UDK 349.6; 341.2

CERIF: S120

DOI: 10.5937/AnaliPFB1903059C

Bojana Čučković, PhD*

FROM EQUALITY TOWARDS EQUITY AND DIFFERENTIATED RESPONSIBILITIES: A CONTEMPORARY INTERNATIONAL ENVIRONMENTAL LAW PERSPECTIVE

The paper analyzes the relationship between the principles of equality, equity and differentiated responsibilities in the specific context of international environmental law. By tracing these three principles throughout the texts of relevant international environmental instruments and agreements, the author provides for distinction between various levels of differentiation through which equity is achieved. It is argued that, due to the novel solutions contained in the Paris Climate Agreement, a change has occurred in contemporary international environmental law regarding the relationship between the principles of equality, equity and differentiated responsibilities. Instead of fostering equality through equity and differentiated responsibilities, these changes have widened the gap between these principles. Differentiation has slowly detached from both equality and equity and has started to fulfill objectives other than fairness, such as achieving wider participation, effectiveness and better implementation of multilateral environmental agreements.

Key words: *Equality. – Equity. – Principle of common but differentiated responsibilities. – Environment. – Climate change.*

* Associate Professor, University of Belgrade Faculty of Law, *cuckovic@ius.bg.ac.rs*.

1. INTRODUCTION

Equality, equity and differential treatment are present through various emanations in general international law.[1] However, their evolution appears to be rather authentic and the use of equity instead of equality is frequent in international environmental law (IEL). Such specificities of IEL may be explained, on the one hand, by the very characteristics of global environmental problems, which cannot be resolved without the participation of the entire international community, or at least its dominant part. On the other hand, it must be acknowledged that not all states contributed to environmental degradation equally and that they differ significantly with regard to their individual capacities to address environmental problems since they represent costly undertakings.

The subject matter of the analysis will be the relationship between the principles of equality, equity and differentiated responsibilities in the specific context of international environmental law. By tracing these three principles throughout the texts of relevant international environmental instruments and agreements, a number of issues will be analyzed. The first part of the paper considers the evolution of the relationship between the principles of equality, equity and differentiated responsibilities, both in the context of IEL and public international law in general. Secondly, the paper will provide an in-depth analysis of these principles and the manner in which they are implemented in a number of international environmental agreements. The third part of the paper focuses on the innovations introduced in the latest international environmental treaty –

[1] For example, the composition of the United Nations (UN) Security Council reflects the inequalities between UN Member States. Inequalities seem also to be reflected in the voting systems of a number of international organizations where a state's number of votes depends on its financial contributions or other criteria. In contrast to such examples, where differentiation was not established in order to foster substantive equality, general international law is also familiar with situations in which differential treatment actually seeks to achieve equality. Thus international maritime law provides for a number of solutions that differentiate between countries with the aim of eliminating differences between them to the highest degree possible. It should, however, be noted that inequalities between states are not necessarily unjust. Aristotle provides classical distinctions between the terms equality, justice and equity. In his words, "if the persons are not equal, they will not receive equal shares," whereas although "justice in distribution must be in accordance with some kind of merit, (...) not everyone means the same by merit" (Aristotle 2004, 86). In regard to equity and its relation to justice, Aristotle considers them to be one and the same. However, while both are good, in Aristotle's opinion "what is equitable is superior" (Aristotle 2004, 100). The problem, though, appears with what should be considered as legally just. Since "all law is universal, and there are some things about which one cannot speak correctly in universal terms" it may become "necessary to make universal statements but not possible to do so correctly." In such cases, "the law takes account of what happens more often, though it is not unaware that it can be in error" (Aristotle 2004, 100).

the Paris Agreement on Climate Change. Finally, an assessment of the possible repercussions of such novel solutions on the relationship between the principles of equality, equity and differentiated responsibilities will be the subject of analysis in the last part of the paper.

2. EQUALITY, EQUITY AND COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN EARLY IEL INSTRUMENTS: THE STOCKHOLM AND RIO DECLARATIONS REVISITED

There appears to be a reverse evolution in the relationship between equality and equity in IEL as compared to general international law. In international law, the principle of sovereign equality came to life quite late and was born out of obvious inequalities that existed between states, in an attempt to disguise substantive inequalities by proclaiming formal equality.[2] Opositely, in IEL the principle of equality represented a starting point which, in a world of still present disparities, was transformed into the principle of equity and "common but differentiated responsibilities" (CBDR).

These three principles can be traced in the texts of relevant international environmental instruments that paved the way for current international environmental agreements. In contrast to Principle 24 of the 1972 Stockholm Declaration on the human environment, which proclaimed that international matters concerning the protection and improvement of the environment should be handled "by all countries, big and small, on an equal footing," with no mention of equity or differentiated responsibilities,[3] the 1992 Rio Declaration on environment and development did not refer to the principle of equality but instead

[2] Voigt, Ferreira (2016, 286) offer a definition of the principle of sovereign equality of states that is in line with the prevailing position that equality equals to a "guarantee that all states have equal rights and obligations." As noted by Lavanya Rajamani (2006, 2), differentiated duties may therefore be perceived as a derogation of the principle of sovereign equality. However, it should not be disregarded that the free will of states to enter into differing commitments actually represents a valid link between sovereign equality of states and their unequal rights and duties. States are the ones who decide whether they will express their consent to be bound by treaties providing for differentiated obligations. It therefore appears that formal equality between states fosters their substantive equality through means of formal inequalities (unequal rights and duties) based on substantive inequalities. Such an understanding of the principle of sovereign equality is close to Hans Kelsen's (1944, 209) thesis that, in international law, "equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights," which basically means that equality should be understood in a way that "under the same conditions States have the same duties and the same rights."

[3] UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

relied largely on equity.[4] It stated that the special situation and needs of developing countries should be given priority, particularly the least developed and those most environmentally vulnerable, and provided the first and most famous recognition of the principle of common but differentiated responsibilities, by stipulating that not all states contributed to the present environmental degradation in the same manner and that, therefore, not all States should have the same commitments both to the environment and to each other.[5] A definition of equity is offered by Voigt (2014, 51), who refers to it as "the quality of being impartial, fair, and just." In the area of international environmental law, this comes down to taking account of "states' different 'circumstances', whether these relate to the stage of development, economic means, risk (exposure and vulnerability), (...) financial and technological capacity, etc." In regard to the CBDR principle, it is regularly understood as a manifestation of equity in IEL (Cullet 1999a, 169).

This shift from Stockholm equality towards Rio equity and differentiation may be explained by the specific relationships between a number of factors, as well as their varying significance for different categories of international actors. As remarked by Beyerlin (2006, 262), many Third World countries opposed the approach adopted at the Stockholm Conference for two main reasons. Firstly, they perceived environmental degradation predominantly as a result of the industrialization process in developed countries and, secondly, pollution was not among their priorities. Equal obligations therefore needed to be replaced by differentiated obligations, in order not only to achieve the practical aim of getting underdeveloped and developing countries to make environmental commitments, but also to acknowledge the current realities since in the post-Stockholm period the economic and social concerns of developing countries far exceeded the environmental concerns of developed ones. The shift from equality towards equity and differentiation therefore represented a reflection of both necessity and fairness within the international community at the time, the latter however prevailing over the former.

[4] In contrast to the CBDR principle, which is defined in Principle 7 of the Rio Declaration, IEL does not provide a definition of equity, neither in general nor in regard to the international climate change regime. United Nations Conference on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26 (vol. I).

[5] Principles 3, 6 and 7 of the 1992 Rio Declaration on Environment and Development. For a detailed doctrinal analysis of the CBDR principle in international law, *see* Stone (2004, 276–301).

3. MODES OF INTEGRATING THE PRINCIPLES OF EQUITY AND COMMON BUT DIFFERENTIATED RESPONSIBILITIES INTO THE PROVISIONS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS: COMMON AIM – DIFFERENT MEANS AND BASIS

The next issue to be analyzed concerns the modes of integrating the Rio principles of equity and differentiated responsibilities into specific international environmental agreements, with special focus on the international climate change regime, protection of the ozone layer and atmosphere, biological diversity and desertification. Although the relevant provisions of the respective conventions all reportedly aim to achieve equity of the contracting parties, the differentiation through which equity is to be achieved is compound and can be identified at various levels. Such diversification regarding the means of integrating the two Rio principles into specific agreements may be explained by the specificities of the particular environmental problem, the level of disparities between states as regards their capacities to address it, as well as the intended objectives. On the other hand, these considerations dictated the very form and content of the treaty provisions that contain the differentiated commitments. The analysis will, for the moment, exclude the 2015 Paris Agreement, and will focus on a number of international environmental treaties that preceded it. The reason for using such an approach lies in the fact that the youngest member of the environmental treaties' family introduces significant innovations that deserve a separate, more detailed and focused analysis. Such an analysis would further enable relevant comparisons to be made, as well as conclusions to be reached regarding the very topic of this paper, i.e. the relationship between the principles of equality, equity and differentiated responsibilities.

3.1. Differentiation at the Level of Primary Treaty Rules vs. Differentiation at the Level of Treaty Implementation

Firstly, there appears to be differentiation at the level of primary treaty norms and differentiation at the level of their implementation. Both levels of differentiation appear to be twofold.

The most common manifestation of differentiation at the level of primary treaty rules can be described as "loose" since it makes contracting parties' commitments conditional upon their "particular circumstances," in so far as it is "appropriate" or "as far as possible."[6] Its

[6] Article 6 of the Convention on Biological Diversity stipulates that general measures for conservation and sustainable use of biological diversity will be performed "in accordance with particular conditions and capabilities of a contracting party. The same level of differentiation is achieved by using other formulations, such as "as far as

second variation is less frequent in IEL and includes stipulating entirely different commitments from one contracting party to another. An example of such "strict" mode of differentiation is the establishment of greenhouse gas emission (GHG) reduction targets by the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) only for the group of developed contracting parties stated in Annex I,[7] or differentiation of commitments provided in Article 4 of the UNFCCC.[8]

Differentiation at the level of implementation of treaty norms is first and best perceived through the Montreal Protocol on Substances that Deplete the Ozone Layer, which provides for reciprocal commitments of all parties at the level of primary treaty norms, but with longer implementation periods for developing countries for which compliance with this treaty is more difficult.[9] However, another, more frequently used variation of this mode of differentiation, exists through the so-called implementation aid. Since many parties to environmental agreements do not possess the required financial and technical capacities to implement the commitments stipulated in the given treaty, their implementation is made conditional upon the aid which is to be provided either by those

possible and as appropriate" (Art. 7 CBD). Convention on Biological Diversity, 5 June 1992, United Nations Treaty Series, Vol. 1760, 79. A similar pattern is used in Art. 5 of the UN Convention to Combat Desertification which contains the formulation "in accordance with their circumstances and capabilities." The United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 17 June 1994, United Nations Treaty Series, Vol.1954, 3.

[7] Art. 10 of the Kyoto Protocol defines the commitments that are to be fulfilled by all parties, Art. 2, 3, 4, 5, 6, 7 and 8 define the commitments of the Annex I parties, whereas Art. 11 stipulates additional commitments for the Annex II group of parties. Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, 10 December 1997.

[8] Paragraph 1 of Art. 4 provides commitments of all parties, paragraph 2 lists commitments for developed country parties and other parties included in Annex I, whereas paragraphs 3, 4 and 5 of the same Article stipulate the commitments of the developed parties included in Annex II. UN General Assembly, United Nations Framework Convention on Climate Change: Resolution adopted by the General Assembly, 20 January 1994, A/RES/48/189, United Nations Treaty Series, Vol. 1771, 107.

[9] The initial text of the Montreal Protocol on Substances that Deplete the Ozone Layer stipulated in Art. 5 that any party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita, on the date of the entry into force of the Protocol for it, or any time thereafter within ten years of the date of entry into force of the Protocol, would be entitled to delay its compliance with the control measures by ten years. Subsequent amendments followed a similar pattern, although by specifying precise timetable for Art. 5 countries to implement the obligations of phasing-out hydrochlorofluorocarbons and phasing-down hydrofluorocarbons. The Montreal Protocol on Substances that Deplete the Ozone Layer, 16. September 1987, United Nations Treaty Series, Vol. 1522, 3. For more details on the amendments, see the official Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer (United Nations Environment Programme 2018, 19–23).

contracting parties that possess such capacities or by an international fund established for that purpose.[10]

Significant differences exist between these options from the perspective of their effectiveness. Differentiation at the level of implementation, at least its first option, has not only proven to be the most successful,[11] but it also has had positive reverse impact on primary norms, by providing them with additional strength (*see* Voigt 2014, 56–58). Judging by the experience of the Kyoto Protocol, the second variation of substantive differentiation failed to live up to expectations, whereas the first one is usually considered as additional maneuvering space for contracting parties not to fulfill their commitments, and thus represents the further weakening of already weak international environmental commitments.[12]

3.2. Equity Through Collective and Individual Differentiation

Secondly, *ratione personae*, differentiation can encompass a group of states or can be established between countries on an individual basis, independently of the common characteristics that they share with other countries. Both approaches have certain advantages and disadvantages. Collective differentiation enhances negotiating capacities and the general position not only of the group as a whole, but also of each individual member of the group. However, such an approach, as noted by Cullet (1999b, 552), tends to be "reductionist", since it fails to take into account the immense disparities and inequalities between countries that are considered to belong to a particular group. In other words, the classification of countries as developed, developing or least developed, cannot adequately reflect the characteristics and specificities of each particular country: not all developed countries are equally developed, and the circumstances of all developing countries are not the same.[13] Individual differentiation may thus be perceived as a sounder solution since it is based on the individual circumstances of

[10] Art. 10 of the Montreal Protocol on Substances that Deplete the Ozone Layer, Art. 20 of the Convention on Biological Diversity, Art. 13 of the Stockholm Convention on Persistent Organic Pollutants. Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, United Nations Treaty Series, Vol. 2256, 119

[11] Namely, according to the United Nations Environment Programme (2019), compared to 1990 levels, the global phasing-out of substances that deplete the ozone layer has reached 98%, whereas ozone depletion would have increased ten times by 2050 compared to current levels had it not been for this international treaty.

[12] For additional argumentation see Handl (1990, 9).

[13] Voigt (2014, 52) argues in favor of individual differentiation due to another aspect of this problem. The author stresses that it is impossible for particular groups of states to be precisely identified in the sense that "the antagonistic dividing line between developed and developing countries is not only becoming increasingly blurred, but in effect an obstacle to meaningful mitigation action".

each country and its own capability to contribute to resolving a particular environmental problem. However, in an international community consisted of nearly 200 states, such an approach is problematic both at the level of the creation and at the level of implementation of international norms.[14] Namely, normative frameworks are not able to reflect these specificities by defining them or at least by offering firm criteria for properly determining them.[15] Instead, they mostly opt for rather loose formulations that simply make implementation of particular duties conditional on the national circumstances and capabilities of the contracting parties, whatever that may mean, thus practically equating individual differentiation with the first option of substantive differentiation, as explained in the previous section.[16]

3.3. Equity: Single Aim – Different Basis?

Thirdly, regarding the very basis for differentiation, differentiated responsibilities of contracting parties may be considered to be based on the principle of common but differentiated responsibilities, whereas others can hardly be linked to this principle. Namely, in its initial meaning, the CBDR principle took into account the varying historical contributions to environmental degradation of the so-called developed and developing countries and observed differentiated treaty obligations as a means of corrective justice. In addition to the climate change regime,[17] differentiation is explicitly based on the CBDR principle in the 2001 Stockholm Convention on Persistent Organic Pollutants[18] and the 2013 Minamata Convention on Mercury.[19] Other international environmental treaties that provide for differentiated commitments of contracting parties do not offer any explicit basis for differentiation, with differentiation implicitly stemming from the characteristics of the particular situation,

[14] Cullet (1999b, 552), in contrast, uses the number of states in the international community as an argument in favor of the individual differentiation approach. The author believes that "the relatively manageable number of states in the international community" enables taking into account "the situation of each and every state to determine their actual capacity to respond to a given problem."

[15] In addition to the Kyoto Protocol which provided a list of developed countries in one of its annexes, the Montreal Protocol on Substances that Deplete the Ozone Layer may also serve as an exception in this regard. It offers clear numerical criteria for determining which countries qualify as Article 5 countries, i.e. developing country deserving special treatment. Such a method of classifying countries as developing countries may be perceived, among other things, as having contributed to the success achieved by this international environmental instrument.

[16] *See* examples contained in footnote 6.

[17] Art. 3 and 4 of the United Nations Convention on Climate Change, Art. 10 of the Kyoto Protocol to UNFCCC.

[18] *See* the Preamble to the Stockholm Convention on Persistent Organic Pollutants.

[19] Minamata Convention on Mercury, 6 November 2013, UNEP(DTIE)/Hg/INC.5/7.

needs and capabilities of the contracting parties.[20] Since the CBDR principle can be understood as just one among many emanations of equity, does this mean that equity represents a basis for differentiation in all international environmental treaties that do not rely on CBDR?

There appears to be a significant disparity that arises from this distinction regarding the basis for differentiation. Differentiation based on the CBDR principle seems to be in pursuit of corrective justice, fairness and fairly achieved outcomes. In contrast, differentiation based on other reasons may have other ultimate aims, such as effectiveness and better treaty implementation, either exclusively or in combination with fairness. Thus, it has not only become obvious that substantive equality would never be reached in IEL – not even through equity and differentiation – but it has also become questionable whether differentiation always tends to reach equity and fairness. This question gains even more importance in the context of the 2015 Paris Agreement on Climate Change.

4. DIFFERENTIATION IN THE PARIS AGREEMENT ON CLIMATE CHANGE: ABOLISHMENT OF THE CBDR OR ITS NOVEL ELEMENT?

Following previous considerations, the next matter to be questioned relates to changes to the the CBDR principle that were introduced by the 2015 Paris Agreement on climate change. The replacement of strictly determined quantified GHG emission reduction targets with the so-called "nationally determined contributions" (NDCs) represents a major novelty. Namely, instead of defining emission reduction targets in the text of the agreement and exclusively for the group of developed parties, the Paris Agreement opts for a solution where all contracting parties have quantified emission targets, but these targets are to be determined on their own.[21] Although there is still differentiation between developed and developing parties in certain provisions of the Agreement,[22] this seems to have been abandoned in the case of emission reduction targets, as

[20] According to the analysis provided in Pauw *et al.* (2014, 31–32), the CBDR principle can be identified as a basis for differentiation even in the multilateral environmental treaties that do not mention it explicitly, such as the Convention on Biological Diversity. However, the arguments supporting this claim do not seem convincing enough. On the other hand, the absence of a link to the CBDR principle in certain environmental treaties may be explained by the temporal argument since their adoption preceded the introduction of the principle in the Rio Declaration. The Montreal Protocol on Substances that Deplete the Ozone Layer may serve as an example in this regard.

[21] Art. 3 and 4 of the Paris Agreement on Climate Change. Paris Agreement on Climate Change, 12 December 2015, C.N.63. 2016.TREATIES-XXVII.7. d.

[22] Art. 9 appears to be most indicative in this regard. However, differentiation between categories of countries is also present in other articles. For example, Art. 3

the central and most significant treaty commitment. Instead, a specific kind of individual differentiation takes precedence over the previously-used collective differentiation. It, nevertheless, differs from ordinary individual differentiation in that it is determined by the contracting parties themselves, in line with their own interests and assessment of national capabilities.[23]

Even though some authors claim that differentiation through taking account of particular national conditions and capabilities of a contracting party may be considered as a novel element of the CBDR principle,[24] such a solution may also be understood as an abolishment of the CBDR principle with regard to differentiation at the level of central primary treaty norms, with its implicit subsistence with regard to less important provisions of the treaty[25] and at the level of implementation aid.[26] If differential treatment is perceived as a means to achieve equity and equality, this departure from the CBDR may be understood as a necessity brought about by the fact that circumstances have changed and that greater significance should be attached to current environmental and economic factors than to historical reasons. Are we witnessing the emergence of a new principle of different national circumstances (DNC) which will serve as the basis for differentiated responsibilities and achieving equity in IEL? Is this principle nothing more than an evolving version of the CBDR principle, or is differentiation in IEL actually based on the combination of the two (CBDR-DNC)?

The answer is – none of the above. The Paris Agreement abolished the CBDR principle, while at the same time it reintroduced the well-

recognizes the need to support developing countries in implementing treaty provisions, Art. 4 allows developing parties longer GHG peaking, etc.

[23] Cullet (2016, 317) qualifies this sort of individual differentiation as self-differentiation.

[24] Beyerlin (2006, 279) proposed a revised scheme of commitments that would entail a sliding scale of reduction obligations, allowing for a more flexible differentiation between the parties, according to their share of greenhouse gas emissions at the present, or which are expected to have in the near future. Although the author reads the CBDR principle as encompassing such an option, in our opinion it would actually represent either its complete abolishment or significant modification, which would need to be recognized through a newly-adopted formulation, contained in a future international environmental instrument.

[25] Art. 7, paragraph 3 stipulates that "the adaptation efforts of developing country Parties shall be recognized, in accordance with the modalities to be adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement at its first session."

[26] Art. 13, paragraph 2 states that "the transparency framework shall provide flexibility in the implementation of the provisions of this Article to those developing country Parties that need it in the light of their capacities", whereas paragraph 3 provides the same for the group of the least developed countries and small island developing states.

known, but previously slightly differently formulated, principle of different national circumstances. Namely, the preamble of the Paris Agreement reiterate the equity and CBDR principles, however with an addition – "in the light of different national circumstances."[27] Such a formulation indeed represents another important novelty in the future climate change regime since it was not contained in any of its previous reiterations. However, certain provisions that contain differentiated commitments mention CBDR-DNC,[28] while others rely exclusively on equity,[29] and some invoke only "different national circumstances".[30]

Maljean-Dubois (2016, 154–155) believes that the new formula increases "the range of factors that may serve as a basis for determining differentiation" and perceives it as opening the door for an "evolutionary interpretation" of the CBDR. However, the manner in which the new CBDR-DNC principle is used in the specific provisions of the Paris Agreement proves that it has little or no connection to its UNFCCC and Kyoto Protocol predecessors.[31] Firstly, not only has its essence and substance vanished, since it is used in provisions that do not differentiate between the countries on the basis of their contribution to environmental degradation, it focuses on successive, i.e. future contributions and long term GHG development strategies, not on historic ones. Secondly, by requiring that successive contributions follow the principle of progression, meaning that each successive GHG emission reduction target needs to be higher than the previous one, the Paris Agreement has definitely departed from the CBDR principle. By opting for the principle of progression as regards nationally determined contributions, the Paris Agreement takes the assumptions that the national circumstances will certainly improve, thus resulting in the country's advanced capacities to handle the climate change issue, and that its emission of GHG will surely decrease. But what if this is not the case? Would it be fair to

[27] The Preamble to the Paris Agreement states that contracting parties shall pursue the objectives of the UNFCCC and that they are "being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

[28] Article 4, paragraph 3 states that "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." In a similar manner, Art. 4, paragraph 19 stipulates a duty to formulate and communicate long-term low greenhouse gas emission development strategies, by taking into account common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

[29] *See* Art. 4.1. and Art. 14 of the Paris Agreement.

[30] Art. 4.4, Art. 13.1 and Art. 15.2. of the Paris Agreement.

[31] Rajamani (2016, 509) takes the same position, although using different arguments.

require more ambitious NDCs from those contracting parties that have limited national capacities and are not large GHG emitters, while at the same time leaving it entirely at the discretion of the greatest emitters, with favorable national circumstances, to decide to which extent their targets will increase successively? Such a solution basically consists of abandoning the CBDR principle in its original sense. Thirdly, the original CBDR principle entailed certain formal criteria derived from the wording of Principle 7 of the Rio Declaration.[32] The absence of any formal criteria by which nationally-defined contributions could be determined, may serve as another indication that the Paris Agreement actually departs from the CBDR.[33] In line with these arguments it can be concluded that although formally still present, though in combination with the DNC part, the CBDR principle has actually been withdrawn from the climate regime, whereas its place has been taken over by the principles of equity and different national circumstances. The DNC principle, however, should not be considered as something completely new in the climate regime and in IEL in general. It has served as a basis for differentiation for quite some time, although through different formulations, and it is the equivalent of what was considered the "loose" variation of differentiation at the level of primary treaty norms, as explained in part 3.1 of this paper.

The Paris Agreement has demonstrated another departure from its predecessors and other environmental treaties: it does not opt for specific type of differentiation; it encompasses them all. As explained above, it provides for both individual, or self-differentiation, and collective differentiation. It not only stipulates differentiation at the level of primary treaty commitments, it also uses differentiation with regard to their implementation. Finally, it formally links differentiation to the CBDR principle, although it substantially uses equity and the principle of different national circumstances as its basis.

[32] As noted by Honkonen (2009, 258–259), this does not mean that the content of the CBDR principle is definitely determined and deprived of any controversies. Even other, less disputed IEL principles, such as the principle of environmental impact assessment and the precautionary principle, are not characterized by firm and precise content. Such a claim should be understood in the sense that certain formal elements of the CBDR principle could be derived from its initial definition contained in the Rio Declaration, whereas the Paris Agreement obviously does not follow these criteria, at the same time, by failing to provide new ones. An in-depth discussion on the elements of the CBDR principle and its content is offered by Rajamani, (2006, 130–138 and 152).

[33] In addition to criticizing the absence of formal criteria, according to which contributions would be based on the CBDR principle, Vanderheiden's (2015, 43) analysis offers insightful direction on the application of the CBDR principle in relation to the financial aspect of the climate change phenomenon.

5. THE PARIS CLIMATE AGREEMENT: ANY CONSEQUENCES REGARDING THE RELATIONSHIP BETWEEN EQUALITY, EQUITY AND DIFFERENTIATED RESPONSIBILITIES IN CONTEMPORARY IEL?

Due to the novel solutions contained in the Paris Agreement, a change has occurred in contemporary IEL regarding the relationship between the principles of equality, equity and differentiated responsibilities. Namely, differentiation based on different national circumstances may only be understood as the direct application of the principle of equity and cannot be considered to emanate from the principle of common but differentiated responsibilities. This is clear from the very wording of the Paris Agreement which stipulates certain treaty commitments by explicitly referring only to the principle of equity, whereas in regard to other obligations it simultaneously refers to the principles of equity and common but differentiated responsibilities. It seems that, although still formally present, the principle of common but differentiated responsibilities represents neither the exclusive nor the most important means for achieving equity and that the principle of respective national capabilities has taken precedence. By opting for such a basis for differentiation, the international climate change regime has taken a step back and abandoned the "advanced" or "progressive" level of differential treatment, as provided by the Kyoto Protocol. The differentiation present in the future climate change regime has thus combined modes of differentiation used in other environmental agreements. "Strict" differentiation is replaced by "loose" differentiation; differentiation encompassing groups of states is substituted by self-determined individual differentiation, whereas instead of being based on the CBDR principle, differentiation is now mainly based on national circumstances and capabilities of each individual contracting party.

As an aim for achieving equity and confronting the fact of inequality with the fiction of equality, changes that have occurred in IEL, related to differential treatment and differentiated responsibilities, have inevitably influenced respective changes in the principles of equity and equality. Equity and equality have become "loose", determined on an individual basis and depending on national circumstances and the capabilities of the parties to a particular environmental agreement. This will undoubtedly result in further weakening of the already weak environmental commitments, whereas the equity principle will be perceived as a tool in the hands of the developed instead of the developing countries. Namely, if in 1992 CBDR appeared as a necessary compromise to attract environmentally unaware developing countries which, at the time, had other priorities, during the second decade of the 21st century it is necessary to make compromises with developed and

certain developing countries, in order to plead for their participation in international environmental agreements, with underdeveloped and developing countries becoming aware that they have been impacted the most by climate change and other environmental consequences, *inter alia* due to their high vulnerability and low resilience capacities. Therefore, instead of fostering equality through equity and differentiated responsibilities, these changes have further deepened the inequalities between the members of the international community. Differentiation is no longer a means for achieving equity between developed and developing in a world of substantive inequality; rather it became a constituent element of an insufficiently defined new concept of equity which is to be achieved through equally undefined and vague differentiation based on individual capabilities of each member of the international community. In other words, the interpretation and application of the principles of equity and differentiation has always been and will always be dependent upon the interests of the developed states. If back in the 1990s these states had an interest to offer strict and collective differential treatment based on the clear lines of the CBDR principle, in 2010s the interests of developed states have obviously undergone a significant change, which has resulted in loose and individual differentiation based on an undefined principle of equity. Although at some point during the evolution of IEL, differentiation, as an emanation of equity, had the potential of being perceived as a tool for fostering substantive equality, it has recently become obvious that differential treatment does not pursue equality any longer and that it has departed from it. Differentiation has, also, slowly detached from equity and started to fulfill objectives other than fairness, such as effectiveness of international environmental treaties. It now predominantly serves the purely rational and practical purposes of attracting as many contracting parties to a particular environmental agreement as possible and better implementing those agreements once they enter into force.[34]

6. CONCLUSION

The reasons for introducing differentiation into international environmental law were initially distinct from the reasons for

[34] Under these circumstances, in which participation and effectiveness definitely take precedence over fairness in multilateral environmental agreements, the presence and subsistence of fairness as the key quality of the principle of equity is, in our opinion, best explained by Voigt, Ferreira (2016, 288). The authors rightly note that "while effectiveness depends on participation, participation in turn depends on states' own perception of fairness and equity with regard to other states' contributions towards addressing the problem". Put differently, the state's willingness to make environmental commitments will, among other factors, depend on its own perception of the given treaty's fairness. A similar line of reasoning is offered by Ringius, Torvanger and Underdal (2002, 1).

differentiation in other areas of international law. This distinction is mainly due to the principle of common but differentiated responsibilities, which has significantly influenced the understanding of the equity principle, although it has generally been considered to be just one of its potential manifestations. Namely, the CBDR principle contains a significant, though quite specific understanding of fairness, which, at the time of the Rio Declaration, prevailed over other more pragmatic factors. By abandoning the CBDR principle, the application of equity in IEL risks losing this specificity and becoming closer and more similar to the practical purposes that differentiation has in other areas of international law.[35]

By abandoning the CBDR principle, as well as by introducing multiple and flexible forms of differentiation, the Paris Agreement has significantly disturbed the relationship between equality, equity and differentiated responsibilities in contemporary IEL. Initially, in the community consisting of unequal states, IEL started to evolve based on formal equality. which was soon substituted by equity and CBDR, so as to eventually achieve substantive equality. Unfortunately, reality took a different turn. IEL indeed started its development by establishing formal equality in the Stockholm Declaration; equality was indeed transformed into the principles of equity and CBDR in the Rio Declaration and some of the successive multilateral environmental agreements, but substantive equality has never been achieved. Instead, with the abolishment of the CBDR principle in the new climate change regime, IEL risks, though only formally, being reduced to equity through differentiation, although it in fact provides for differentiation detached from equity. Differentiation that does not aim to achieve fairness cannot be viewed as based on equity. Therefore, instead of establishing "equitable differentiation", as an evolving principle of international law for the protection of the environment,[36] it seems that IEL is closer to what may be described as a principle of pragmatic differentiation.

Instead of being at the forefront of IEL in terms of equitable outcomes of differentiation, the international climate regime has taken

[35] Additionally, Caney (2005, 748) remarked that the influence of the global distribution of environmental burdens and benefits risks being lost as well, which also lay in the basis of differentiation at the time when this approach was first introduced in IEL.

[36] According to Shelton (2010, 125), however, the equitable differentiation approach does not rely exclusively on morality and the notion of justice; it also includes other, more practical aims such as fostering "more effective action on issues of common concern". Therefore, in this perspective equitable differentiation is equitable and based on the sense of fairness, but at the same time it is able to achieve additional pragmatic aims. Here lies the most important distinction as regards our qualification of "pragmatic differentiation", which basically either excludes the element of fairness or leaves it to a minor, negligible extent.

a step backward. By opting for the DNC principle, it has reintroduced loose, individual differentiation based on vague and undefined criteria.[37] Although it should be acknowledged that such a solution represented the only acceptable compromise between negotiating parties at the Paris conference, adopted mainly in order to ensure wide participation, it remains to be seen whether the solution will live up to the other fairness-free aim for differentiation – assuring better implementation of the treaty. Indeed, strict and collective differentiation, applied in the Kyoto Protocol to UNFCC, failed to achieve successful results. Nevertheless, other, more successful forms of differentiation could have influenced the architecture of the future climate treaty. An attempt could have been made to achieve both equitable and pragmatic differentiation by adapting successful solutions from other multilateral environmental agreements to the specificities of the climate change regime, such as individual differentiation at the level of implementation of the treaty, based on objective and clear numerical criteria.

In order to protect the environment, IEL needs successful international treaties. Successfully implemented multilateral treaties that do not pursue equity and fairness are therefore worth more than fair agreements that gain insufficient acceptance and prove unsuccessful. For the sake of present and future generations, all the species and the planet itself, let us hope that the drafters of the Paris Agreement sacrificed equity for the success of the climate regime.

REFERENCES

Aristotle. 2004. Nicomachean Ethics. *Cambridge Texts in the History of Philosophy*, ed. Roger Crisp. Cambridge: Cambridge University Press.

Beyerlin, Ulrich. 2006. Bridging the North-South Divide in International Environmental Law, *Journal of Foreign Public Law and International Law* 66: 259–296.

Caney, Simon. 2005. Cosmopolitan Justice, Responsibility, and Global Climate Change. *Leiden Journal of International Law* 18: 747–775.

Cullet, Philippe. 1999a. Equity and Flexibility Mechanisms in the Climate Change Regime – Conceptual and Practical Issues, *Review of European, Comparative and International Environmental Law* 8: 168–179.

[37] For opposing views that praise the potentials of the new climate regime and its solutions *see* Voigt, Ferreira (2016, 301–302); Voigt, (2014, 54); Rajamani (2016, 494); Maljean-Dubois (2016, 159).

Cullet, Philippe. 1999b. Differential Treatment in International Law: Towards a New Paradigm in Inter-State Relations. *European Journal of International Law* 10: 549–582.

Cullet, Philippe. 2016. Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps. *Transnational Environmental Law* 5: 305–328.

Handl, Günther. 1990. Environmental Security and Global Change: The Challenge to International Law. *Yearbook of International Environmental Law* 1: 3–33.

Honkonen, Tuula. 2009. The Principle of Common But Differentiated Responsibility in Post-2012 Climate Negotiations. *Review of European, Comparative and International Environmental Law* 18: 257–267.

Kelsen, Hans. 1944. The Principle of Sovereign Equality of States as a Basis for International Organization. *The Yale Law Journal* 53: 207–220.

Maljean-Dubois, Sandrine. 2016. The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime? *Review of European, Comparative International Environmental Law* 25: 151–160.

Pauw, Pieter, Steffen Bauer, Carmen Richerzhagen, Clara Brandi, Hanna Schmole. 2014. Different Perspectives on Differentiated Responsibilities – A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations. Discussion Paper 6/14. Bonn: German Development Institute.

Rajamani, Lavanya. 2006. *Differential Treatment in International Environmental Law*. Oxford: Oxford University Press.

Rajamani, Lavanya. 2016. Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics. *International and Comparative Law Quarterly* 65: 493–514.

Ringius, Lasse, Asbjørn Torvanger, Arild Underdal. 2002. Burden Sharing and Fairness Principles in International Climate Policy. *International Environmental Agreements: Politics, Law and Economics* 2: 1–22.

Shelton, Dinah. 2010. Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change. 91–125 in *Human Rights and Climate Change*, ed. Stephen Humphreys. Cambridge: Cambridge University Press.

Stone, Christopher. 2004. Common But Differentiated Responsibilities in International Law. *American Journal of International Law* 98: 276–301.

United Nations Environment Programme. The Secretariat for the Vienna Convention for the Protection of the Ozone Layer and for the Montreal Protocol on Substances that Deplete the Ozone Layer. 2018. *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer*. Nairobi, Kenya: Ozone Secretariat.

United Nations Environment Programme. 2019. Success Achieved to Date and the Road Ahead. *https://www.unenvironment.org/ozonaction/who-we-are/about-montreal-protocol,* last visited June 26, 2019.

Vanderheiden, Steven. 2015. Justice and Climate Finance: Differentiating Responsibility in the Green Climate Fund. *The International Spectator* 50: 31–45.

Voigt, Christina. 2014. Equity in the 2015 Climate Agreement. *Climate Law* 4: 50–69.

Voigt, Christina, Felipe Ferreira. 2016. "Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement. *Transnational Environmental Law* 5: 285–303.

Article history:
Received: 25. 7. 2019.
Accepted: 3. 9. 2019.