Project* case as concerning the "need to reconcile economic development with protection of the environment".³ This juxtaposes for instance with the well-known formulation of sustainable development from the 1987 Brundtland Report as a process that "meets the needs of the present without compromising the ability of future generations to meet their own needs".⁴

Second on the list of real instrumentality in the climate change field is the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC). Differentiation among States based on the CBDR principle has long been a feature of international environmental law, including climate change law, and CBDR-RC features centrally in the climate change treaties.⁵ The meaning of the CBDR-RC principle is a matter that is critical to the international climate change law edifice, because *both* developed and developing country action on climate change will determine the success or failure of the regime. Indeed the Court's customary international law ruling was that *every* State is under the stringent due diligence obligation to use all the means at its disposal to protect the climate system in accordance with its capabilities and available resources, albeit in accordance with their common but differentiated responsibility and respective capabilities.⁶

Here, matters became interesting. Key among the tensions during the advisory proceedings has been the extent to which, in actuality, legal obligations in the climate sphere depend on a State's blend of contributions to atmospheric greenhouse gas concentration (historically and currently), and depend on States' current capabilities and national circumstances as referred to in the Paris Agreement. National circumstances include a country's level of economic and social development. The Court found that the CBDR-RC principle embraces all of these dimensions. Further, the Court importantly observed that the status of individual countries is not static, their national circumstances continue to change.⁷ This means that countries are on a spectrum, rather than in two camps of developing and developed States. It also means that there is clear scope for an increasing level of obligation on a particular State. This has concrete, real-world implications. Most obviously at present, although the Court does not say so specifically, China is poised to outpace the US as the major GHG gas contributor, with the EU until now in second place, while China's capacity to contribute to mitigation is also growing. It was of interest that Judge Xue disagreed with the Court's approach, considering the Court's view that States sit on a spectrum distorts the foundational structure of the climate change treaty regime.⁸

¹ *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025 [2025] ICJ Reports [161].
² [178].

³ [147] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 78, para. 140.

⁴ *Our Common Future*, 43.

⁵ *Obligations of States* (n 1) [178, 179].

⁶ [291] [457(3)(B)(a)].

⁷ [148, 150]. See Christina and Ferreira, Felipe (2016) "'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement", 5 *Transnational Environmental Law* 2, 285.

⁸ Separate Opinion of Judge Xue [62-64].

The principle of CBDR-RC is a manifestation of the third principle, the principle of equity.⁹ The Court remarks that equity is an emanation of the idea of justice, and the Court assumes that when applying positive law it may choose the interpretation that appears in the circumstances of the case closest to the requirements of justice.¹⁰ This remark raises issues. Interpretations of the law have effects going beyond individual cases. It is important to consider the extent to which a particular interpretation of the law really can be considered to be confined to the case-specific circumstances before a judicial body. If it is merely a question of the law's application, perhaps that could be the case, but often application implies certain interpretations. This is of course part of how the law develops. However international lawyers will need to be mindful of the ongoing interplay between the importance of equity in the law as revealed in the circumstances of particular cases and the remainder of a legal rule's overall objective substantive content, which will be binding on all.

Intergenerational equity is a related, fourth principle, as referred to in the preamble of the Paris Agreement and discussed above.¹¹ Fifth, the precautionary approach or principle is key, as referred to in Article 3 (3) of the United Nations Framework Convention on Climate Change (UNFCCC) and addressed already above.¹² One of the interesting questions might be how in due course the precautionary principle may play into the determining the temporal scope of international climate obligations.¹³ For instance, should the time from which customary international law duties of prevention incorporation might run be decided by reference to when prudent States would have taken action taking into account the precautionary principle's tenet of acting rather than delaying action when faced with scientific uncertainty?

Sixth, the Court determines that the polluter pays principle is not part of the applicable law, having not been specified in the treaty context.¹⁴ This is an interesting conclusion because, if States were viewed as “the polluters”, the principle of CBDR could be connected with ideas of the polluter paying because of how the CBDR principle takes account of States’ historical emissions. However the Court views the polluter pays principle as relating primarily to the conduct private actors and to concepts of strict liability. The Court adds that this does not preclude the possibility of international law developing to generate strict liability for acts that that may not be internationally wrongful.¹⁵ Ultimately the Court’s view may assist in the development of the CBDR-RC principle on its own terms, at a remove from the polluter pays principle.

Finally, seventh, the Court brings in the duty to cooperate, previously identified as a matter of customary international law,¹⁶ but now also as a principle in the climate change treaty framework.¹⁷

⁹ [151].

¹⁰ [152].

¹¹ See under *Due Regard for Future Generations*.

¹² [180].

¹³ See below under *What the Court has left for later, including liability*.

¹⁴ [159-160].

¹⁵ [160].

¹⁶ [140-142]

¹⁷ [178, 183].