13

Common but Differentiated Responsibilities and Respective Capabilities

*Patricia Galvao Ferreira**

13.1 INTRODUCTION

This chapter examines how domestic courts have considered the principle of 'common but differentiated responsibilities and respective capabilities' (CBDR-RC) when deciding lawsuits alleging violations of domestic statutory obligations, constitutional rights, or common law duties by governments in the context of efforts to mitigate climate change. Although CBDR-RC emerged first as a principle of international law to guide State-to-State relations (outward-looking), national courts are increasingly relying on CBDR-RC to help interpret the scope of national climate obligations (turning this principle 'inward-looking').[1]

A growing number of courts are relying on CBDR-RC when analysing a country's individual obligation to do their 'fair share' of global mitigation efforts under the United Nations (UN) climate regime or when defining the scope of each country's unique due diligence standard of protection in the face of global climate risks. Courts are using CBDR-RC as part of a set of hard and soft international environmental law standards to help determine what level of political discretion governments have when deciding whether to reduce emissions in their territories, how much to reduce, and by what timeline.

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[1] Study Group on Principles on the Engagement of Domestic Courts with International Law, 'Mapping the Engagement of Domestic Courts with International Law – Final Report' in International Law Association Report of the Seventy-Seventh Conference (International Law Association, London 2016) (ILA Domestic Courts and International Law Final Report).

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It is worth noting that while some courts are more explicit in their application of the CBDR-RC principle, others are doing so implicitly, by engaging with related concepts such as a country's obligation to do their part and contribute their 'fair share' of global climate efforts. This chapter therefore includes examination of decisions where courts explicitly referred to CBDR-RC as a relevant principle when setting the legal standards applicable to the adjudication, articulated reasonings related to the concepts of fair distribution of climate responsibilities, invoked CBDR-RC in the interpretation of specific legal obligations, or engaged with concepts directly related to the principle. Thus far, CBDR-RC has featured primarily in climate mitigation cases, particularly but not exclusively in lawsuits challenging the legality of overall efforts of a State to mitigate climate change.

Although the CBDR-RC jurisprudence is still nascent and at times inconsistent, it holds relevance due to the important role this principle plays in the effectiveness of the international climate change regime, and in worldwide efforts by those most affected by climate impacts to promote climate justice. As discussions on each country's 'fair share' of global climate efforts pick up pace in the context of the 2015 Paris Climate Agreement's (PA) iterative process of pledge and review of national contributions, aimed at closing the emissions gap to achieve the temperature goal of 'well below 2°C' and striving to remain at '1.5°C', we expect the CBDR-RC jurisprudence to expand over time. There is an expectation that more judicial decisions will engage with the principle, following plaintiffs invoking CBDR-RC in complaints before international human rights bodies such as the Committee on the Rights of the Child (CRC), the Human Rights Committee (HRC), and the European Court of Human Rights. CBDR-RC also features in the upcoming Advisory Opinion (AO) by the Inter-American Court of Human Rights (IACtHR) on the scope of State obligations to respond to human rights implications of climate threats. With courts' engagement with CBDR-RC becoming more established, it is also possible to predict that it will appear in future climate litigation related to climate finance, adaptation, or loss and damage.

In the balance of this chapter, Section 13.2 introduces a background discussion on two issues that are central to understanding how courts are finding legal content in the emerging concept of national 'fair shares' of global climate efforts: a) the evolution of the CBDR-RC principle in the international climate regime; and b) the scientifically backed international political consensus on the global average temperature goals needed to avoid dangerous climate impacts, as well as the associated concepts of remaining global carbon budgets and fair allocation of national carbon budgets. Section 13.3 then reviews the CBDR-RC case law development; Section 13.4 highlights emerging best practices; Section 13.5 analyses the potential for replicability; Section 13.6 concludes with a few observations.

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13.2 RELEVANT BACKGROUND ISSUES

13.2.1 *CBDR-RC in International Climate Law*

CBDR-RC is foundational to international environmental law[2] and is deeply embedded in the UN climate regime.[3] The principle has two separate elements: the common responsibility of States to respond to the global climate change challenge; and the need to differentiate which 'fair share' of the common responsibility should be assigned to each individual country according to a series of possible equity benchmarks.[4] These equity benchmarks have never been enumerated in the text of international climate law agreements. In climate negotiations and in decisions of the Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC), we find reference to the following criteria: individual responsibilities for the climate problem (e.g. historic or current greenhouse gas (GHG) emissions, absolute emissions, or *per capita* emissions); capabilities to take climate action (financial, technological, or institutional capacities); and/or stages of development.[5]

Climate action has been long recognised as a common responsibility of all countries. As an international problem of 'common concern', climate change can only be confronted via multilateral cooperation.[6] As the Intergovernmental Panel on

[2] United Nations, 'Declaration of the United Nations Conference on Environment and Development' (1992) 31 ILM 874 (Rio Declaration) principle 7. Some authors (e.g. Owen McIntyre, 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources' (2006) 46 Natural Resources Journal 157; David Tacaks, 'Carbon Into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law' (2009) 15 Hastings West-Northwest Journal of Environmental Law and Policy 39) argue that CBDR-RC can already be recognised as an emerging principle of customary IEL, although there are dissenting opinions (e.g. Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017); Philippe Cullet, 'Differentiation' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021). See also Daria Shapovalova, 'In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities' and Thomas Leclerc, 'The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law' in Benoît Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021).

[3] References to CBDR-RC appear in the preamble and in several operative provisions of the 1992 UNFCCC and the 2015 Paris Agreement and in dozens of decisions adopted by the Conference of the Parties to the UNFCCC (COPs) and the COP serving as the Meeting of the Parties to the Paris Agreement (CMA); ibid Bodansky, Brunnée, and Rajamani (n 2) 27.

[4] See Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press 2018) 244.

[5] Bodansky, Brunnée, and Rajamani (n 2) 26. For a detailed discussion on how countries have engaged with these equity benchmarks for differentiation in their NDCs and a critical analysis of which benchmarks are aligned with IEL principles see Lavanya Rajamani and others, 'National "Fair Shares" in Reducing Greenhouse Gas Emissions Within the Principled Framework of International Environmental Law' (2021) 21 Climate Policy 983, 984.

[6] All members of the United Nations are Parties to the United Nations Framework Convention on Climate Change (as of 2023).

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Climate Change (IPCC) noted in its 2014 Assessment Report 5 (AR5), international cooperation is crucial to address 'global commons' challenges such as climate change, characterised by having 'multiple actors that are diverse in their perceptions of the costs and benefits of collective action; emissions sources that are unevenly distributed; heterogenous climate impacts that are uncertain and distant in space and time; and mitigation costs that vary'.[7] States have consistently reaffirmed their common responsibility, including in the latest COP 27 decision in which they reiterated 'the critical role of multilateralism … including in the context of the implementation of the Convention and the Paris Agreement, and the importance of international cooperation for addressing … climate change'.[8]

Although there is also consensus on the general need to differentiate each individual State's 'fair share' of global climate efforts, the relative importance of the various possible equity benchmarks for differentiation, and on how exactly differentiation should be implemented in a world where contributions to GHG emissions, financial and technological capabilities, and development indicators are in flux, has remained under political dispute. The differentiation element of CBDR-RC can thus be considered an open standard of international climate law, a standard whose normative content is currently being defined by State practice, judicial interpretation, and continuous international negotiations.

Despite the lack of consensus on specific equity benchmarks, it is possible to identify a significant level of agreement over a set of normative expectations that have been at the core of differentiated responsibilities since the inception of the international climate regime. One normative expectation is that developed countries must 'take the lead' in the international climate response, and a second normative expectation is that differentiation must be guided by equity considerations.[9] The allocation of differentiated climate responsibilities along a North–South (developed countries–developing countries) axis has been a constant element of CBDR-RC in the text of various climate legal agreements and

[7] Ottmar Edenhofer and others, 'International Cooperation: Agreements & Instruments' in Ottmar Edenhofer and others (eds), *Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2015) 1008.

[8] UNFCCC, Sharm el-Sheikh Implementation Plan, FCCC/CP/2022/10/Add.1 (20 November 2022) (Sharm-el-Sheikh Implementation Plan) preamble, first paragraph.

[9] United Nations Framework Convention on Climate Change (entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 3(1). The UNFCCC regime has also consistently provided for special treatment to countries that are particularly vulnerable to the adverse effects of climate change, expressly citing low-lying and other small island countries, and other developing countries prone to floods, droughts, and desertification. The UNFCCC additionally differentiates the forty-nine Parties classified as least developed countries (LDCs) by the United Nations, giving them special consideration on account of their limited capacity to respond to climate change and to adapt to its adverse effects. There is therefore a normative expectation that these countries will receive international support as part of global efforts to address climate change. This aspect of differentiation may become relevant in future climate litigation related to finance or adaptation.

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decisions. The UNFCCC preambular language recognises that industrialised countries are the source of most past and current (in 1992) GHG emissions and should assume greater responsibility.[10] Operative provisions of the UNFCCC also contain a directive that developed countries should 'take the lead' in combating climate change and its adverse effects.[11]

The PA represents a new approach to international equity in the climate regime, replacing the top-down structure and binary Annex I/non-Annex I distinction of the Kyoto Protocol with a bottom-up, self-differentiation approach to the formulation of 'Nationally Determined Contributions' (NDCs). CBDR-RC remains, however, a fundamental principle, expressly appearing in the preamble and in provisions relating to the Agreement's purpose, progression, and long-term low GHG emissions development strategies, besides various references in specific operative provisions, including on mitigation, finance, and adaptation.[12] Despite its significantly altered form, including the added expression 'in light of different national circumstances', the two basic normative expectations associated with CBDR-RC remain: developed countries must play a 'leadership role'; and each NDC is expected to represent a country's 'fair share' of global efforts according to their contributions and/or capabilities and national circumstances.[13]

In other words, the *common* aspect of CBDR-RC was thus strengthened, but the normative expectation of differentiation based on equity considerations remains, including a North–South distinction based on 'leadership' of developed countries. Without international consensus on which equity benchmarks should be considered (and given which weight) when defining individual 'fair shares', and on what exactly should the concept of 'leadership' of developed countries mean in practice, there are various parallel normative discussions on what constitutes each country's 'fair share' taking place.[14] In addition, discussions about the precise

[10] Sharm-el-Sheikh Implementation Plan (n 8).

[11] UNFCCC (n 9) art 3(2).

[12] Paris Agreement (entered into force 4 November 2016) 3156 UNTS 79 (Paris Agreement) art 2(2) states that the 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'; Christina Voigt and Felipe Ferreira, '"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 TEL 285.

[13] Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics' (2016) 65 ICLQ 493, 506; Voigt and Ferreira (n 12); UNFCCC (n 9) arts 4(2), 4(3), 4(5); Joanna Depledge, 'Foundations for the Paris Agreement' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change* (Oxford University Press 2017); Patricia Galvao-Ferreira, 'Differentiation in International Environmental Law' in Neil Craik and others (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press 2018); Lavanya Rajamani and Emmanuel Guerin, 'Central Concepts in the Paris Agreement and How They Evolved' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change* (Oxford University Press 2017). References to special treatment for countries that are most vulnerable to adverse effects of climate change and LDCs were also maintained in the Paris Agreement.

[14] Kate Dooley and others, 'Ethical Choices behind Quantifications of Fair Contributions under the Paris Agreement' (2021) 11 (4) Nature Climate Change 300–305.

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content of developed countries' obligations with respect to finance and technology transfer are ongoing.[15]

The operationalisation of differentiation in Article 4 of the PA, on mitigation, is especially relevant to this chapter, as thus far all climate lawsuits invoking CBDR-RC relate to mitigation. In Article 4, Parties agreed to peak emissions as soon as possible and to undertake progressive and rapid emissions reductions in order to achieve net zero emissions by 2050.[16] They have also agreed that emissions will take longer to peak in developing countries than in developed countries.[17] The language indicates that Parties have certain leeway when defining the scope of their mitigation actions under their NDCs. This flexibility is, however, bounded by certain directives, including that: a) the sum of individual contributions must be sufficient to achieve the PA long-term temperature goals; b) each successive NDC 'will represent a progression [over the preceding one] and reflect its highest possible ambition'; and c) the NDC will reflect the country's 'common but differentiated responsibilities and respective capabilities, in light of different national circumstances'.[18]

There is no mechanism to review the adequacy of each individual State's contribution to the long-term goals, or the 'fairness' of these contributions. The PA relies instead on two main mechanisms. The first is an enhanced transparency framework whereby each country has the legal obligation to regularly report on their progress in contributing their share to meet the global goals.[19] The second is the global stocktake, whereby Parties to the PA will periodically review the sum of reductions pledged in the NDCs to assess the collective progress towards the global temperature goals and to identify what added levels of effort are still needed.[20]

The normative expectations that NDCs will reflect a country's 'fair share' to the collective effort, based on differentiated responsibilities and capabilities in light of national circumstances, and that developed countries will continue to 'take the lead' are vital for building international trust in the PA iterative process. The 2018 Paris Rulebook requires countries to provide narrative justification for the ambition and fairness of their NDCs when regularly reviewing and updating them, including how they are addressing the normative expectations of developed country leadership, progression, and highest possible ambition.[21] Despite the lack of international consensus on equity benchmarks, a country's justification of how they arrived at

[15] See e.g. Yulia Yamineva, 'Climate Finance in the Paris Outcome: Why Do Today What You Can Put Off till Tomorrow?' (2016) RECIEL 25(2) 174–185.

[16] Paris Agreement (n 12) art 4(1).

[17] ibid.

[18] ibid art 4(3); See Rajamani and Guerin (n 13) 85.

[19] Yamide Dagnet and Kelly Levin, 'Transparency (Article 13)' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change* (Oxford University Press 2017).

[20] Jurgen Friedrich, 'Global Stocktake (Article 14)' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change* (Oxford University Press 2017).

[21] Rajamani and others (n 5) 984.

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their proposed 'fair share' can be – and has been – politically scrutinised by other countries and by non-State actors.[22] And now domestic courts are also finding normative content on these international legal concepts of 'common responsibility' and 'differentiated fair share'.

Before examining concrete examples of courts' engagement with CBDR-RC, the chapter briefly reviews the scientifically backed political consensus (reflected in COP decisions and the Paris Agreement) on the need to keep the global average temperature between 1.5°C and 2°C, as well as calculations of the remaining global carbon budget based on this temperature goal, as they are key to understanding the use of CBDR-RC as an interpretive tool in climate litigation.

13.2.2 *Long-term Temperature Goal and Carbon Budgets*

Courts around the world have recognised the best available climate science assessed in IPCC reports as part of the undisputed factual basis informing their adjudication of climate lawsuits.[23] Virtually all climate decisions include reference to IPCC reports on the state of climate science to demonstrate, inter alia: estimates of global temperature levels that would avoid catastrophic impacts; and pathways for emissions reductions that would ensure the world keeps global temperature rise below agreed limits. The IPCC 1.5°C Special Report and Assessment Report Six (AR6) have strengthened the scientific consensus (already reflected in the temperature goal of the Paris Agreement) on the risks of allowing global average temperatures to exceed 1.5°C.[24]

The concept of global carbon budgets has closely followed the consensus on maximum temperature goals based on climate science. A global carbon budget has been defined as 'the maximum amount of cumulative global emissions to the atmosphere that may be "allowable", based on the physical properties of the climate system, in order to stay below a politically agreed warming limit'.[25] Scientists have been able to estimate which maximum global carbon budgets will increase the likelihood of meeting the PA temperature goal. Carbon budgets featured prominently in IPCC

[22] ibid.

[23] On IPCC see Shardul Agrawala, 'Context and Early Origins of the Intergovernmental Panel on Climate Change' (1998) 39(4) Climatic Change 605–620; Mike Hulme and Martin Mahony, 'Climate Change: What Do We Know about the IPCC?' (2010) 34(5) Progress in Physical Geography 705–718; Alison Shaw and John Robinson, 'Relevant but not Prescriptive? Science Policy Models within the IPCC' (2004) 48 Philosophy Today 106–117.

[24] Valerie Masson-Delmotte and others, 'Summary for Policy Makers' in Global Warming of 1.5°C (2018) <www.ipcc.ch/sr15/chapter/spm/#:~:text=A%20wide%20range%20of%20adaptation,knowledge)%2C%20the%20risks%20of%20sea> accessed 23 February 2024; See also the earlier Intergovernmental Panel on Climate Change, Fourth Assessment Report (2007), which informed the Paris Agreement's temperature goal.

[25] Bård Lahn, 'A History of the Global Carbon Budget' (2020) 11(3) Wiley Interdisciplinary Reviews Climate Change 2.

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AR4, IPCC Special 1.5°C Report (SR5), and again in IPCC AR6.[26] The PA does not include a specific reference to carbon budgets. However, in the 2021 Glasgow Climate Pact, States expressed 'alarm and utmost concern that … carbon budgets consistent with achieving the Paris Agreement temperature goals are now small and being rapidly depleted',[27] while in the 2022 Sharm el-Sheikh Implementation Plan they affirmed their resolve to 'pursue further efforts to limit the temperature increase to 1.5°C'.[28] The concept of carbon budgets has also been invoked in various policy debates, either to support specific policy proposals at the national level, to advocate for burden-sharing of climate efforts based on equity considerations, or to guide financial investments.[29] This policy uptake comes despite IPCC reports indicating residual scientific uncertainty about the size of remaining carbon budgets, depending on several factors.[30]

The unsettled political debate on which equity markers should drive the distribution of shares of remaining global carbon budgets among countries makes it more challenging for the IPCC to estimate scenarios of specific remaining carbon budgets for each country or even groups of countries. Courts need to navigate this complex science-policy interface when trying to determine the existence and scope of domestic legal obligations in light of the normative framework of the international climate regime. The next section examines how courts are relying on CBDR-RC not to directly derive rights or legal duties but rather as an interpretive tool to help establish the scope of domestic legal obligations.

13.3 STATE OF AFFAIRS: CASE LAW DEVELOPMENT

Citizen groups that are particularly vulnerable to climate impacts have increasingly invoked CBDR-RC across jurisdictions as part of their claims either that governments are *setting* emissions reductions targets that are too low in light of what should constitute their 'fair share' of global mitigation efforts, or that governments are failing to meet their obligations to effectively *implement* their legislated 'fair share' targets. These citizen groups argue that it is now possible to identify minimum legal standards of 'fair share' contributions for individual countries, based on the concept of a remaining global carbon budget in light of the PA temperature goal and other norms and principles of international climate law, particularly CBDR-RC. They argue that courts must therefore consider these minimum international legal standards when interpreting the scope of domestic constitutional, statutory, or common law legal obligations in the context of addressing climate risks.

[26] ibid.
[27] UNFCCC, Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1 1/CMA 3 (13 November 2021) [2].
[28] Sharm-el-Sheikh Implementation Plan (n 8) [4].
[29] Lahn (n 25) 1.
[30] Masson-Delmotte and others (n 24) [C.1.3].

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13.3.1 *Common Responsibility*

A number of courts have now relied on the 'common responsibility' element of CBDR-RC – explicitly or implicitly – to help establish that States are under a legal obligation to do 'their part' to address the climate challenge. The starting points for courts when engaging with the common element of the CBDR-RC principle is the recognition of the significant risks and impacts posed by climate change, the global nature of the threat, and the inexorable need for a coordinated international response. In *Urgenda*,[31] *Grande-Synthe*,[32] *Neubauer*,[33] and *Klimaatzaak*,[34] the courts took judicial notice that the global dimension of climate change requires governments in each country to engage in a collective response through international cooperation, if they are to protect their citizens from the significant dangers of climate change. By reproducing relevant provisions of the UNFCCC and the PA, the Dutch, French, German, and Belgian courts either explicitly or implicitly recognise that by joining the international climate regime under the UNFCCC, governments acknowledge their common, albeit differentiated, responsibility over this global response.

Courts either explicitly reason[35] or infer that by joining an international regime that explicitly affirms the need for global cooperation, governments incur a legal obligation to fulfil their part of shared global efforts as part of their duty of care to protect citizens against significant climate risks and impacts. This is an important development in climate litigation. Courts are using the 'common responsibility' aspect of CBDR-RC to reject a prominent defence which governments have advanced against climate lawsuits over the years: that their nationally determined emissions reduction targets and other climate plans are not legally binding under international law or national law and, therefore, are discretionary political acts that should be exempt from judicial review. This is also an important development in international environmental law, as national courts are now expanding on

[31] *Urgenda Foundation v The State of The Netherlands* [2015] ECLI:NL:RBDHA:2015:7196 (District Court of the Hague) (*Urgenda District Court*); *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) (*Urgenda Supreme Court*) [2.2.1].

[32] *Commune de Grande-Synthe v France* [2020] N°427301 (Conseil d'Etat) (*Grande-Synthe*) [12].

[33] *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court) (*Neubauer*) [197].

[34] *VZW Klimaatzaak v Kingdom of Belgium and Others* [2023] 2022/AR/891 (Cour d'appel de Bruxelles) (*VZW Klimaatzaak Appeal*) [283] 'The national contributions of each of the States party to the UNFCCC, including Belgium, to reducing GHG emissions are the world's main tool for preventing and mitigating the risk of dangerous global warming. These international agreements are based on the mutual trust of the States that are party to them in the fact that each will contribute to the effort required to achieve the desired result, and it is in this way that the contribution of each State, including a "small" State like Belgium (on a global scale), plays a decisive role in the fight against global warming'.

[35] See *Urgenda Supreme Court* (n 31) [5.7.1]–[5.7.9]; *Neubauer* (n 33) [199]–[204].

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a principle of international (State–State) cooperation to give it normative content when interpreting obligations owed to individuals.

This reasoning can be seen as distinct from and additional to the arguments used to reject another common defence advanced by governments (and corporations) against climate lawsuits: lack of causation or 'de minimis' / 'drop in the ocean' contributions.[36] The argument in the lack of causation defence is that governments and corporations have an obligation to do their part by reducing emissions under their control, no matter how small their share of contributions. This argument is anchored in the fact that climate change is caused by the combination of a myriad of sources that, even if insignificant in isolation, jointly become a significant problem.[37] Independent of what others are doing, a government or corporation can be found to have an obligation to act in order to minimise the danger by reducing emissions that they can control. This legal debate can be linked to concepts of causation in tort law and the need to identify relevant contributors to a collective legal wrong or problem.

The reasoning based on the 'common responsibility' element of CBDR-RC is different, as it places the focus not on causation or contribution but rather on remedy or redress. Distinct from the causation defence, the redressability defence in climate litigation relates to arguments that the creation and implementation of domestic climate policies are impervious to judicial review, as a judicial decision mandating a country to set a certain minimum level of GHG emissions, or to implement emissions reduction targets, will not be able to effectively redress plaintiffs' harms or reduce their risks. Under this argument, due to the global nature of climate change, an effective remedy to plaintiffs' injuries or risks depends on the uncertain or speculative response from various other governments and actors, something courts have no power to influence; in other words, it is a political rather than a legal question. This debate appeared in *Massachusetts v EPA*, where the US Supreme Court found the redressability requirement satisfied because the requested relief for EPA to regulate CO_2 emissions from American motor vehicles, even if not alone solving global climate change, would likely slow or reduce impacts or risks significantly.[38] In the case *Juliana v United States*, the Ninth Circuit panel declared the lawsuit non-justiciable in part because the requested injunction for the US to develop and implement a plan to do its part to reduce emissions would not solve global climate change. In other words, the case was dismissed on redressability grounds.[39]

[36] See Chapter 16 on Causation; see also Nataša Nedeski and André Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Litigation' (*EJIL: Talk!*, 15 December 2022) <www.ejiltalk.org/a-guide-to-tackling-the-collective-causation-problem-in-international-climate-change-litigation/> accessed 24 February 2024.

[37] Nedeski and Nollkaemper (n 36).

[38] *Massachusetts v EPA* 549 US 497, 517 (2007).

[39] *Juliana v United States* 947 F.3d 1159 (9th Cir 2020) 1171; Matt Lifson and others, 'Redressability of Climate Change Injuries after Juliana' (*Legal Planet*, 12 June 2020) <https://legal-planet.org/2020/06/12/guest-contributors-matt-lifson-camila-bustos-and-natasha-brunstein-redressability-of-climate-change-injuries-after-juliana/> accessed 24 February 2024.

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When using CBDR-RC to help interpret the scope of legal obligations, courts are taking judicial notice that each country has politically and legally agreed, by ratifying the UNFCCC and the PA, that they depend on the actions by the rest of the international community if they are to afford any level of protection to their citizens from the impacts and dangers of global climate change. Therefore, national courts in the Netherlands,[40] Germany,[41] France,[42] and Belgium[43] have concluded that since addressing climate risks is a common responsibility of all States, there is at least a normative command, if not a legal obligation, for each country to do their part, by contributing their 'fair share' to the multilateral efforts on climate change, as the only way to offer a measure of effective redress.

Courts are recognising that even those countries that contribute minimal emissions are equally (or often disproportionately more) vulnerable to climate impacts. These countries are highly dependent on the success of the international response to protect their citizens. Governments cannot argue that there is no legal obligation to do their part of the common response, because it will not offer sufficient or effective redress for a problem that is global and collective, when their lack of action is actively undermining global efforts and essentially making any potential measure of redress more difficult or impossible.

13.3.2 *Differentiated Responsibilities and Capabilities*

The second way in which courts are engaging with CBDR-RC relates to the 'differentiated' aspect of the principle, which more directly relates to the 'fair share' concept. Various plaintiffs have challenged the legality of current emissions targets set by States for being too low to represent their 'fair share' of global efforts and therefore inadequate to offer an effective contribution to the global response to the dangers of climate change.[44] When courts engage with the concept of a country's minimum 'fair share' they are again considering that countries have politically agreed to the PA temperature goal and often legalised this goal by referencing it in national climate law. Courts are also noting that a global target temperature goal allows for scientific calculations of remaining global carbon budgets with limited or no overshoot, even when lingering scientific uncertainties make exact calculations of this budget elusive.[45]

[40] *Urgenda Supreme Court* (n 31).
[41] *Neubauer* (n 33).
[42] *Grande-Synthe* (n 32).
[43] *VZW Klimaatzaak Appeal* (n 34).
[44] Lucy Maxwell, Sarah Mead, and Dennis van Berkel, 'Standards for Adjudicating the next Generation of Urgenda-Style Climate Cases' (2022) 13(1) JHRE 35.
[45] See e.g. *Neubauer* (n 33) [209]–[210] 'By adopting the temperature limit of art 2(1)(a) Paris Agreement, the legislator has set the fundamental course of national climate change law in a direction that gives the German state an opportunity to effectively fulfil its constitutional mandate to take climate action through its own efforts embedded within an international framework. (b) The legislator is not entirely free in how it specifies the obligation to take climate action under [constitutional law]'; and *Neubauer* (n 33) [215] on carbon budget.

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Courts address the normative expectation that a country's individual 'part' must represent its 'fair share' of global efforts when they engage with the range of equity benchmarks articulated in the effort-sharing negotiations and principles of the climate regime or in the literature. For example, various courts have taken judicial notice of a country's contributions to global emissions in absolute or *per capita* terms or of its levels of socio-economic development achieved in part due to historic emissions.[46] As part of their exercise to decide whether the 'differentiated' element of CBDR-RC carries legal meaning, a small number of courts have also engaged with the normative expectation that developed countries should 'take the lead' in global climate efforts, when identifying what would be a legal minimum 'fair share' of the remaining global carbon budget for each individual country.[47]

Enduring disputes among countries over how to translate the differentiated element of CBDR-RC into concrete effort-sharing standards in the international climate regime, and the Paris Agreement bottom-up model of self-differentiation via NDCs, have left courts struggling to identify a core normative content from the evolving CBDR-RC principle.[48] Courts are arriving at different conclusions as to what extent the CBDR-RC principle has or has not curtailed the level of discretion of legislative and administrative bodies to set their own mitigation targets, or to meet these targets, based on the concepts of 'fair share', differentiation, and 'leadership role' for developed countries. Some courts, like in the cases of *Grande-Synthe*,[49] *Notre Affaire à Tous*,[50] and *Klimaatzaak*,[51] make references to CBDR-RC in their decisions in the context of discussing countries' 'fair shares', yet they do not articulate whether (and how) they considered the different CBDR-RC equity benchmarks when interpreting the scope of national climate obligations. These courts merely assert that the Paris Agreement left it to each individual country to propose their individual 'fair share' contributions to the international climate response.

In *Urgenda* and *Neubauer*, the courts also relied on the CBDR-RC principle (explicitly or implicitly) to grapple with the question of the degree of discretion governments have in determining their individual 'fair share' of global efforts to address climate change. These courts found that although there is no legal standard determining the exact scope of individual emissions reductions targets or timelines, they could assess whether the State has adopted the minimum reasonable measures to fulfil their duty of care to protect against the dangers of global climate change, based on existing international climate law principles and

[46] For example, *Neubauer* (n 33) [29]; *Urgenda Supreme Court* (n 31) [2.1].
[47] *Urgenda Supreme Court* (n 31) [2.1]; *Grande-Synthe* (n 32) [9].
[48] Gerry Liston, 'Enhancing the Efficacy of Climate Change Litigation: How to Resolve the "Fair Share Question" in the Context of International Human Rights Law' (2020) 9(2) CILJ 241.
[49] *Grande-Synthe* (n 32) [9].
[50] *Notre Affaire à Tous and Others v France* [2021] No 1904967, 1904968, 1904972 1904976/4-1 [26]–[27].
[51] *VZW Klimaatzaak Appeal* (n 34) [169].

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standards, including CBDR-RC, but also cooperation, the precautionary principle, and intergenerational equity. A more detailed examination of the courts' reasoning is included in the next section.

As part of this discussion, the Dutch courts have considered whether the CBDR-RC directive that developed countries play a leadership role in global climate efforts has normative value when determining the degree of discretion States hold when defining their minimum 'fair share'. The Hague Court took notice that by agreeing, under international climate law, to take the lead in climate action with other developed countries, the Netherlands has 'therefore committed to a more than proportional contribution to reduction, in view of a fair distribution between industrialized and developing countries'.[52] The discretionary power of the State to decide its 'fair share' was thus limited by the legal norms and principles of the international climate regime, including CBDR-RC.

The implication is that the political discretion of the Dutch government to choose among the broad array of equity benchmarks when defining its 'fair share' for the Netherlands is not unlimited. The Dutch courts are indicating, if implicitly, that as a developed country that needs to do a more than proportional contribution to reductions, the Netherlands is entitled to a smaller piece of the remaining global carbon budget than if calculated based on global emissions per capita (GEC). In contrast, the German courts in *Neubauer*[53] and *German Family Farmers*[54] found that the German government still keeps the wide political discretion to choose among equity benchmarks when defining a 'fair share', including by choosing to use the GEC *benchmark*, therefore apparently dismissing a normative role for the concept of developed countries' leadership role under the CBDR-RC principle.[55]

Judicial engagement with the CBDR-RC element of 'leadership role' for developed countries has begun to spread outside European jurisdictions. The New South Wales Court in *Gloucester Resources Limited v Minister for Planning*[56] invoked this concept when rejecting the market substitution argument advanced by the mining company against the denial of their permit to expand a coal operation due to increased carbon emissions, namely that developing countries with weaker regulations would

[52] *Urgenda District Court* (n 31) [4.76].

[53] *Neubauer* (n 33) [225].

[54] Rajamani and others (n 5) [20].

[55] *Urgenda Supreme Court* (n 31) [7.3.4], 'Moreover, the Court of Appeal rightly held in para. 60 that it would not be obvious for a lower reduction rate to apply to the Netherlands as an Annex I country than to the Annex I countries as a whole. As the Court of Appeal considered in para. 66, the Netherlands is one of the countries with very high per capita emissions of greenhouse gases. In the above agreements at EU level, the reduction percentage agreed upon for the Netherlands is, accordingly, one of the highest reduction percentages applicable to the EU Member States (Annex II to the Effort Sharing Decision). It can be assumed that this high percentage corresponds to the possibilities and responsibilities of the Netherlands. As the Court of Appeal established in para. 60, the State has not substantiated why a lower percentage should apply'.

[56] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (*Gloucester Resources*).

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fill the gap in coal production if Australia left coal on the ground.[57] The Philippines Human Rights Commission also addressed the 'leadership role' of developed countries in their Carbon Majors report. The Commission found that although all States have the responsibility to contribute to the response to climate change, whether they have contributed no GHG emissions or half of current emissions, highly industrialised countries that have benefited from historic emissions 'bear a larger share in providing solutions to the problems they have created'.[58]

The matter has also recently been addressed at the international level in the recent General Comment issued by the CRC. The Committee establishes a strong link between climate inaction and human rights violations and elaborates on what this means in terms of mitigation. It calls 'for urgent collective action by all States to mitigate greenhouse gas emissions, in line with their human rights obligations', noting that 'historical and current major emitters should take the lead in mitigation efforts'.[59] It further specifies:

> When determining the appropriateness of their mitigation measures in accordance with the Convention, and also mindful of the need to prevent and address any potential adverse effects of those measures, States should take into account the following criteria:
>
> (a) Mitigation objectives and measures should clearly indicate how they respect, protect and fulfil children's rights under the Convention. …
> (b) States have an individual responsibility to mitigate climate change in order to fulfil their obligations under the Convention and international environmental law, including the commitment contained in the Paris Agreement to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels by 2030. Mitigation measures should reflect each State party's fair share of the global effort to mitigate climate change, in the light of the total reductions necessary to protect against continuing and worsening violations of children's rights. Each State, and all States working together, should continuously strengthen climate commitments in line with the highest possible ambition and their common but differentiated responsibilities and respective capacities. High-income States should continue to take the lead by undertaking economy-wide absolute emission reduction targets, and all States should enhance their mitigation measures in the light of their different national circumstances in a manner that protects children's rights to the maximum possible extent.[60]

[57] ibid [539].
[58] Sharm-el-Sheikh Implementation Plan (n 8) [117].
[59] Committee on Rights of the Child, 'General Comment No 26 on Children's Rights and the Environment with a Special Focus on Climate Change' (22 August 2023) UN Doc CRC/C/GC/26.[95].
[60] ibid [98].

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13.4 EMERGING BEST PRACTICES

In the context of a yet fledgling jurisprudence on CBDR-RC, many courts are still struggling to navigate the complexity of this multifaceted and evolving principle. It is, however, possible to identify a few examples of emerging best practices (EBPs). Since plaintiffs will most likely continue to invoke CBDR-RC in climate litigation, this section highlights some EBPs, while also discussing some missteps that courts can avoid when called to examine the normative value of CBDR-RC as an interpretive tool to delimit the scope of obligations or rights in the context of foreseeable climate risks and impacts.

The German Constitutional Court offered the most comprehensive treatment of the legal consequences of the 'common responsibility' element of CBDR-RC in *Neubauer*, if implicitly. After referencing CBDR-RC in the Paris Agreement as part of the relevant international law framework it was taking into consideration,[61] the Court declared that the global nature of climate change does not invalidate the national obligation to take climate action, instead being 'significant for determining the content of the duty of climate change related protection' under German Constitutional law.[62] The Constitutional Court held that the global nature of climate change compels the State to engage in internationally oriented activities to tackle climate change, requiring it to promote climate action within the international framework.[63] According to the Court, the State is under a constitutional obligation to take steps to protect citizens against climate risks, 'with the help of international involvement'.[64]

The German Court went on to say that the international engagement aspect of the constitutional obligation includes two distinct elements. First, international engagement requires negotiation and participation in international agreements to promote the collective international action needed to offer effective protection to German citizens. Second, international engagement requires effectively implementing individual contributions agreed to in the international climate regime. In the Constitutional Court's words, 'the international dimension of the obligation to take climate action [under the German Constitution] is not confined to the task of seeking to resolve the climate problem at the international level and ideally reaching some agreement to that effect. Rather, the constitutional obligation to take climate action also extends to the implementation of agreed solutions.'[65] It is reasonable to affirm that the Constitutional Court has thus set one obligation of conduct (to negotiate and to participate in good faith in international agreements to deliver a global

[61] *Neubauer* (n 33) [8].
[62] ibid [149].
[63] ibid [144].
[64] ibid.
[65] ibid [200].

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response to climate change) and one obligation of results (to effectively implement whatever contribution it has agreed to at international level, to avoid undermining the success of the collective efforts). This was the first time that a national court made this linkage, that as part of their 'common responsibility' to address global climate change through international cooperative efforts, a State is under an obligation to implement their NDCs once they are defined and set in national law.

To be clear, the Constitutional Court did not explicitly articulate that it was using CBDR-RC to help interpret this obligation to participate in the elaboration and to implement international obligations. The 'common responsibility' element of CBDR-RC, however, is the one that manifests the scientifically backed international political consensus that climate change is an environmental problem of 'common concern' that evades unilateral or plurilateral action, necessarily requiring a multilateral or global coordinated response.

Unlike the traditional outward treatment of the principle of cooperation under international environmental law, which sets State-to-State obligations to cooperate to respond to problems of 'common concern' (in order to prevent or address transboundary harm to each other), here the Court is applying the 'common responsibility' element of CBDR-RC inward: to help interpret the scope of constitutional obligations of protection for German citizens against the risks of climate change, which require international coordination. To protect German citizens, the government must participate in good faith in the international regime by doing its part of the global response, which should represent the country's 'fair share' to keep the legitimacy and trust of the collective response. This is an EBP because it addresses the problematic State defence accepted by some courts that, because climate action in one country cannot redress the risks or impacts of climate change, climate obligations are non-justiciable or defy judicial responses.

It is worth noting that the Constitutional Court was careful not to overstep the division of powers, refraining from deciding on the precise scope of an obligation to participate in good faith in the international climate legal regime.[66] It set instead minimum standards [very low, critics may say] affirming that a violation of a duty of protection occurs 'if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal'.[67] The Court concluded that by ratifying the PA and adopting its temperature limits under German law, the legislator had set the country in a direction that 'gives the German state an opportunity to effectively fulfil its constitutional mandate to take climate action through its own efforts *embedded within an international framework*'.[68] The Court

[66] See Chapter 6 on Separation of Powers.
[67] *Neubauer* (n 33) [152].
[68] ibid [210].

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concluded that the State was not in violation of this obligation at the time. Despite this low standard, the logical conclusion is that the German Constitutional Court established that the State does not have the unlimited discretion to withdraw from international cooperative regimes, or to arbitrarily decide on its own climate actions, thereby ignoring the international regime's principles and standards.

In other words, the German Court granted the legislator significant leeway when deciding the allocation of global mitigation efforts that represents Germany's 'fair share'. However, as discussed later, it affirmed that the necessity to engage internationally generates an obligation for the State to participate in the international legal regime in good faith, by both considering relevant international climate law principles (including differentiated responsibilities and capabilities) when determining these national targets, and effectively implementing these nationally determined targets in order to build trust, as mutual trust is key to the success of international climate efforts.

The Dutch Court decisions in the *Urgenda* case best illustrate how courts can engage with the various elements of the CBDR-RC: the common responsibilities element[69] as well as the two angles of differentiated responsibilities and respective capabilities, in light of national circumstances (leadership role for developed countries and self-differentiation based on equity benchmarks). The Dutch Court decisions represent EBP when clearly articulating the potential normative value of the 'leadership role' of developed countries under the CBDR-RC principle. As the 'leadership role' of developed countries is an important element of CBDR-RC and is fundamental to maintain trust in international cooperative efforts to address climate change, it is essential that courts in developed countries tackle this normative concept when analysing the scope of legal obligations to contribute their 'fair share'.

The *Urgenda* decisions found that this leadership role requires developed countries to contribute a 'more than proportionate share' of global mitigation efforts.[70] The evident conclusion, although not stated with these exact words by the Dutch courts, is that the 'leadership role' element of CBDR-RC constrains the political discretion of developed countries to define their 'fair share' exclusively based on options such as 'emissions per capita rights' (EPC).[71] EPC approaches to determining a 'fair share' of the remaining global carbon budget take the *status quo* of highly unequal past levels of emissions, and other equity benchmarks such as financial and technological capacity or socio-economic development needs, for granted. The Dutch courts did not identify a specific equity formula that governments were legally required to use to define 'fair share', recognising that there is not yet a politi-

[69] Similar to the German Constitutional Court, although not as well developed.

[70] *Urgenda District Court* (n 31) [4.76].

[71] Keith Williges and others, 'Fairness Critically Conditions the Carbon Budget Allocation across Countries' (2022) 74 Global Environmental Change 102481.

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cal consensus on equitable allocation formula enshrined in international or Dutch law. Although governments retain political discretion to define specific fair shares based on ethical assumptions and political choices, they have to be consistent with the principles and norms of the UNFCCC and Paris Agreement. Current research broadly acknowledges that EPC and grandfathering approaches do not distribute global efforts in a fair manner, according to CBDR-RC, rather benefiting countries with a comparably current high share of emissions and placing developing countries at disadvantage.[72]

The Dutch courts in *Urgenda* also offer the most comprehensive discussion of CBDR-RC equity benchmarks, when deciding whether there is a duty of care to contribute a minimum fair share.[73] First, the courts explicitly deliberate on the Netherlands' differentiated responsibility based on its contributions to GHG atmospheric concentration. For example, the District Court (first instance) discussed the country's absolute and per capita emissions in comparison with other developed countries (particularly EU and the USA) but also the BRIC emerging economies (Brazil, Russia, India, and China).[74] The District Court explicitly states that developed countries accepted to take the lead in global climate efforts because '[f]rom a historical perspective the current industrialized countries are the main causers of the current high greenhouse gas concentration in the atmosphere and that these countries also benefit from the use of fossil fuels, in the form of economic growth and prosperity'.[75] Besides historic contributions, the District Court also considered the capabilities equity indicator by stating that this prosperity also means that '[developed] countries have the most means available to take measures to combat climate change'.[76]

The Dutch Court of Appeal (second instance) equally considered contributions (responsibilities) and capabilities as relevant in the context of the leadership role: 'taking into account their *per capita* emissions, the long history of their emissions and their resource bases, the Annex I countries must take the lead in fighting climate change'.[77] The Court of Appeal went on to consider that the Netherlands has relatively high *per capita* emissions, even when compared to other developed countries. In absolute emissions, the Court noted that the Netherlands ranks 34th out of 208 countries and 'of the 33 countries with even higher emissions, only nine have a higher per capita emission and not a single one is an EU Member State'.[78] The district courts returned to responsibilities and capabilities indicators when rejecting the State's defence that the timeframe to comply with the decision is too

[72] Dooley and others (n 14) [300]–[305].
[73] *Urgenda District Court* (n 31).
[74] ibid [2.27]–[28].
[75] ibid [4.57].
[76] ibid.
[77] *Urgenda Supreme Court* (n 31) [9].
[78] ibid [28].

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short, noting not only that the State has officially acknowledged the severity of the climate crisis but that:

> It deserves further attention that the Netherlands as a highly developed country has profited from fossil fuels for a long time and still ranks among the countries with the highest per capita greenhouse gas emissions in the world. It is partly for this reason that the state should assume its responsibility, a sentiment that was also expressed in the UNFCCC and the PA.[79]

The Dutch Supreme Court (apex decision) confirmed the lower courts' decisions, stating that although the distribution of global efforts should not be based solely on historic emissions, they must be taken into consideration alongside capabilities.[80] Rejecting the argument that the IPCC AR4 emissions reduction range of 25–40 per cent was calculated for developed countries as a group, and should not be used to determine the Netherlands individual contribution, the Supreme Court reiterated that considering Dutch high *per capita* emissions and capabilities even when compared to other developed countries, 'it would not be obvious for a lower reduction rate to apply to the Netherlands…'[81] Although the Supreme Court concluded that the exact 'fair share' was still to be determined by political bodies, it made clear that they are bound by the set of equity benchmarks from the international climate regime when making this determination, shifting the burden to the State to justify why a lower reduction rate would apply to the Netherlands in light of equity benchmarks or other international climate law norms. This is in line with the interpretation the CRC made on the scope of developed countries' 'fair share' obligations in their General Comment 26, as reproduced in Section 13.3.

The German Constitutional Court also showed best practice when articulating that the government is required to formulate its individual national contribution to global efforts in a way that will build trust among members of the collective response. Although not stated explicitly in the *Neubauer* decision, this articulation has two important normative implications that other courts can equally recognise. First, although governments retain leeway when deciding what constitutes their individual 'fair share', in the absence of clear international agreement on valid fairness benchmarks, they must justify how their calculation aligns with the principles and standards of the UN climate regime, particularly CBDR-RC. Shifting the burden to the State to justify the 'fairness' of their proposed contribution to global efforts to address climate risks and impacts is an EBP for minimum legal standards that courts can replicate. As noted in the IPCC AR6, the Paris Rulebook obliges Parties to provide information on fairness considerations in their NDCs,

[79] ibid [66].
[80] ibid [5.7.6].
[81] ibid [7.3.4].

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including reflecting equitable principles of the climate regime (CBDR-RC being a key principle).[82]

The Dutch courts also showed EBP when they separated the 'leadership role' for developed countries from considerations of the set of CBDR-RC equity benchmarks that should guide governments in determining their 'fair share', even if the differentiated elements of CBDR-RC are interrelated (with the Dutch courts explicitly linking the 'leadership role' normative expectation to historic emissions, per capita emissions, and capabilities). CBDR-RC is likely to appear in future climate litigation in developing countries, including in high emitting emerging economies. Courts in the Global South will thus be urged to consider the normative role of the various equity benchmarks related to the principle in international climate law to determine the respective differentiated fair share, without engaging with the 'leadership role' exclusive to developed countries. It is important to clarify that the differentiated element of the CBDR-RC principle applies to the determination of responsibilities in all Parties to the UNFCCC, not only to developed countries.

By signalling that there is a distinct normative role for the CBDR-RC equity benchmarks for identifying minimum fair shares, the *Urgenda* decisions help to repel the mistaken view that CBDR-RC serves only to establish greater obligations to developed countries, with developing countries getting from the principle only a right to receive support for their climate action. Another mistaken view that the separate judicial treatment of the various elements of CBDR-RC, including the 'common responsibility' and the equity benchmarks, can help dispel is the one that proposes that the principle allows developing countries to concentrate only on climate adaptation rather than mitigation. As part of their common responsibility to pursue the temperature goal of the PA, all countries must propose their differentiated nationally determined contribution to emissions reductions. All countries must therefore do their part, however small, and justify why their NDC represents their 'fair share' of global efforts according to disclosed equity benchmarks.

Although not explicitly articulating it as a legal consequence of the CBDR-RC principle, the German Constitutional Court in *Neubauer* illustrates EBP in engaging with the 'common responsibilities' aspect of CBDR-RC, related to the global nature of the climate challenge. The Constitutional Court indicates that a blatant refusal to participate in global cooperative climate efforts to tackle climate dangers, or a patently inadequate contribution to such efforts, constitutes a constitutional violation. Other courts can now follow this best practice if their governments and parliaments decide, for example, to withdraw from the Paris Agreement without offering valid alternatives for global climate action.

[82] Anthony Patt and others, 'Chapter 14: International Cooperation' in Priyadarshi R. Shukla and others (eds), *Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) 1468.

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13.5 REPLICABILITY

As the jurisprudence on CBDR-RC is still recent, there are questions related to its replicability. A flurry of pending cases in which CBDR-RC was either part of the plaintiffs' claims or where related concepts of 'fair shares' and equity in light of international climate law have been considered indicates that it is very likely that other courts will engage with the principle in their reasoning. CBDR-RC plays a noticeable role in recent climate proceedings launched against Italy and Poland. In *A Sud et al v Italy*,[83] the plaintiffs argue that Italy's proposed emissions reduction targets do not represent its 'fair share' based on a report prepared by Climate Analytics which 'assesses the contribution of the Italian State towards meeting the Paris Agreement's long-term temperature goal, in line with the principles of equity and common but differentiated responsibilities as enshrined in that agreement, so that its climate commitments represent a "fair share" towards achieving that goal'. Polish citizens, with support from the NGO ClientEarth, also relied on a Climate Analytics report on fair shares when they brought forward five similar cases questioning Poland's decisions to allow GHG emissions in excess of their fair share.[84]

Despite most of the decisions featuring CBDR-RC or related concepts of 'fair share' in light of international climate law equity principles and norms being concentrated in European jurisdictions, the principle or related concepts appear in courts' reasonings in cases in Australia[85] and Canada.[86] In *Do-Hyun Kim et al v South Korea*,[87] which is still pending, a group of youth activists filed a complaint before South Korea's Constitutional Court challenging the central government for their 'inadequate' climate policies. Although the plaintiffs did not explicitly invoke CBDR-RC, they engaged with related concepts of carbon budget and fair shares.

While all the cases reviewed in this chapter were presented before courts in developed countries, courts in the Global South will most likely be called to deliberate on

[83] *A SUD and others v Italy* [2021] (Civil Court of Rome) <https://climatecasechart.com/non-us-case/a-sud-et-al-v-italy/#:~:text=Summary%3A,a%20stable%20and%20safe%20climate> accessed 24 February 2024.

[84] *ClientEarth v Poland (on Behalf of MG)* [2021] <https://climatecasechart.com/non-us-case/clientearth-v-poland-acting-on-behalf-of-mg/#:~:text=Summary%3A,worsening%20effects%20of%20climate%20change.> accessed 24 February 2024; *ClientEarth v Poland (on Behalf of MO)* [2021] <https://climatecasechart.com/non-us-case/clientearth-v-poland-on-behalf-of-mo/#:~:text=Summary%3A,worsening%20effects%20of%20climate%20change> accessed 24 February 2024; *ClientEarth v Poland (on Behalf of MS)* [2021] <http://climatecasechart.com/non-us-case/clientearth-v-poland-on-behalf-of-ms/> accessed 24 February 2024; *ClientEarth v Poland (on behalf of PN)* [2021] <http://climatecasechart.com/non-us-case/clientearth-v-poland-on-behalf-of-pn/> accessed 24 February 2024; *ClientEarth v Poland* (*on behalf of PR*) [2021] <http://climatecasechart.com/non-us-case/clientearth-v-poland-on-behalf-of-pr/> accessed 24 February 2024 (all pending).

[85] *Gloucester Resources* (n 56); *Waratah Coal Pty Ltd v Youth Verdict Ltd and Others* (No 6) [2022] QLC 21.

[86] *Mathur v Ontario* [2023] ONSC 2316.

[87] *Do-Hyun Kim et al v South Korea* [2020] Constitutional Court of South Korea (pending).

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the normative content of both the common element of CBDR-RC, and the equity benchmarks of responsibilities and capabilities. Plaintiffs in the Global South can use CBDR-RC arguments to challenge the legality of either timid targets or the failure to meet targets, based on each individual country's obligation to contribute their 'fair share' to meet the temperature goal of the PA.[88]

CBDR-RC has also been invoked in pending individual complaints related to climate rights before international bodies such as the CRC and the HRC and in the cases against Austria and Switzerland currently pending at the European Court of Human Rights.[89] The principle also appears prominently in the Portuguese children's case against thirty-three European States (*Duarte Agostinho v Portugal et al*) before the European Court of Human Rights.[90] In *Duarte Agostinho*, the youth plaintiffs invoke CBDR-RC as part of the international legal framework to help challenge the emissions reduction targets from key European countries for not representing their 'fair share' of global efforts. In anticipation of arguments that, because there is currently no international agreement on a set of equity criteria to guide fair allocation of a remaining carbon budget, definition of a 'fair share' remains a political question and therefore impervious to judicial review, they argue that 'fair share' ambiguity should be resolved in their favour since this ambiguity 'is a direct consequence of the failure by states (globally) to agree a clearly defined approach to sharing the burden of mitigating climate change'.

In January 2023, Chile and Colombia included five questions related to common but differentiated responsibilities as part of their request for an AO by the IACtHR[91] which was called to clarify the scope of State obligations to respond to human rights implications of climate threats. This AO may generate new insights on how courts throughout Latin America will engage with CBDR-RC in climate litigation in the near future. Considering the evolution of the CBDR-RC principle in the PA, moving towards a more nuanced differentiation, we expect that plaintiffs from countries in different stages of development, but particularly from emerging economies with growing emissions, to engage with this principle in their climate litigation strategies.

Although all CBDR-RC cases have thus far been in civil law jurisdictions, there is no apparent obstacle for courts in common law countries to examine the normative value of CBDR-RC as an interpretive tool to help establish and define the scope of open common law concepts, or of statutory law in common law jurisdictions.

[88] For an analysis of the potential of using a 'fair share' approach to climate litigation, in light of CBDR-RC, against Brazil, see Maria Antonia Tigre, 'The "Fair Share" of Climate Mitigation: Can Litigation Increase National Ambition for Brazil?' (2023) JHRP <https://academic.oup.com/jhrp/advance-article-abstract/doi/10.1093/jhuman/huad032/7261647> accessed 24 February 2024.

[89] Rajamani and others (n 5) [984].

[90] *Duarte Agostinho v Portugal and 32 other States* App no 39371/20 (ECtHR).

[91] 'Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency' (2023) <www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf> accessed 24 February 2024.

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Because courts are clear that they are using CBDR-RC as interpretive tools to help establish the content of open standards based on national law (rather than international legal obligations that may potentially generate rights), the jurisprudence discussed in this chapter can be replicated in countries that adopt a monist model or a dualist model of international law incorporation into national law.

Thus far, litigation invoking CBDR-RC has been restricted to cases related to climate mitigation. Yet the principle is also very relevant to questions related to international climate finance. It is fair to anticipate, for example, cases arguing that developed countries have a constitutional or duty of care obligation to provide a 'fair share' of climate finance to developing countries as part of their common but differentiated responsibility to effectively contribute to international climate efforts in a way that builds trust among other countries. Since developed countries as a group have an obligation to provide climate finance to developing countries under the UN climate regime, it is possible that similar arguments related to whether individual developed countries are contributing their 'fair share' of this collective financial obligation be raised in national or international courts. With the evolution of CBDR-RC from an outward-looking principle of international law (State-to-State) to an inward-looking principle (influencing the scope of obligations within jurisdictions), we should expect other innovative litigation strategies related to climate adaptation and loss and damage. Courts around the world should thus be prepared to properly address CBDR-RC arguments in the future.

13.6 CONCLUSION

The 2022 IPCC Sixth Assessment Report states with 'high confidence' that 'issues of equity remain of central importance in the UN climate regime, notwithstanding shifts in the operationalization of [CBDR-RC] from Kyoto to Paris'.[92] Yet, the same IPCC report has also recognised the challenge of determining 'fair shares' in a system based on voluntary, self-determined contributions and noted the low political feasibility of States agreeing on equity benchmarks within the UNFCCC regime at the moment.[93] As a result, actors and mechanisms outside the UNFCCC regime will continue to shoulder the burden of developing such equity benchmarks, as 'it is only in relation to such a "fair share" that the adequacy of a state's contribution can be assessed in the context of a global collective action problem'.[94]

[92] Patt and others (n 82).

[93] ibid [14.3.2.3].

[94] ibid. For initiatives proposing methodologies to identify fair shares of various countries, see e.g. 'Climate Equity Reference Project' <https://climateequityreference.org/> accessed 24 February 2024; 'Friends of the Earth Climate Fair Shares' <www.foei.org/what-we-do/climate-justice-and-energy/climate-fair-shares/> accessed 24 February 2024; 'Climate Action Tracker Fair Shares' <https://climateactiontracker.org/methodology/cat-rating-methodology/fair-share/> accessed 24 February 2024; 'Climate Analytics' <https://climateanalytics.org/publications/2020/fair-share-carbon-dioxide-removal-increases-major-emitter-responsibility/> accessed 24 February 2024. For reviews of literature on equitable methods for effort-sharing see Rajamani and others (n 5) [1021] and Dooley and others (n 14).

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In this context, courts will undoubtedly feature among the actors increasingly facing questions related to fair effort-sharing in light of CBDR-RC in the context of climate litigation. The momentum of 'fair share' climate litigation shall pick up pace as Parties provide their narrative justification for the ambition and fairness of their NDCs, as required by the Paris Rulebook, as they are pressured to provide more rigorous information on their adopted equity considerations, and as the scientific community continues to work on reducing uncertainties over the remaining global carbon budget.

Furthermore, as the impacts and dangers of climate change become more evident, and questions on who should bear the costs of dealing with such impacts and risks become more prominent, plaintiffs will likely prompt courts to deliberate on the normative content of CBDR-RC when interpreting the scope of a country's obligation to contribute its 'fair share' under the international climate regime in relation to adaptation, loss and damage, and finance, besides mitigation. This chapter offers some thoughts to inform what promises to be thriving legal debates in courts around the world in the years to come.

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