



**Equity Considerations for
the Pandemic Treaty:
Learning from Other
International Treaty
Regimes**

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Health and Climate Change: Multilateral Treaty Regimes to Address Global Issues of Common Concern to Humankind



Constitution of the World Health Organization

Principles 2 to 5

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all.

Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger

Article 1

The objective of the World Health Organization (hereinafter called the Organization) shall be the attainment by all peoples of the highest possible level of health.

United Nations Framework Convention on Climate Change

1st preamble

Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind,

6th preamble

Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions

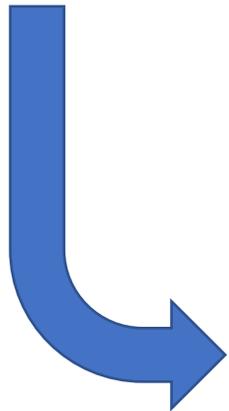
ARTICLE 2 OBJECTIVE

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

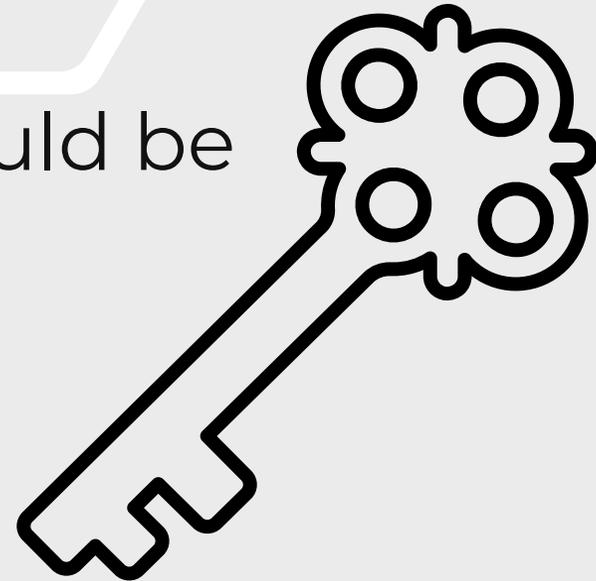
Key Concept in International Law

Fairness = Equity

According to Aristotle, “equals should be treated equally and unequals unequally”.



As applied to current international relations, developed and developing countries have different circumstances and hence should not be treated in the same way in terms of responsibilities and obligations





EQUALITY

Equality = Sameness

Equality promotes fairness and justice by giving everyone the same thing.

BUT, it can only work *if everyone starts from the same place*. In this example, equality only works if everyone is the same height.

EQUITY

Equity = Fairness

Equity is about making sure people get access to the same opportunities.

Sometimes our differences or history can create barriers to participation, so we must **FIRST ensure EQUITY** before we can enjoy equality.

Reflection of the concept of **equity** in international law

Prime examples:

- International environmental law – principle of **common but differentiated responsibility (CBDR)** - acknowledges that all States have a shared obligation to address global environmental damage although not all States have equal historic responsibility for causing such damage and that States with both greater historic responsibility and greater capacity due to their more developed economic circumstances should provide assistance (finance, technology transfer, technical assistance, capacity building) to those that have less capacity to address such damage due to their less advanced development circumstances (i.e. developing countries)
- International trade law – principle of **special and differential treatment (S&D)** - acknowledges that not all States have the same capacity to implement trade obligations due to differing development circumstances and that those with less capacity to implement due to their development circumstances (i.e. developing countries) should be provided with assistance (finance, technology transfer, technical assistance, capacity building)
- International health law – WHO tobacco control convention recognizes the need to provide financial and technical assistance to developing countries

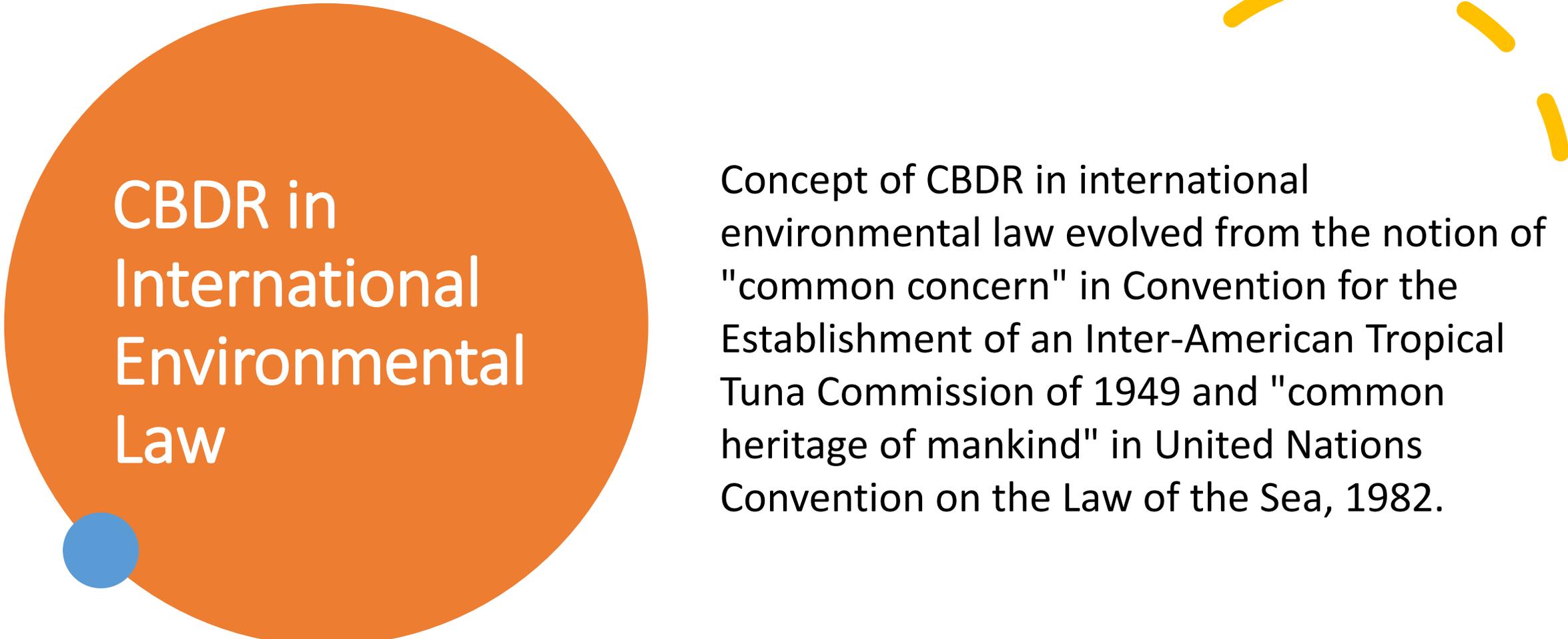


Reflection of the concept of **equity** in international law

Three objectives of recognizing differentiated responsibility and differentiated treatment within a treaty:

- To provide substantive equity as a key element of the treaty (i.e. to make the treaty be a just and fair treaty)
- To encourage cooperation among States
- To provide incentives for States to implement their obligations





CBDR in International Environmental Law

Concept of CBDR in international environmental law evolved from the notion of "common concern" in Convention for the Establishment of an Inter-American Tropical Tuna Commission of 1949 and "common heritage of mankind" in United Nations Convention on the Law of the Sea, 1982.



CBDR in International Environmental Law

See

<https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf>

1972 Stockholm Declaration on the Human Environment

Principle 9

Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development ***through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries*** and such timely assistance as may be required.

Principle 12

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.

Principle 23

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be ***essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries, but which may be inappropriate and of unwarranted social cost for the developing countries.***



CBDR in International Environmental Law

1992 Rio Declaration on Environment and Development

Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. ***In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.***

See

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf



CBDR in International Environmental Law

See

https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf

United Nations Framework Convention on Climate Change

3rd preamble

Noting that the ***largest share of historical and current global emissions of greenhouse gases has originated in developed countries***, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs,

6th preamble

Acknowledging that ***the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions***

Art 3 Principles

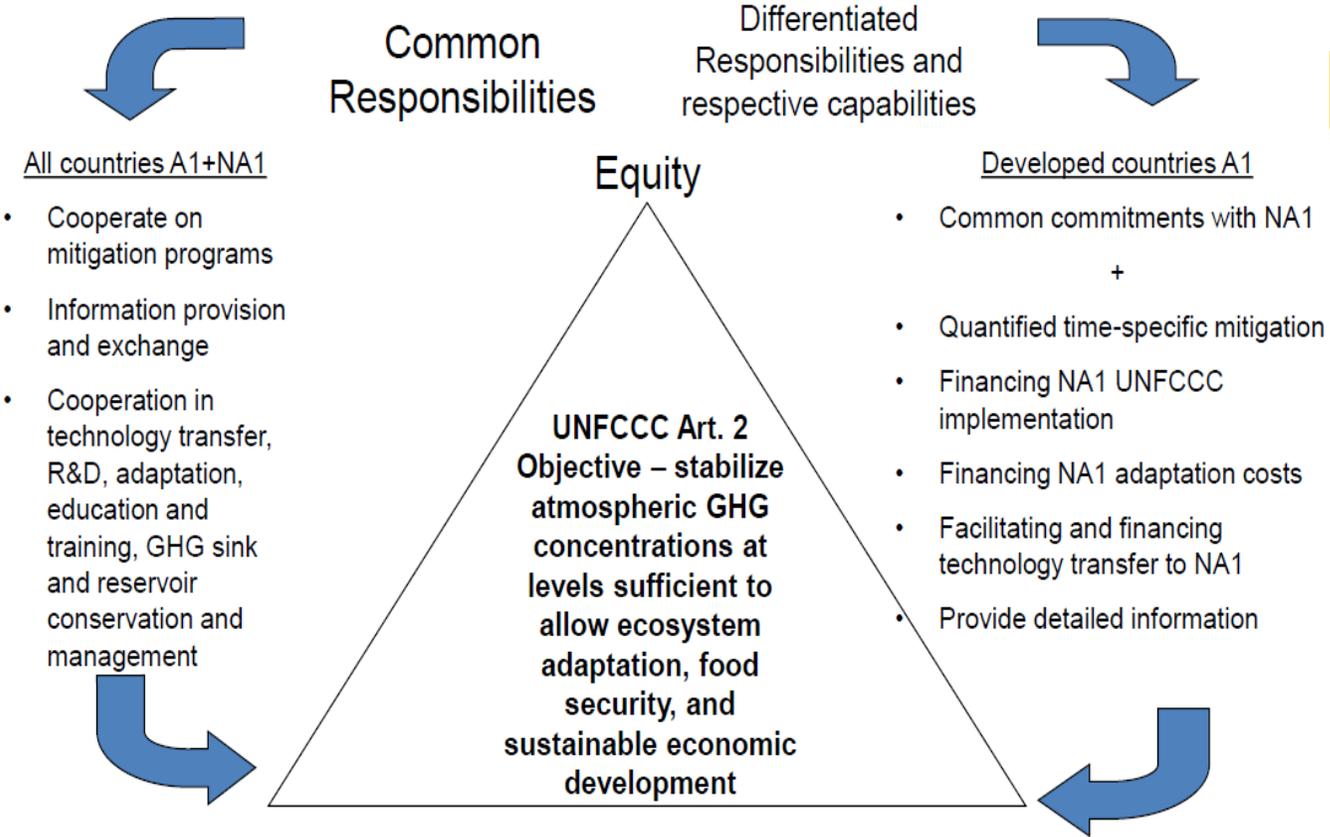
In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The ***Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.***

CBDR in International Environmental Law

United Nations Framework Convention on Climate Change

Art 4 Commitments



The relationship between common and differentiated commitments (Art. 4.7)

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties

See https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf



CBDR in International Environmental Law

See

https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf

UNFCCC's Paris Agreement

3rd preamble

In pursuit of the objective of the Convention, and ***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,***

Art 2

2. This Agreement will be ***implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances***

Art 4

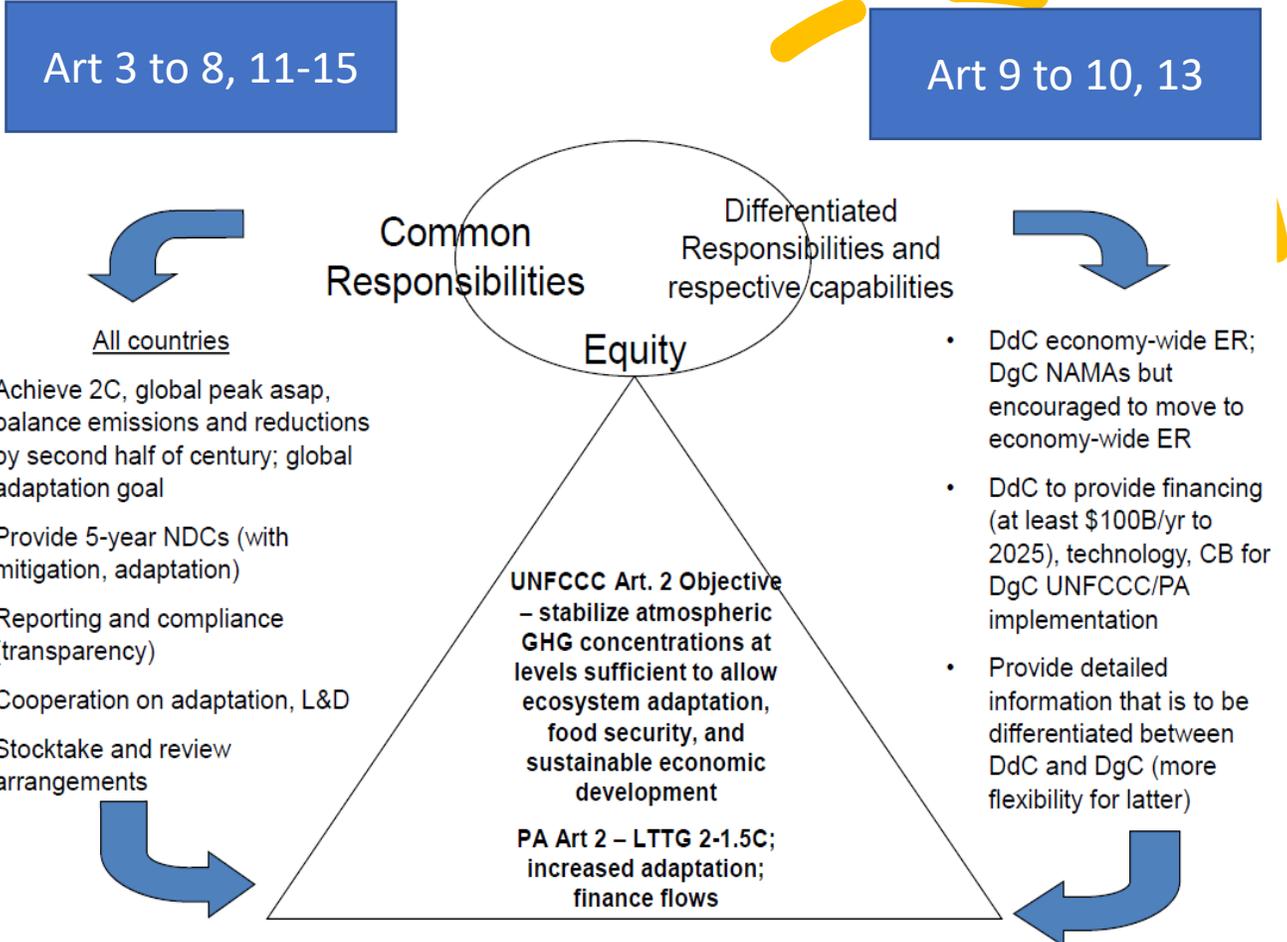
3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, ***reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances***

19. All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 ***taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances***

CBDR in International Environmental Law

See https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf

UNFCCC's Paris Agreement



Examples of the legal relationship between UNFCCC and Paris Agreement

- Art 2.1 chapeau – Paris Agreement’s purpose is “enhancing the implementation of the Convention”
- Art 4.14 , Art 5 - mitigation-related methods and guidance
- Art 9.1 – continuation of developed countries’ climate finance obligations under the Convention
- Art 10.6 – support for technology transfer to developing countries

CBDR in International Environmental Law

See <https://www.cbd.int/doc/legal/cbd-en.pdf>

Convention on Biological Diversity

Common obligations

Art 5-19, 20.1, 21.4, 22

- Cooperation, conservation and sustainable use, identification and monitoring, incentives, research and training, public education and awareness, impact assessment and minimization, access to genetic resources, access to and transfer of technology, information exchange, technical and scientific cooperation, biotechnology, finance,

Differentiated obligations

Art 16.2 – developed countries to provide technology transfer to developing countries

Art 20.2, 20.3 – developed countries to provide new and additional financial resources to developing countries

The relationship between common and differentiated obligations (Art. 20.4)

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties

Montreal Protocol on Ozone Depleting Substances

CBDR in International Environmental Law

Common obligations

Art 2 to 4, 6-7, 9

- Control consumption of ODS, control trade in ODS to non-parties, assessment and review of control measures, reporting of data, research and development, public awareness and exchange of information

Differentiated obligations

Art 5.1 – developing countries entitled to delay implementation (by 10 years)

Art 5.2 – developing countries to be provided with access to environmentally safe alternatives and technologies

Art 10 – needs of developing countries to be taken into account in the provision of technical assistance for implementation

See

<https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf>

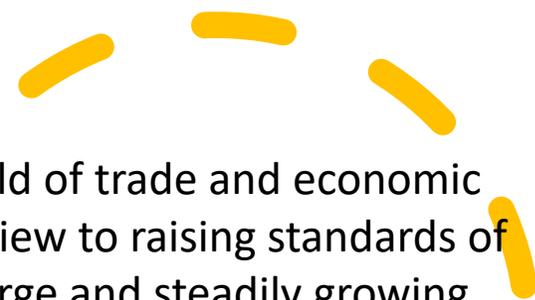


Special and Differential Treatment in International Trade Law

See https://www.wto.org/english/docs_e/legal_e/04-wto.pdf

Agreement to Establish the World Trade Organization

1st preamble



Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so ***in a manner consistent with their respective needs and concerns at different levels of economic development,***

2nd preamble

Recognizing further that there is ***need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development***

Special and Differential Treatment in International Trade Law

The WTO Agreements contain special provisions which give developing countries special rights and which give developed countries the possibility to treat developing countries more favourably than other WTO Members. These special provisions include, for example, longer time periods for implementing Agreements and commitments or measures to increase trading opportunities for developing countries.

These provisions are referred to as “special and differential treatment” (S&D) provisions. The special provisions include:

- Provisions aimed at increasing the trade opportunities of developing country Members;
- Provisions under which WTO Members should safeguard the interests of developing country Members;
- Flexibility of commitments, of action, and use of policy instruments;
- Transitional time-periods;
- Technical assistance;
- Provisions relating to LDC Members.

See WTO, Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by the Secretariat (2 March 2021), WT/COMTD/W/258, at

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W258.pdf&Open=True>

Special and Differential Treatment in International Trade Law

Agreement	Provisions aimed at increasing the trade opportunities of developing country Members	Provisions that require WTO Members to safeguard the interests of developing country Members	Flexibility of commitments, of action, and use of policy instruments	Transitional time-periods	Technical assistance	Provisions relating to Least developed country Members	Total by Agreement ²
General Agreement on Tariffs and Trade 1994	8	13	4				25/25
Understanding on Balance of Payments of GATT 1994			1		1		2/2
Agreement on Agriculture	1		9	1		3	14/13
Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures		2		2	2		6/6
Agreement on Technical Barriers to Trade	3	10	2	1	9	3	28/25
Agreement on Trade-Related Investment Measures (TRIMs)			1	2		1	4/3
Agreement on Implementation of Article VI of GATT 1994		1					1/1
Agreement on Implementation of Article VII of GATT 1994		1	2	4	1		8/8
Agreement on Import Licensing Procedures		3		1			4/4
Agreement on Subsidies and Countervailing Measures (SCM)		2	10	7			19/16
Agreement on Safeguards		1	1				2/2
General Agreement on Trade in Services (GATS)	3	4	4		2	2	15/13
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)				2	1	3	6/6
Understanding on Rules and Procedures Governing the Settlement of Disputes.		7	1		1	2	11/11
Agreement on Government Procurement (GPA)		3	6		1	2	12/10
Agreement on Trade Facilitation (TFA)			3	7	7	9	26/10
TOTAL	15	47	44	27	25	25	183/155

² The first figure reported in this column is the sum over all categories of the listed number of S&D provisions in each Agreement. This figure is obtained by counting each appearance of a provision, including when a provision is classified in more than one category. There are 21 provisions across the WTO Agreements which are classified in more than one category: one provision in the Agreement on Agriculture, three in the TBT Agreement, one in the TRIMs Agreement, three in the SCM Agreement, two in the GATS, two in the GPA and nine in the TFA (the details can be found in the relevant sections). The second figure in this column, on the other hand, reports the number of provisions in each Agreement when each provision is counted only once. The total of 155 over all the Agreements counts the provisions once, while the total of 183 is the total of all listed provisions

See WTO, Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by the Secretariat (2 March 2021), WT/COMTD/W/258, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W258.pdf&Open=True>

CBDR / S&D in International Health Law

See https://treaties.un.org/doc/Treaties/2003/05/20030506%2002-12%20PM/Ch_IX_04p.pdf

WHO Framework Convention on Tobacco Control

Common obligations

Art 4-21, 26.2

- Guiding principles, general obligations, reduce tobacco demand through various measures, regulate tobacco product content, regulate tobacco product packaging and labelling, education, training, public awareness, ban tobacco advertising and promotion, tobacco dependence reduction and cessation, ban illicit tobacco trade, ban tobacco sales to minors, support for alternative activities, protect the environment, provide for liability, research and information exchange, reporting, scientific and technical cooperation,

Differentiated treatment

4.6, 22.1, 26.3, 26.4

Art 4.6 – technical and financial assistance for economic transition of tobacco growers and workers in developing countries

Art 22.1 – cooperate to strengthen capacity to fulfill FCTC obligations, taking into account needs of developing countries and EITs

Art 26.3 – promote use of different channels to provide funding to tobacco control programmes of developing countries and EITs

Art 26.5(a) – mobilize and use public and private financial and technical resources available for tobacco control activities to assist Parties, especially developing countries and EITs

Key Indicative Elements to Reflect Equity in the Pandemic Treaty: CBDR and S&D in Other International Regimes as Models

Common

- Application of general norms and obligations
- Cooperation on implementation, research, information exchange, education and public awareness raising
- Implementation reporting
- Governance

Differentiated

Obligations for Developed Countries

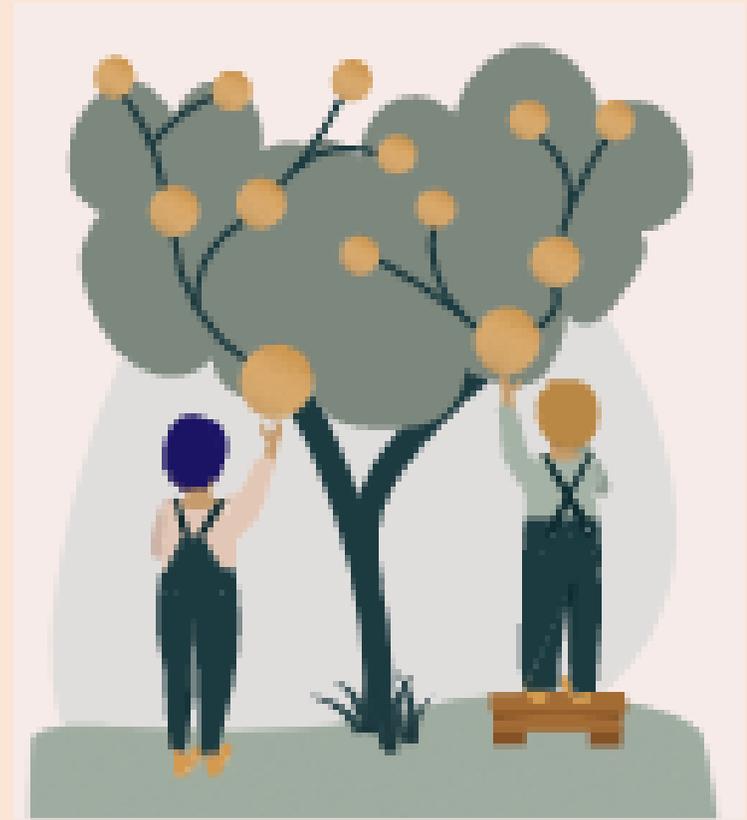
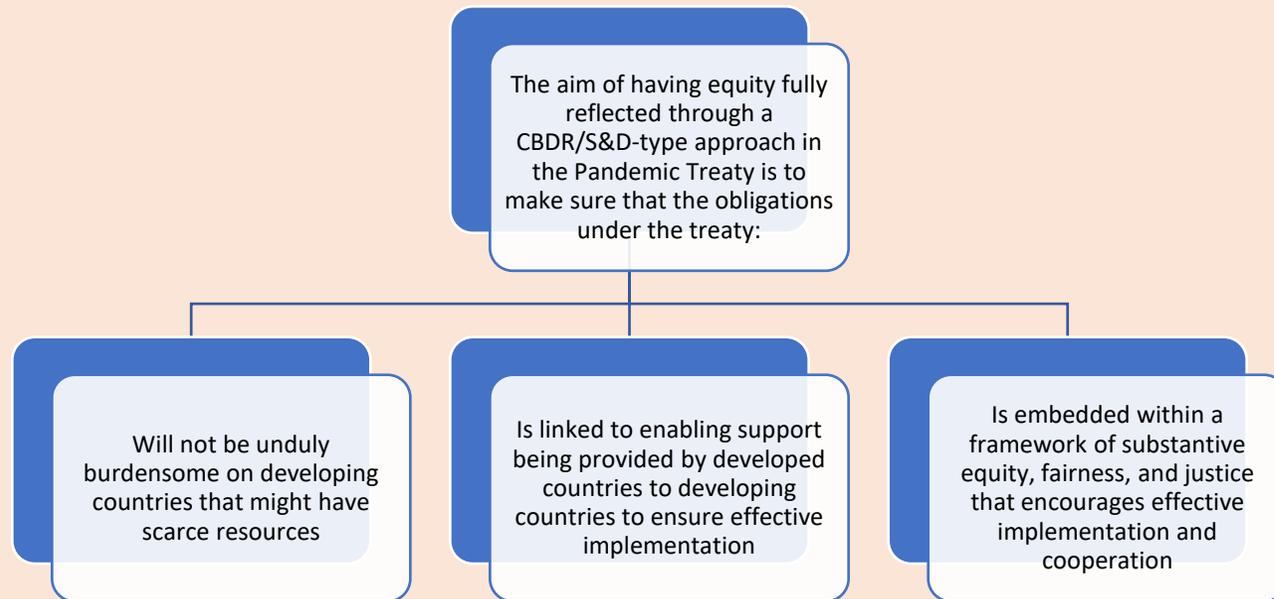
- Provision of finance, technology transfer, capacity building, technical assistance from developed to developing countries to support their implementation of obligations
- More detailed and prompt transparency (report, data, surveillance, etc) requirements
- No flexibility in implementing obligations

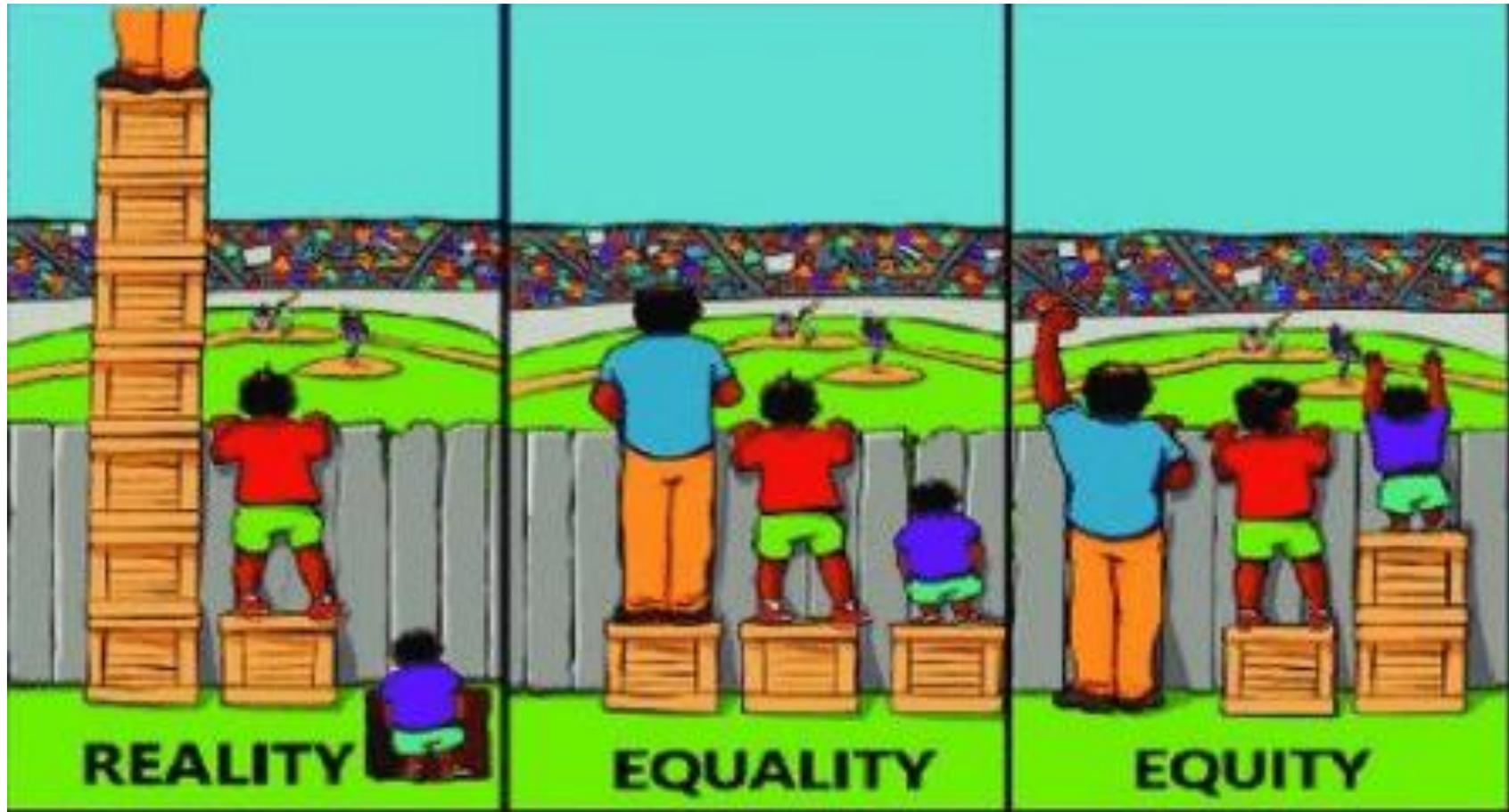
Treatment for Developing Countries

- Longer time periods and/or provision of transition periods for implementation of their obligations
- Provisions requiring that needs of developing countries be taken into account (e.g. access, benefit sharing, national sovereignty, right to development)
- Flexibility in terms of obligations or implementation thereof
- Flexibility in terms of implementation reporting (frequency, data, content)

Equity means that everybody gets what they need to be successful in implementing their obligations under the treaty

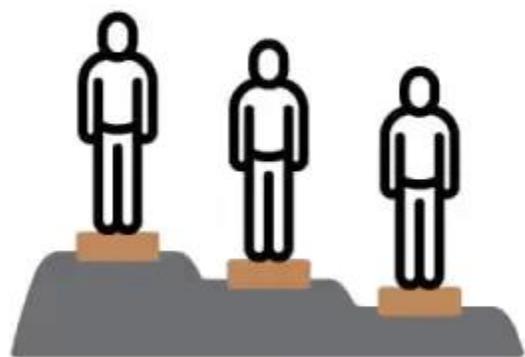
“From each according to their ability, to each according to their needs”



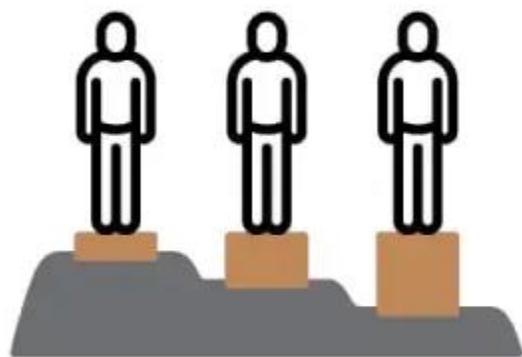


When the underlying real conditions show the existence of inequality in that some have better circumstances (whether for historical or other reasons) than others, formal equality of treatment results in exacerbating inequality; embedding equity of treatment seeks to create conditions of fairness to address inequality

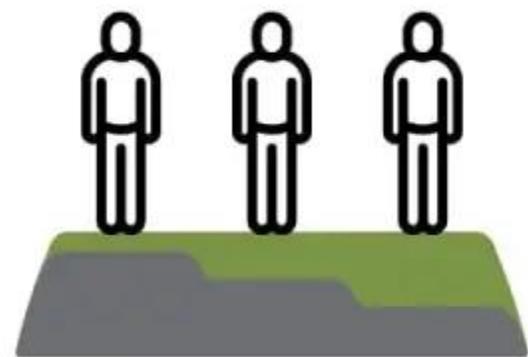
Equality is not the same as *equity*, and ultimately we're striving for *justice*.



EQUALITY



EQUITY



JUSTICE

Thank you

Vicente Paolo Yu

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