"Common but Differentiated Responsibilities" in the Paris Agreement

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“COMMON BUT DIFFERENTIATED RESPONSIBILITIES” IN THE PARIS AGREEMENT ON CLIMATE CHANGE: POLICY OR POLITICS?

Henrique Schneider*

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I. INTRODUCTION

On December 12th, 2015, the negotiators of the United Nations Conference of Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) adopted a decision containing the Paris Agreement (PA) as the conclusion to their two-week long deliberations.¹ The final act was presided by the then French Foreign Minister, Laurent Fabius, and seconded by the French President of the time, François Hollande, as well as by the then Secretary General to the United Nations, Ban Ki-moon.² It is an anecdote, but a telling one: On the center-stage, there was no minister of environment. On the podium, there was no scientist⎯only people doing foreign policy.³ Indeed, the Paris Agreement is often criticized for being primarily a political agreement rather than a plan for “solving the climate change problem.”⁴

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³ See id. (providing an interesting, if sometimes officious, account of the negotiations from different perspective).
But this is neither surprising nor a peculiarity of the Paris Agreement. Many, maybe all, international agreements are political in nature. They might be motivated or informed by many sources, including science, but the final drafting will require political trade-offs, and their adoption is a political act. The process at the United Nations’ climate summits is not different. These meetings take place under the UNFCCC, and they are informed by reports produced by the Intergovernmental Panel on Climate Change (IPCC), which is a body for assessing the science related to climate change. But in the meetings, pressure groups like non-governmental organizations and the media are welcomed. Some organizations are structured in constituencies and can, to a limited degree, interact in negotiations. Climate negotiations under the UN are, fundamentally, a political process.

The fact that the Paris Agreement is, as many other such texts, a political accord does not turn it into a good or bad agreement. It is just a fact to keep in mind when interpreting the Paris Agreement, aligning domestic policy to it, and assessing it. Because of its political nature, the Paris Agreement is an agreement to act and not necessarily to deliver results. It stands to reason that results will be the outcomes of the actions, but nonetheless, the Parties to the Agreement nationally determine their contributions and do not guarantee outcomes. Even if they did, the Paris Agreement has no means to enforce any result. Or, as it was aptly formulated: “The success of the Paris Agreement relies on a system of ‘pledge and review’, and the power of shaming laggards. This puts much of the burden for holding countries accountable on civil society.”

An important political principle in the Paris Agreement is “common but differentiated responsibilities” (CBDR). The UNFCCC’s website explains this:

[W]hile there’s a duty on all countries to take climate action, the types of action they take will depend on their differing national circumstances. The flexibility inherent in the Agreement has meant that so far[,] some countries have

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pledged to cut their net climate emissions to zero by 2050, while other countries have set other goals.11

Some Parties intend to achieve their contributions via technological improvement, while others regulate and introduce fiscal mechanisms such as carbon taxes. Some parties cooperate between themselves, and others try to achieve their goals on their own. This differentiation is intended by the Paris Agreement because of its subscribing to common but differentiated responsibilities.12 But at the same time, it makes these policies difficult to compare. In a global accord, this leads to some hard questions.13 For example, can a country introduce carbon border adjustments on goods produced in countries with a lesser level of climate action? Or, is the dilution of intellectual property rights a policy a country can adopt as climate action based on CBDR? These questions will be addressed here as a case study for the limits and possible development of CBDR, but especially as hard political questions that will need much deliberation and trade-offs.

The remainder of this text discusses the principle of CBDR in the context of the Paris Agreement, discussing two examples of hard questions: carbon border adjustments and intellectual property. As such, this text is an analysis of international soft law, keeping in mind its political background and the influence of political decision-making on it. On the one hand, this paper contributes to the discussion of the still little understood notion of CBDR. On the other, it elaborates how the Paris Agreement itself is an evolutionary process of negotiations shaped by the actions of the Parties as well as by their coordination.

II. ARTICLE 2 OF THE PARIS AGREEMENT

Article 2 of the Paris Agreement has two paragraphs. The first sets the three goals of the agreement: mitigation, adaptation, and finance. The second contains CBDR. Together they read:

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context

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12 Mark Roelfsema et al., Taking Stock of National Climate Policies to Evaluate Implementation of the Paris Agreement, 11 NATURE COMMC’NS, no. 2096, 2020, at 7.

13 See id. at 7. Roelfsema’s paper provides an overview of different goals and policies. “The results show that for all countries there is either a significant implementation gap or ambition gap. Unless governments increase ambition, the collective effort of current national policies significantly stays short of the objectives of the Paris Agreement and even fails to meet the joint ambition secured in NDCs.” Id. at 6.
of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

2. This 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.14

The introductory sentence in the first paragraph is already signaling that the entire Paris Agreement is a trade-off between different desiderata, with globally responding to the threat of climate change being just one among them. Instead, this response is put into the context of sustainable development and eradication of poverty. There is an ongoing discussion whether climate action is equal in importance to these areas or subordinate to them.15 Additionally, the article’s text says that the Paris Agreement is seen as an advancement of the UNFCCC, which entails the continuation of its other elements, such as the framework per se or the Kyoto Protocol.16 The Paris Agreement is, therefore, an additional piece of global climate policy.

There are, however, important shifts to the logic of this policy under the Paris Agreement. The goals of the agreement, as set forth in paragraph 1, mark these shifts. They state clearly that while the Parties to the Agreement will together work towards global goals, each Party is autonomous in defining their own way of achieving these goals. This shift in logic can be further detailed. The first shift is stipulating global ambition instead of targeting the emissions of industrialized countries. The second is the open-

14 Paris Agreement, supra note 1, at art. II.
15 See Marie-Claire Cordonier Segger, Advancing the Paris Agreement on Climate Change for Sustainable Development, 5 CAMBRIDGE J. INT’L & COMPAR. L. 202, 204–09 (2016).
texture, or bottom-up character, of the agreement instead of a top-down approach. Open texture means that Parties can choose their climate-policy tools and declare them transparently to others. The agreement offers some instruments, but they are complementary to the parties’ self-developed policies. Global stocktakes would subsequently validate the parties’ policies and perhaps move or nudge them in a certain direction. Open texture also means that there is an agreement to act and not necessarily to deliver results.

The third is the move from a focus in mitigation to the three goals of mitigation, adaptation, and finance.17

The three goals of the Paris Agreement and how they relate to each other have been discussed controversially, especially among negotiators. While there is no textual evidence for any prioritization among these goals, negotiators have factually expressed their preferences, and Parties have emphasized one over another. Institutional memory of the Conferences of Parties after Paris suggests that between 2017 and 2019, as well as in 2021, adaptation was the negotiators’ focus.18 In the Conference of 2022, finance took the center stage.19 Mitigation, on the other hand, seems to have been de-prioritized in the agenda-setting (with the possible exception of the transparency and methodologies discussed in 2016, and later developed in Katowice in 2018).20

The second paragraph of Article 2 of the Paris Agreement contains the principle of CBDR, or as some call it, CBDR-RC, for respective capabilities.21 This principle is not new to the UNFCCC.22 For example, it

17 See id. at 343.
19 See Arthur Wyns, COP27 Establishes Loss and Damage Fund to Respond to Human Cost of Climate Change, 7 LANCET PLANETARY HEALTH 21, 21 (2022); Natalia Alayza et al., COP27: Key Takeaways and What’s Next, WORLD RES. INST. (Dec. 8, 2022), https://www.wri.org/insights/cop27-key-outcomes-un-climate-talks-sharm-el-sheikh.
21 It is a minor question regarding how to abbreviate the text in 2.2 PA. The text goes: “This 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.” Paris Agreement, supra note 1, art. II, ¶ 2 (emphasis added). The abbreviation used here takes the first letter of the first four words in italics. CBDR-RC uses the first letter of all words in italics, substituting the “and” with a dash.
22 See Philippe Cullet, Common but Differentiated Responsibilities, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 161, 161 (Malgosia Fitzmaurice et al. eds., 2010); see also United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107. In fact, this principle is part of the UNFCCC’s establishment, in Article 3.1 of its convention:

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
allowed the binary logic of the Kyoto Protocol in which a Party is either in Annex I (i.e., with an obligation to mitigate greenhouse gas emissions) or not (i.e., without any such obligation). The novelty of the Paris Agreement is, however, its combining of global action and CBDR. This leads to “two somewhat loose handles”: the non-determinate complementarity of individualized action and the assessment of actions on a global scale. The one handle is: all Parties are called on and agree to act, possibly in mitigating, and/or adapting, and/or financing, but they are called on differently. It is their individual decision how they respond to this call and which actions they undertake. The other handle is: Parties’ responses will be made transparent, compared, and commented on by others in an interactive process called Global Stocktake. This process is itself part of climate negotiations and feeds back into a possible actualization of Parties’ contributions to the global effort.

These “two somewhat loose handles” can be a source of controversy and arbitrage, but they also can facilitate a process of enhancing climate action and increasing ambition. This disjunctive possibility arises from the institutional design of the Paris Agreement—the remarks made so far should have shown its open texture—and the political nature of climate negotiations.

Per Josephson offers a different interpretation of what CBDR means, recalling its context in the second paragraph of Article 2 of the Paris Agreement. First, CBDR is not conceived here as the sole or main principle of the Agreement. Instead, it is one of its elements, arguably at the same level with the goals and subordinated to the enhancement of the implementation of the Convention. Per Josephson argues when looking at the differentiation allowed in the transparency and compliance frameworks of the Agreement:

There is room for flexibility aimed at developing countries in regard to the technical expert review, but this is linked to ‘capacities’ and ‘national capabilities and circumstances’ rather than CBDR. Anyway, it has been suggested that this implies a shift in CBDR utility, in the sense that it is being responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

Id.

23 See Pieter Pauw et al., Subtle Differentiation of Countries’ Responsibilities Under the Paris Agreement, 5 PALGRAVE COMM’NS, no. 86, 2019, at 2.


given more procedural than substantial regard. In other
words, CBDR may now dictate the ‘how’ rather than the
‘what’. 27

In any of these interpretations, either the “somewhat loose handle” or
the “CBDR applying only to how and not what,” it seems implied that the
principle itself underwent a change with the Paris Agreement. This change
has consequences for the negotiations.

III. THE EVOLUTION OF CBDR IN THE PARIS AGREEMENT

The Paris Agreement changed the content of the CBDR in at least three
ways. 28 First, the Paris Agreement distinguishes between developed and
developing parties. But, it does not classify them in a dichotomy, for
example, in lists like the Annex I. 29 On the one hand, this allows for all Parties
to increase their respective ambition. On the other, it still allows for Parties
to continue to self-identify as developing, even if they increase ambition. The
principle goes further by stipulating that each Party is its own benchmark—
opposed to one benchmark for all Parties in a classificatory group—“in the
light of different national circumstances” and “respective capabilities.” 30

Second, each Party states by and for itself what its contributions to the
goals of the Agreement are. In submitting Nationally Determined
Contributions (NDCs), Parties effectively introduce a climate action plan.
This, again, has a double effect. On the one hand, Parties remain relatively
free and differentiate themselves with regard of their contributions. This is
also referred to as the bottom-up approach of the Paris Agreement. Note also
how these contributions are less binding than commitments or obligations.
On the other hand, all Parties are compelled to formulate such a plan, which
in turn, contains the notions of “progression” and “highest possible
ambition.” 31 Additionally, it stands to reason that when Parties submit their
contributions, at least some domestic legislation aligned to it will follow.

Thirdly, the Paris Agreement contains a series of further
differentiations, which depend on context (e.g., Least Developed Countries
(LDCs) or Small Island Developing States (SIDS)), on specific issues (e.g.,
adaptation finance), or procedures (e.g., timelines and reporting). 32

27 Id.
28 Pauw et al., supra note 23, at 2.
29 See id.
30 Paris Agreement, supra note 1, at art. II, ¶ 2.
31 Id. at art. IV, ¶ 3.
32 Pauw et al., supra note 23, at 2.
Perrez confirms this shift in CBDR. Offering a negotiator’s perspective, he writes:

Linking CBDR to the states’ respective circumstances and capabilities makes clear that the concept should not be understood as dividing the world into fixed categories of developed and developing countries, but that it provides for “targeted differentiation and flexibility.” One year later, the US–China Joint Announcement on Climate Change, which was negotiated by the same US lawyer who was also involved in finding the compromise in the small group in Geneva for the Minamata Convention, similarly qualified CBDR “in the light of different national circumstances”, and this solution later became the basis for how the Paris Agreement addressed the issue. Like in the Minamata Convention, this formulation represented a “political signal of flexibility and dynamism”, underlining that given the differences in national circumstances among states, a simple categorization of states as developed or developing might not be appropriate. Thus, the negotiations of the Minamata Convention have strongly influenced the Paris Agreement, but at the same time, they have also contributed to the evolution of the understanding of the CB[DR] principle.33

IV. CBDR IN CLIMATE NEGOTIATIONS

Climate negotiations under the UNFCCC are primarily political negotiations.34 In such an environment, CBDR can be used for arbitrage as well as for increasing ambition. Arbitrage occurs when Parties using CBDR escape their commitment to act or to be transparent about their actions, or to use any methodology in making their actions visible, traceable, or comparable. In negotiators’ jargon, arbitrage occurs when Parties use CBDR

to legitimize “business as usual” scenarios.\footnote{See Ronan Connolly et al., \textit{How Much Human-Caused Global Warming Should We Expect with Business-As-Usual (BAU) Climate Policies? A Semi-Empirical Assessment}, 13 ENERGIES, Mar. 15, 2020, at 2.} Increasing ambition, in contrast, occurs when CBDR enables all Parties, especially developing Parties, to take up climate actions which they would not have taken up if only developed Parties were called to act. Of course, there is no clear-cut difference between arbitrage and increasing ambition. These are rather two poles with negotiators combining them. The institutional arrangement of the Paris Agreement can incentivize Parties to increase their ambition, or, if badly set up, to arbitrage.

Institutionally, there is an important element of the Paris Rulebook, the Global Stocktake, which leads to an updating of each Party’s NDC.\footnote{See Marjan Peeters, \textit{The Global Stocktake}, in \textit{THE PARIS AGREEMENT ON CLIMATE CHANGE} 326, 326 (Geert Van Calster & Leonie Reins eds., 2021).} This Stocktake is engineered to be dynamic, with several rounds of Stocktakes between Parties leading them to progressively increase their respective ambitions.\footnote{See Schneider, \textit{supra} note 6.} In a nutshell, the roadmap envisioned is: By 2020, Parties will have communicated their NDCs and long term plans, and by 2023, there would be a Global Stocktake, which will lead to updated NDCs by 2025.\footnote{See Navigating the Paris Rulebook, WORLD RES. INST., https://www.wri.org/paris-rulebook (last visited June 8, 2023).} By 2028, there would be another Global Stocktake, which would generate new NDCs by 2030.\footnote{See id.} The Global Stocktake, therefore, is a review mechanism assessing the overall progress of parties as a collective in the light of the Paris Agreement’s goals and identifying remaining areas of action and opportunities.\footnote{See Paris Agreement, \textit{supra} note 1, at art. XIV.} There is an individual review of Parties, including the verification of each Party’s data and tracking their individual achievements of NDC.\footnote{Id. at art. XIII, ¶ 11–12.} Also, all Parties are to deliver transparency reports every second year; the first is due in 2024.\footnote{See Navigating the Paris Rulebook, \textit{supra} note 38.} In addition to that, there is an expert group focused on facilitating implementation and promoting compliance to help countries address barriers to implementation and further climate action.\footnote{Paris Agreement, \textit{supra} note 1, at art. XIII, ¶ 13–art. XV.}

This review process feeding forward into an update of NDCs has been praised as well as criticized. Lavanya Rajamani and Daniel Bodansky highlight the institutional design, considering it a failsafe against falling back
into pure arbitrage.\textsuperscript{44} Since Parties undergo individual and collective scrutiny, they are considerably disincentivized to remain inactive or to pledge and implement policies that are completely out of line with or even against the scope of the others. Methodological devices such as the transparency framework, the assessment of data, and the contributing expert committees make sure that other Parties, pressure groups, and the scientific community have enough knowledge when engaging with any given Party about their contributions, the outcomes of their policies, and even their individual national circumstances.\textsuperscript{45}

Ruo-Shui Sun and co-authors criticize the Rulebook because they do not believe that the necessary information is being communicated with enough transparency.\textsuperscript{46} They also critique the lack of the information’s timeliness, what they call “hypothesis-based but not solution-based decision-making,” and generally the lack of an effective system of finance and technology transfer for developing countries.\textsuperscript{47} While the Paris Agreement and its Rulebook have set up many such mechanisms, from the individual Party’s perspective, there is little to no predictability in when and how much of either they would receive. The authors conclude that these institutions might facilitate the long-term operating of the Paris Agreement, but in the short-term, much more support is needed. They recommend paying as much attention to what is referred to capacity building as to the “ambition of mitigation target numbers.”\textsuperscript{48}

It is probably too early to tell whether this institutional design leads to the increase of ambition or if it will end in arbitrage. However, it is noteworthy that all Parties have submitted their NDCs and all their plans at least indicatively foresee actions differing from their business as usual.\textsuperscript{49} On the other hand, the assessment of these NDCs yields that, even if the differentiation between Parties is understood generously, developed Parties undertake significantly more than developing Parties.\textsuperscript{50}


\textsuperscript{45} See \textit{id.} at 1025. “The rules leave Parties with discretion to define their NDCs . . . [and] seek to instil rigour and discipline, and generate ambition and accountability in the climate regime. But, of political necessity, they preserve considerable autonomy, flexibility and discretion for States.” \textit{id.} at 1040.

\textsuperscript{46} See Ruo-Shui Sun et al., \textit{Is the Paris Rulebook Sufficient for Effective Implementation of Paris Agreement?}, 13 ADVANCES ON CLIMATE CHANGE RSCH. 600, 600 (2022).

\textsuperscript{47} \textit{id.}

\textsuperscript{48} \textit{id.}


\textsuperscript{50} See Michel G.J. den Elzen et al., \textit{Updated Nationally Determined Contributions Collectively Raise Ambition Levels but Need Strengthening Further to Keep Paris Goals Within Reach}, 27
At least to some judgement, this significant difference can be indicative of some Parties using CBDR for arbitrage or at least for not increasing their ambition. The question of whether a Party’s ambition is commensurate with its own differentiated circumstances and specific capabilities is difficult to assess. For this reason, the Global Stocktake is not purely an exercise in “shaming and blaming,” but a constructive dialogue in which Parties can share experiences as well as success stories. While the effectiveness of both these elements might be discussed controversially, there is a heuristic that best describes the outcomes of the institutional design of the Paris Agreement regarding how Parties increase their ambition with CBDR: A Party is unlikely to be able to skip everything every time.

V. FROM NEGOTIATIONS TO POLICIES

Observing how negotiators and Parties employ CBDR in their engagement with the UNFCCC and their pledges to the Paris Agreement is one way of investigating the content of CBDR. There are many others in addition to this one, among them is testing the limits of the principle by analyzing individual policies or policy proposals in the light of their adequacy with CBDR. This approach might be called “asking the hard questions” for two reasons.

First, it tests the boundaries of CBDR with the aim of establishing whether a policy is consistent with it. The question is hard because it entails trading off the content of CBDR and its relationship to the Paris Agreement yielding a disjunctive response: yes or no. This is a hard question, because it addresses the core of CBDR but also calls for criteria and methodologies for stipulating adequacy, as well as methodologies for trading off. Second, it is a hard question because it cannot be answered in the abstract alone but must address a specific policy of a Party. In other words, it is about calling out a Party’s policy for not being consistent with CBDR in the Paris Agreement. This is a hard question, because in the political context of international negotiations, this approach might create obstacles to the process.

In the following two sections, this approach for asking the hard questions of CBDR by testing its limits, such as discussing whether specific
policies or proposals are consistent with the principle, is exemplified. The next section assesses the European Union’s (EU) carbon border adjustment mechanism (CBAM). The section after that discusses the transfer of intellectual property rights. Both sections will explain how these policies fail against CBDR and why. This leads, hopefully, to a better understanding of the principle. CBAM will be covered in more detail because it is a policy being contemporarily deployed. IP transfer, on the other hand, is a proposal.

VI. THE EU’S CBAM

The EU is working on the introduction and implementation of a CBAM. This mechanism is intended to compensate for the difference in carbon prices between those in the EU and not in the EU by imposing an additional price element, the adjustment, on imported goods. The rationale behind the mechanism is based on two potential side-effects of the EU’s high carbon price relative to other economies. First: This price difference could cause companies in the EU to migrate their production plants to jurisdictions with a lower price, effectively evading the EU’s price system. This is called carbon leakage. Second: The same difference in carbon-price could also lead to a disadvantage of producers in the EU. They carry the higher price, while their non-EU competition face a much lower price, if any. If these goods with lower or no carbon prices are imported into the EU, they can undercut EU-level competition prices because of the carbon price differential. In the EU’s view, this would constitute unfair competition. The CBAM is, therefore, supposed to correct these imbalances, diminishing incentives for carbon leakage and setting a level playing field between domestic producers and producers abroad.

The key characteristics of CBAM are its coverage of flows, sectors, geographies, policies, and the calculation of the adjustment. Regarding trade flow, there are CBAMs on exports or imports or both. A CBAM on exports, effectively an export-subsidy, would probably be a prohibited export subsidy under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures. Also, it could incentivize domestic producers to increase the carbon intensity of exports, which would result in an emission increase. Finally, it does not address both rationales for the

53 See id.
54 See TERO KUUSI ET AL., PRIME MINISTER’S OFF. OF FINLAND, CARBON BORDER ADJUSTMENT MECHANISMS AND THEIR ECONOMIC IMPACT ON FINLAND AND THE EU 35 (2020).
CBAM itself, only its preoccupation with carbon leakage. An adjustment of imports effectively introduces new or higher tariffs. They, too, could be contrary to the WTO. Environmental integrity concerns would also apply to them. For example, an import tariff could incentivize domestic producers to adjust their production planning to the level of the CBAM, effectively disincentivizing further carbon-mitigation activities or related innovations. Finally, the CBAM on imports leads to a net loss in welfare, notably of consumers. In its EU-version, the CBAM only applies to imports.

Regarding sectors, the main decision is which sectors to include into the CBAM. Environmental integrity and consistency would both suggest applying the CBAM to all goods of all sectors. Practical considerations, however, let its scope shrink to tangible goods only and typically to goods in carbon-intensive sectors with a high carbon cost, trade exposure, and limited ability to pass through the cost to consumers. The idea behind this descoping is twofold. First, reducing the number of participating sectors reduces the administrative costs of handling the mechanism. Second, limiting the CBAM to sectors with little possibility of passing the costs to consumers also reduces the number of stakeholders (increasing the probability of success of passing the legislation) while making them easier to be administrated. Interestingly, this design option focuses on business-to-business transactions excluding end-consumers from its primary scope. While this is not a problem per se, it could be at odds with important indications in mitigation-research: the most effective mitigation is the one which comes out of the change in consumer behavior.

In any case, the EU focuses on cement, steel, and aluminum. In these sectors, the value of priced carbon-inputs (i.e., inputs on which there is a price to be paid by producers to the EU due to their carbon emissions), as a percentage of value added, tends to be relatively high. The idea behind this narrow focus is to diminish the probability of conflicting with the WTO or international trade law. Regarding geography, a CBAM must comply with Article I of the General Agreement on Tariffs and Trade (GATT) and prevent

57 KUUSI ET AL., supra note 54, at 114.
58 See GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING (1989) (the probability of success of passing the legislation increases since less stakeholders means less groups to actively include in the policy making).
59 See KUUSI ET AL., supra note 54, at 63.
60 See Ghislain Dubois et al., It Starts at Home? Climate Policies Targeting Household Consumption and Behavioral Decisions Are Key to Low-Carbon Futures, 52 ENERGY RSCH. & SOC. SCI. 144, 152–53 (2019); see also Rishad Habib et al., Shifting Consumer Behavior to Address Climate Change, 42 CURRENT OP. PSYCH. 108, 110–11 (2021).
61 See KUUSI ET AL., supra note 54, at 35.
the avoidance (“transshipment”) strategies of importers. For this reason, the sectoral approach chosen by the EU seems more adequate than a geographical one.

Probably the most difficult element of the CBAM is determining which policies it covers. The reason for introducing a CBAM lies in the different carbon prices among jurisdictions. However, there is no universal carbon price. First, because there is no international agreement on the pricing of carbon, and second, because as mitigation abatement costs are highly differentiated, it also stands to reason that carbon prices will differ considerably around the globe. Around twenty-two percent of global emissions are currently covered by an explicit price on carbon, and price levels tend to be significantly lower than the cost of compliance with other non-price carbon constraints. But even among the legislations with carbon pricing mechanisms, the mechanisms as such differ considerably, even within the EU. For example, some jurisdictions have carbon taxes (Sweden), others have emissions trading schemes (Germany), and yet others have fiscal advantages and disadvantages for different activities (France). Unsurprisingly, these differences in policies and among pricing mechanisms lead to different levels of prices.

On a technical level, the definition of the CBAM’s policy-coverage is important for calculating the adjustment, or tariff. Being formulated for the singular tangible good, it needs to factor the weight of the imported product, its carbon intensity, and the difference between its carbon price in the EU and in its country of origin. Understanding its carbon intensity is a challenge in itself, since intensity depends, for example, on the good’s lifecycle, the technology used to produce it, or the type of energy production in its supply chain. For this reason, the EU had to consider different elements when developing its formula for the adjustment. First, the EU starts with the difference in carbon pricing between the EU’s pricing and at the origin country of the good. This difference is multiplied by the carbon intensity of the imported good. The product of this multiplication is then multiplied, once again, by the weight of the good. Expressed as a mathematical formula, these considerations yield: Adjustment = weight imported product multiplied by

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62 See id.
63 See id. at 35–36.
64 See id. at 36.
carbon intensity imported product multiplied by \((\text{carbon price EU} – \text{carbon price origin country})\). \(^{68}\)

The problem with the CBAM is not, however, whether it is methodologically sound or economically desirable, at least in as far as the discussion in this Paper goes. \(^{69}\) The question is, instead, whether it is compatible with CBDR.

It would not seem to be for three reasons. First, the Paris Agreement is an agreement to act, with each Party acting according to its specific responsibility and capability. Neither the Paris Agreement nor any other normative instance under the UNFCCC requires Parties to introduce carbon pricing in any form. It has always been the understanding of the negotiations that different policies can be equivalent, even when being completely different. \(^{70}\) The case could be made that if a Party does not act at all or uses CBDR for sheer arbitrage, a CBAM might be in order. However, all Parties have nationally determined commitments and policies. Whether any is engaging in arbitrage is a matter yet to be determined. This occurs in the different assessments and the Global Stocktake. Neither have been concluded yet. A Party unilaterally imposing a CBAM on others falls outside of the UNFCCC and goes against the Paris Agreement’s provisions.

Second, the CBAM precludes the effect of policies benchmarking them against the domestic effort. The Paris Agreement is an agreement to act. Parties did not agree to synchronize the effects of their policies to achieve a uniform level against which they are benchmarked. Developing Parties explicitly ruled out global benchmarking, let alone benchmarking all other policies against one specific type of carbon pricing by one Party. \(^{71}\)

Third, a CBAM presupposes that climate policies have consequences which are translatable to carbon prices. This logic seems more appropriate for mitigation. However, according to Article 2 of the Paris Agreement, adaptation and the management of financial flows are as important as

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\(^{68}\) Kuusi et al., supra note 54, at 50. Note that such a formula leads to an interesting follow-up question: What if the carbon price differential is negative? Does this lead to a negative adjustment, i.e., to an import subsidy?

\(^{69}\) For more on methodologies, see generally Aaron Cosbey et al., Developing Guidance for Implementing Border Carbon Adjustments: Lessons, Cautions, and Research Needs from the Literature, 13 Rev. Envt’l Econ. & Pol’y 3, 3–4 (2019).

\(^{70}\) See Harald Winkler & Lavanya Rajamani, CBDR&RC in a Regime Applicable to All, 14 Climate Pol’y 102 (2014).

\(^{71}\) See, e.g., Andrei Marcu et al., ERCST, Border Carbon Adjustments in the EU: Issues and Options 36 (2020). Under the ERCST’s umbrella, several workshops with negotiators are organized during the year between the sessions of the bodies under the UNFCCC. The institutional memory of these workshops (and of the negotiations under the UNFCCC) are summed up in the different whitepapers published by the ERCST. The particular paper referenced here is the institutional memory of a session in which EU representatives discussed with developing country Parties how the CBAM would affect them.
mitigation in the Paris Agreement. Their instruments, such as financing capacity building or sharing technology, might prove more difficult, even impossible, to translate into a carbon price. By factually forcing the mitigation goal on other Parties, the CBAM violates CBDR.

EU’s CBAM is a hard question in the context of CBDR in the Paris Agreement because, on the one hand, it is a Party’s prerogative under CBDR to introduce a policy it has reasons to believe leads to sound climate action. On the other hand, the CBAM violates CBDR by not only assuming the comparability of policies in terms of carbon pricing, but especially by benchmarking all other Parties against their own domestic benchmark. Why, then, is it still a question? It remains so, because the EU is going to introduce it, no matter what its adequacy with the Paris Agreement is. From there on, it is difficult to say whether it will be accepted by the other Parties and which role it could play in the Global Stocktake. What makes this a hard question is the way it will feed forward into future negotiations.

VII. SHARING INTELLECTUAL PROPERTY

The website of the UNFCCC states:

Over the years, technology development and transfer with regard to adaptation has received increasing attention. The Paris Agreement speaks of the vision of fully realizing technology development and transfer for both improving resilience to climate change and reducing GHG emissions. It establishes a technology framework to provide overarching guidance to the Technology Mechanism.

This quote has an implicit dual reference. First, it is about the Technology Mechanism introduced to the UNFCCC in 2010. This mechanism consists of two bodies tasked with working together: the Technology Executive

72 Paris Agreement, supra note 1, at art. II, § 1(c) (“Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”).
73 In fact, everything points to the CBAM being an enormous rent-seeking and protectionist project. But let’s grant, here, the EU’s belief in its effectiveness (i.e., instead of seeing the CBAM primarily as a rent-seeking project, one can imagine that at least some part of the EU’s process in instituting it was guided by the willingness to set up an effective climate policy). See Arye L. Hillman & Heinrich W. Ursprung, Presentation at the University of Pittsburgh: Rent Seeking: The Idea, the Reality, and the Ideological Resistance (Oct. 7, 2015); Byeongho Lim et al., Pitfalls of the EU’s Carbon Border Adjustment Mechanism, 14 ENERGIES, Nov. 4, 2021, at 14–15.
76 See id.
Committee (TEC) and the Climate Technology Centre and Network (CTCN). The TEC analyzes policy issues and provides recommendations to support countries in enhancing climate technology efforts. The CTCN supports countries to enhance the implementation of climate technology projects and programs. It has three types of activities: providing technical assistance to developing countries; creating access to knowledge on climate technologies; and fostering collaboration among climate technology stakeholders. Second, the quote is referring to Article 10 of the Paris Agreement, which establishes a Technology Framework promoting and facilitating enhanced action on technology development and transfer.77 Parties are currently working on the development of the guidelines to the framework.

The issue of protecting versus sharing intellectual property (IP) is embedded in the discussions of technology transfer.78 In the ecosystem of the UNFCCC, transferring technology means more than just installing a technical device somewhere. It especially means adapting these devices to local circumstances by, for example, training people, developing the technology with its recipients, or incorporating indigenous technologies to it. This, in turn, seems to include giving recipients access to the intellectual property of the transferable technology through, for example, interfaces or sharing industry plans (even secrets). In short, technology transfer does already entail the sharing of IP, to some degree. At the same time, IP is a contentious issue in the negotiations under UNFCCC.79 Some Parties call for a robust framework protecting IP while others prioritize the transfer of technology, even at the cost of weakening IP. There have been some suggestions to make the discourse explicit, either by committing Parties to make IP-sharing mandatory in technology transfer80 or by creating a specific guidance on IP under the Paris Agreement to balance incentives for research, dispersion, and implementation of climate technology.81

For the perspective of this paper, it is interesting to discuss a specific proposal based on CBDR. It suggests a mandatory transfer of technology, including sharing of IP if a Party identifies a gap in the technologies

77 See Paris Agreement, supra note 1, at art. X.
78 See Chen Zhou, Can Intellectual Property Rights Within Climate Technology Transfer Work for the UNFCCC and the Paris Agreement?, 19 INT’L ENV’T AGREEMENTS 107, 120–21 (2019). The issue of whether the protection of IP is legitimate is not settled. Here, it will be granted that it is legitimate to offer some IP protection. But see N. STEPHAN KINSELLA, AGAINST INTELLECTUAL PROPERTY 59 (2008).
81 See Matthew Rimmer, Beyond the Paris Agreement: Intellectual Property, Innovation Policy, and Climate Justice, 8 LAWS, Feb. 18, 2019, at 17.
deployed, and asserts the highest priority to that technology. This suggestion takes the current process to determine climate technology priorities as a starting point. Parties undertake technology needs assessments (TNA). A TNA supports national sustainable development, builds national capacity, and facilitates the implementation of prioritized climate technologies; it is, however, a technical assessment guided by a methodology that has been in place since 2010. According to this suggestion, if a specific technology identified in a TNA fulfills certain criteria, it falls under the category of essential technology. This creates an obligation for other Parties to transfer this technology to and share its IP with the recipient Party. Additional safeguards might be installed but are relatively unimportant here. The relevance of the suggestion lies in its rationale, which is based on CBDR. To fulfill its responsibility, a Party needs to step up its capacity, but the lack of technology makes climate action impossible (for this Party) in the identified area, and therefore, a Party needs the transfer of technology and IP to reach the capacity necessary for taking on its responsibility.

Even though this suggestion’s rationale is based on CBDR, it does not conform with the principle for two reasons. First, the intent of CBDR is primarily negative. While it states that every Party should contribute, its main intention is to set the limits to these contributions to the differentiated possibilities and capabilities of a singular Party. It is not part of the CBDR to impose a positive commitment to one Party or to all Parties towards one. It is worthwhile remembering that the Paris Agreement is an agreement to act, but to act differently yielding several different results. Second, Parties may transfer technology and IP but as a part of the Technology Mechanism or the Finance Mechanism, or even the Cooperative Approaches with due accounting of their efforts. According to the logic of accounting under the UNFCCC, the Party transferring technology and IP can count this transfer towards its own action. This transfer is, however, in view of CBDR, voluntary and lets the transferring Party determine how much and how intensive the transfer is.

Why is IP, generally, a hard question for CBDR? First, the interpretation of CBDR as a negative principle conforms with the present practice under

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84 See Kilian Raiser et al., Corporatization of the Climate? Innovation, Intellectual Property Rights, and Patents for Climate Change Mitigation, 27 Energy Res. & Soc. Sci. 1, 1–2 (2017). The question here is whether there is a “global common” regarding the intellectual property of climate-technologies, i.e., a space in which there is no protection and/or capitalization of intellectual property if it is being used by developing Parties to mitigate or adapt to climate change.
the UNFCCC. However, there is no foundational discourse about how far its limiting scope goes and whether positive duties from a Party to another can be attached to it. Second, in a hypothetical scenario, if a transfer of IP proves to be more effective or even less costly (i.e., more proportionate) and offers Parties the possibility of stepping up their responsibilities by enlarging their capabilities, would it not be desirable, in the light of the first paragraph of Article 2 of the Paris Agreement to consider a more positive role for the second paragraph of that same article? Of course, this is a hard question, after all, because it points at the heart of a political—instead of technical—process. The Paris Agreement is a political negotiation.

VIII. CONCLUSIONS

This Paper investigated the principle of common but differentiated responsibilities in the ecosystem of climate negotiations. First, it explained how CBDR is a principle in the UNFCCC and in the Paris Agreement. However, it also explained that it is far from being axiomatic and immutable. In fact, as a principle, it stands on the same level as, and perhaps even in competition to, the goals of the Agreement. Also, the content of CBDR has been evolving too. At least with the Paris Agreement, it shifted significantly in the direction of recognizing the need to act.

Secondly, this Paper explored the issue of whether CBDR is an instrument for increasing ambition or for arbitrage, explaining how this depends on the other institutional arrangements of the Paris Agreement, especially the Global Stocktake. At least conceptionally, the Global Stocktake can engage Parties to increase their ambition based on CBDR.

Finally, this Paper examined how climate negotiations become climate policies testing CBDR using two case studies. The negative, limiting component of CBDR is shown in connection with the EU’s CBAM as a clear violation of that principle. However, CBDR might also imply a positive content, for example sharing IP under some special circumstances and within the framework of the Technology Mechanism of the Paris Agreement. Both case studies have been dubbed “hard questions” in CBDR because they cannot be solved on technical terms, but in the context of negotiation, since the Paris Agreement and any international climate accord is primarily a political achievement. In examining these issues, this Paper contributes to the better understanding of the CBDR and the Paris Agreement as evolving and evolutionary.

85 See Tuula Honkonen, CBDR and Climate Change, in ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW 142 (Daniel A. Farber & Marjan Peeters eds., 2016).