

# Dilemmas and Breakthroughs in the Application of the Principle of Common but Differentiated Responsibilities in the Context of COP28

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## Abstract

The 28th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) to be held in Dubai, UAE, in 2023 has reached the “UAE Consensus”, which symbolizes that the principle of common but differentiated responsibilities has entered into a new stage, presenting a new pattern of flexibility, procedure and dynamism. However, the problems that still exist in the Conference mean that the principle of common but differentiated responsibilities is still in the process of being realized, and there are still dilemmas such as uncertainty about the legal attributes of the principle, the lack of a specific system to ensure its implementation, and the insufficient capacity of developing countries in terms of financial and technical support. Based on the above, we would like to put forward some suggestions for improving the application of the principle of common but differentiated responsibilities in China: firstly, the status of the principle should be clarified; secondly, a system should be set up to ensure its implementation; and lastly, the provisions on capacity-building for developing countries in terms of financial support and technical assistance should be fine-tuned. Under the current situation, guaranteeing the realization of the principle of common but differentiated responsibilities will be of great significance to the containment and improvement of global climate change.

## Keywords

COP28, Principle of Common but Differentiated Responsibilities, Climate Governance.

## 1. The Connotation of the Principle of Common but Differentiated Responsibilities and Its Jurisprudential Basis

### 1.1. Connotation of the Principle of Common but Differentiated Responsibilities

#### 1.1.1. Common Responsibility

The principle of common but differentiated responsibility refers to the fact that there is only one Earth, and that the integrity of the Earth's ecosystem, as well as the reciprocal influence of national behavior, requires that all countries around the globe bear the responsibility to protect and improve the environment. The main contents of common responsibility include: all countries have the responsibility to protect and improve their own environment; the behavior of countries within their own scope should not cause damage to the environment of areas outside their own scope; all countries should actively participate in international environmental affairs and international cooperation with other countries; all countries should support and assist each other in environmental protection.

#### 1.1.2. Differential Responsibility

Differentiated responsibility means that due to the historical factors of each country, the actual pressure of each country on the environment, the economic and technological level of each

country and other factors, different countries are roughly divided into developed countries and developing countries in the way of responsibility, the size of the responsibility, the responsibility of the time and other specific aspects of the responsibility of the developed countries than developing countries to bear a heavier responsibility.

### **1.1.3. Relationship between the Two**

Common responsibility and differentiated responsibility complement each other, it is precisely because of the establishment of a global common responsibility for the protection and improvement of the environment, will be involved in the next specific distribution of responsibility, but also the emergence of the concept of differentiated responsibility[1]; and no matter because of the differentiated responsibility so that the specific responsibility of the countries are different, each country to assume the responsibility itself is to support the embodiment of the requirements of the global common responsibility. Therefore, the two are mutually supportive of each other, common responsibility is the major premise of differentiated responsibility, differentiated responsibility is the common responsibility of the qualification.

## **1.2. The Legal Basis of the Principle of Common but Differentiated Responsibility**

### **1.2.1. The Theory of Sustainable Development**

The theory of sustainable development is that development which meets the needs of the present without jeopardizing the ability of future generations to meet their own needs[2]. The core requirement of the theory of sustainable development is to guarantee the coordinated development of economic growth and environmental protection, which is an innovation in the development concept of human society and opens up a new direction for the mode of social development. The connotation of sustainable development theory contains four basic elements: intergenerational equity, intragenerational equity, sustainable utilization and integration of environment and development. The theory has further enriched the connotation of human development concepts by elevating environmental awareness to the level of harmonious development of intergenerational relations, and opened up a new path for green development.

### **1.2.2. Public Trust Theory**

Public trust theory, refers to the sovereign country or state, based on the commission of all citizens, as a trustee, for the common interests of the public, the management and protection of specific natural resources, and the public can be based on the public purpose and use of the trust resources of the public to freely utilize them[3]. The public trust is an abstract social contract reached between the citizens of the country and the government of the country in the ecological environmental protection and natural resources management. In this proposed legal relationship, the citizens of the country act as the principals and beneficiaries of the trust property, and the government of the country is the trustee of the trust property, and the core content of the relationship of rights and obligations is the management of natural resources and ecological environment protection.

### **1.2.3. Polluter Pays Principle**

Polluter pays principle means that people in the process of utilizing the environment and resources, on the environmental pollution and natural resources caused by the derogation of the corresponding damage liability in the form of payment of fees[4]. The polluter pays to make up for the pollution of the ecological environment and natural resources caused by his production, life and consumption, and its purpose is to let the polluter take the responsibility of purifying the emission and compensating the environmental damage, and it can also reduce the polluter's behavior of environmental infringement from the side.

## 2. The New Pattern of the Principle of Common but Differentiated Responsibilities in the Context of COP28

### 2.1. Flexibility

The principle of common but differentiated responsibilities in the context of COP28 has been transformed from the original mandatory difference of “absolute dichotomy” to the self-differentiation of “national autonomous contribution”[5]. The Kyoto model provides for absolute differentiation of responsibilities between “North and South countries”, i.e. mandatory emission reduction responsibilities of developed countries and moral emission reduction responsibilities of developing countries, with the aim of strengthening the capacity for compliance, but this “top-down” mode of mandatory emission reduction and governance has exacerbated the conflicts between North and South countries, and the excessive differentiation of responsibilities has led to the emergence of the “top-down” mode of mandatory emission reduction. The principle of common but differentiated responsibilities in the context of COP28, with the self-reducing mode of “national autonomous contribution”, leaves the international collective action on climate issue to the voluntary participation of all countries, which not only guarantees the function of joint emission reduction by the Parties, but also ensures that the Parties can reduce emissions together, and that they can also reduce emissions on a voluntary basis. This not only guarantees the function of joint emission reduction by Parties, but also avoids unnecessary entanglement between differentiated responsibility and common responsibility.

This model has substantially changed the original formulation mechanism of the principle of common but differentiated responsibilities, and is conducive to bridging the huge gap between developed and developing countries. This flexible model of shared responsibility, based on autonomous national contributions and framed by global participation, encourages non-state actors to jointly participate in emission reduction, and helps to reach consensus and jointly realize the emission reduction target.

### 2.2. Procedural

The principle of common but differentiated responsibilities in the context of COP28 has been transformed from the original difference in substantive mitigation commitments to a procedural support and implementation mechanism. The Kyoto Protocol provides for distinct substantive mitigation obligations, supplemented by a well-developed procedural framework, while incorporating the interests of developing countries into the decision-making process of the system. However, developed countries such as the U.S. do not support the Kyoto Protocol's “top-down” quantitative mitigation provisions that apply only to industrialized countries. The principle of common but differentiated responsibilities in the context of COP28 extends the difference from the difference in substantive mitigation targets to the procedural mitigation mechanism, which, led by the collective mitigation target, pays more attention to procedural rules, such as financial support, technical assistance, and capacity building. Such an approach, although its role in substantive mitigation commitments has been weakened, makes it possible to form a growing space for procedural emission reduction implementation and support mechanisms. Undoubtedly, the principle of common but differentiated responsibilities will continue to play a key role in financial support, technology transfer, capacity building and compliance.

### 2.3. Dynamism

The principle of common but differentiated responsibilities in the context of COP28 has transformed the interpretation of differences from static differences to dynamic differences, and the reason why the principle of common but differentiated responsibilities in the context

of COP28 is able to strike a delicate balance between ambitious emission reduction commitments and fair sharing based on differences stems from the dynamic differences established by the principle, which is mainly manifested in three aspects: firstly, introducing the principle of “differentiated responsibilities” to the principle of common but differentiated responsibilities. First, on the basis of the principle of common but differentiated responsibilities, the factor variable of “different national circumstances” is introduced, which develops into a new paradigm of “principle of common but differentiated responsibilities + respective capabilities + different national circumstances”[6]; second, in the way of realizing the principle of common but differentiated responsibilities, relevant differentiation clauses such as financial, technological and capacity building are stipulated, implicitly providing for a differentiation of the principle of common but differentiated responsibilities, and the principle of common but differentiated responsibilities. Secondly, in terms of the realization of the principle of common but differentiated responsibilities, relevant differentiation clauses on finance, technology and capacity building have been stipulated, implicitly distinguishing the different responsibilities of developed and developing countries; and thirdly, at the level of collective objectives, the principle of common but differentiated responsibilities in the context of COP28 is based on the principle of gradual and orderly progress, requiring Parties to continuously increase their commitments on autonomous contributions, and guaranteeing that the realization of their commitments will be continuous and dynamic. Dynamized differentiation reflects the shift from universal, undifferentiated obligations to the provision of implicit differentiation through norms, the application of which allows for the consideration of the different characteristics of countries.

### **3. Dilemmas in the Application of the Principle of Common but Differentiated Responsibility in China in the Context of COP28**

#### **3.1. Uncertainty about the Legal Attributes of the Principle**

Although the principle of common but differentiated responsibilities has been applied to a certain extent in the field of international carbon emissions governance, and is explicitly stipulated in international treaties such as the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, and recognized in international soft law such as the Nairobi Declaration, the Beijing Declaration, and Agenda 21, there is no uniformity in the international community's determination of the nature of the principle of common but differentiated responsibilities. However, the nature of the principle of common but differentiated responsibilities is not uniformly recognized by the international community. For developing countries, most of them would like to see the principle become a mandatory rule of international law or to see an expansion of the “differentiated responsibilities” in the principle of common but differentiated responsibilities. Developed countries, on the other hand, tend to regard the principle as “soft law”, which is not legally enforceable, or as an expansion of the principle of interpretation of “shared responsibility”.

#### **3.2. Lack of a Specific Regime to Guarantee Implementation**

The principle of common but differentiated responsibility lacks legal binding force and implementation at both the level of common and differentiated responsibility. Because the common responsibility mainly relies on the voluntary commitment of the contracting parties, while at the level of differentiated responsibilities, the financial assistance and technology transfer provided by developed countries to developing countries are also non-mandatory. The International Convention on Climate Change does not give the governments of developed countries, for example, a precise and legally binding responsibility to provide clean development technologies. Negotiations at the Climate Change Conference, which were

supposed to reflect cooperation, have been characterized by repeated tug-of-war and compromise, and common but differentiated responsibilities have instead been used as a condition for mutual constraints.

### **3.3. Inadequate Financial and Technological Support for Developing Countries**

Both developed and developing countries should have access to awareness and appropriate information related to the environment. Countries should have a broad understanding of global environmental protection decisions through technological support, and can even provide effective relief and assistance through technological support. However, as far as the development of environmental protection is concerned, the developing countries, which constitute the majority of the world's population, have to rely more on the financial and technological assistance of the developed countries in order to take up the obligation of improving environmental protection together with the developed countries. This is mainly due to the conditionalities embodied in the provisions of the Protocol. Some parts of the Protocol state that a better solution to the problem of financial assistance and technology transfer for developing countries does not require strong obligations or solidarity in terms of power to express its expectations, but depends on the effective implementation of financial assistance and technology transfer by developed countries[7]. However, if developing countries did not focus on improving their own technological capacity and relied solely on assistance from developed countries, it would be difficult to discuss the realization of the international cooperation objectives of the Protocol on climate change. In the long run, the level of trust between developed and developing member countries will be tested. Based on the principle of common but differentiated responsibilities in the protocol, it is necessary to guarantee the fulfillment of the commitments of developing countries through the provision of additional costs and the strengthening of capacity. However, with the upgrading of the economy and social development, deepening the background of the global environmental regulatory mechanism, the active participation of developing countries and the further enhancement of their own technological capabilities are the key to the early realization of the goal of global environmental protection.

## **4. COP28 Background of China's Solution to the Principle of Common but Differentiated Responsibilities of the Application of the Dilemma of the Breakthrough**

### **4.1. Clarify the Status of Its Legal Principles**

The principle of common but differentiated responsibilities is the basic rule for determining carbon emission obligations in international consultation. Although developed and developing countries still differ in their understanding of the principle of common but differentiated responsibilities, this difference has a tendency to narrow. Since the launch of the Durban Platform in 2011, the principle of common but differentiated responsibilities has been weakened for a while, but it has been reaffirmed and explicitly expressed in the Paris Agreement in 2015, which also shows the unshakeable status of this principle in international environmental law and its application to international carbon emission governance[8]. The principle is unshakeable for the following reasons: firstly, the principle of common but differentiated responsibilities is in line with the moral concept of fairness and justice and the legal basis; secondly, the principle breaks the stalemate of the previous international climate negotiation to a certain extent, and promotes the international carbon emission governance to enter into the right track; lastly, the dynamics of the principle of common but differentiated responsibilities itself makes it have a strong vitality, and it can be enriched continuously in the concrete application of the principle. Finally, the dynamic nature of the principle of common

but differentiated responsibility makes it more dynamic and can enrich its connotation in concrete application, providing guidance for the subsequent international carbon emission governance[9].

Therefore, it is clear that there is a need to determine the status of the principle of common but differentiated responsibilities as a basic legal principle. Up to now, some international legal documents related to carbon emissions often use declarative language to express this principle, which easily leads to the misunderstanding of “soft law” by the contracting parties, and thus makes it difficult to form a clear “legal certainty” within the international community. In addition, in practice, some countries often evade their responsibilities on the grounds that this principle is not a fundamental principle of international environmental law. Therefore, it is necessary to clarify the legal attributes of the principle of common but differentiated responsibilities, and only by determining the legal binding force of the principle of common but differentiated responsibilities can we promote the development of uniform legal practice and eventually form international customary law[10]. Therefore, in the future legislation on international carbon emissions, the developing countries should participate more actively, express their positive demands, and try their best to clearly mark the legal attributes of the principle of common but differentiated responsibilities in the international legal documents, so as to avoid the developed countries from using the “moral responsibility”, “ethical obligations” and other non-mandatory principles to avoid the developed countries from using the “moral responsibility”, “ethical obligations” and other non-mandatory principles. “Only in this way can we safeguard the basic rights and interests of developing countries, such as the right to survival and the right to development, and give developing countries a greater say in the future negotiations on the right to carbon emissions, so that the principle of common but differentiated responsibilities can be taken seriously and recognized by the international community [11].

## **4.2. Establishment of a Safeguard System for Implementation**

### **4.2.1. Formulate a Quantitative Table and Timeframe for the Specific Emission Reduction Responsibilities of the Parties under the Guidance of the Principle of Common but Differentiated Responsibilities.**

The application of the principle of common but differentiated responsibilities under the Paris Agreement has been promoted mainly through national autonomous contributions, but its implementation has been relatively ineffective, mainly due to the fact that the provisions on the responsibility for emission reduction are too soft law and lack legal binding force. Legislation in the environmental field mostly adopts principle-based provisions, with greater flexibility, fewer specific obligations, a lack of safeguard clauses and lower costs of non-compliance. At this stage, it is necessary to adopt a “soft and hard” legislative model, and formulate a specific quantitative table and time chart for the responsibility of emission reduction. In terms of legislative technology, it can adopt the annex mode of the United Nations Framework Convention on Climate Change or the form of implementing regulations; in terms of legislative strategy, it can take into account the differentiated responsibility, that is, each party has a mandatory responsibility to reduce emissions, but only in the quantification of the responsibility to make a distinction, and it can also adopt the provisions of the “grace period”, that is, to allow developing countries to delay implementation. It can also adopt a “grace period” provision, that is, allow developing countries to delay the fulfillment.

### **4.2.2. Constructing a Multi-principal Synergistic Climate Governance Mechanism**

The so-called multi-principal synergy refers to the construction of a benign climate governance model by the government, the market and private actors[12]. In the context of reverse globalization, the role of the market and private actors in climate governance has been concentrated, and COP25 and COP26 have held thematic discussions on market mechanisms,

private financing and other topics, and COP28 has reaffirmed the important role played by non-state actors in climate governance. In the future, carbon market mechanisms will be promoted and a comprehensive private financing system will be formed[13]. Private environmental governance can not only fill the gap before governments take action, but also make a difference after governments exit the market. It can be seen that multifaceted synergistic governance is an innovative governance model for global climate governance, and the formation of a multi-principal synergistic climate governance model is the main direction for the improvement of the global climate governance system in the future.

#### **4.2.3. Improve the International Climate Governance Compliance Guarantee Mechanism**

The Paris Agreement establishes a flexible national autonomous contribution emission reduction mechanism and a ratchet-type “global inventory + transparency + compliance” all-round compliance guarantee mechanism. However, the current status of implementation of the Paris Agreement cannot hide its lack of enforceability[14]. The formulation of the World Environment Convention seems to have sent a warning signal: relying only on non-punitive compliance guarantee mechanism can no longer cope with global warming and other climate problems, implanting a strong guarantee system for the fulfillment of environmental protection obligations, and breaking through the traditional principle of jurisdiction over environmental damages, only then can it be expected to prevent further deterioration of the environment. From the latest report released by the United Nations Intergovernmental Panel on Climate Change, it can be seen that the actions of some countries are not consistent with their emission reduction commitments, which is mainly due to the fact that the national autonomous contribution targets are submitted and implemented by countries on their own initiative, without a strong accountability and monitoring mechanism. In order to address this situation, firstly, a strong accountability mechanism should be set up, and there are two options here: firstly, to urge parties to implement their actions by means of a performance guarantee fund; and secondly, to set up an independent accountability mechanism to play a supervisory role to ensure that emission reduction pledges are implemented and financial commitments are honored. Secondly, the establishment of an international climate court could be considered. The complexity, globality and irreversibility of the climate issue determine that climate cases need judges with specialized knowledge, and having professionals to solve specialized climate issues can guarantee the effectiveness and judicial nature of the work.

#### **4.3. Refine the Provisions on Financial Support, Technical Assistance and other Capacity-building for Developing Countries**

The “differentiated responsibility” of the principle of common but differentiated responsibilities is also embodied in the level of financial support, technical assistance and other capacity building for developing countries, in which capacity building is crucial to effectively respond to climate change. Developed countries have realized huge economic benefits by plundering resources and destroying the environment, so they need to provide certain assistance to developing countries to compensate for the climate damage caused, and this obligation is based on the principle of “polluter pays” and “beneficiary compensates”. However, the financial support and technical assistance provided by developed countries to developing countries has been virtually non-existent. Although COP28 has paid attention to the overall shortfall in emission reduction targets of various countries, it has also paid great attention to the implementation conditions for realizing the targets, especially the shortfall in financial support for developing countries, and urged developed countries to raise their ambitions and implement the financial support, but it has not yet reached an agreement on the realization of the financial resources of developed countries.

The issue of finance is a core concern of developing countries and has a direct impact on their adaptive capacity building. UN Secretary-General Guterres has emphasized the need for developed countries to deliver on long-outstanding commitments and establish a clear and credible roadmap to double funding for climate adaptation. Based on this, setting a deadline for financial support for compliance and stipulating corresponding punitive measures is one of the actions that must be implemented as soon as possible in the follow-up negotiations. In addition, developing countries should strengthen their technical and climate change adaptation capacities, take climate security and disaster risk management as entry points, and comprehensively improve their decision-making support and guarantee capacity to deal with climate change, as well as the level of scientific research on climate change.

## 5. Conclusion

The principle of common but differentiated responsibilities, as a core principle of international environmental law, plays an irreplaceable role in promoting global climate governance, and the connotation and jurisprudence of the principle of common but differentiated responsibilities in the context of COP28 have shown a new development trend. However, it still faces many challenges in terms of legal attributes, implementation guarantees and financial and technical assistance to developing countries. At the same time, due to the dynamic and complex nature of international environmental law, responses to the dilemma of applying the principle of common but differentiated responsibilities may need to be continuously adjusted and improved in practice. In the face of the serious challenge of global climate change, the international community must strengthen cooperation and work together to promote the in-depth implementation of the principle of common but differentiated responsibilities in order to achieve the goal of sustainable development.

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